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Decision

Matter of: CoSTAR Services, Inc.

File: B-417581; B-417581.2; B-417602; B-417602.2

Date: August 26, 2019

Michael A. Gordon, Esq., Michael A. Gordon PLLC, for the protester.
Susan E. Sharp, Esq., Department of the Navy; and John W. Klein, Esq., and Karen L. Hunter, Esq., Small Business Administration, for the agencies.
Katherine I. Riback, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting agency improperly offered base operations support service requirements to the Small Business Administration for acceptance into the Small Business Administration's 8(a) program is denied where the protester has not shown a violation of procurement regulation or that the agency acted in bad faith.

DECISION

CoSTAR Services, Inc., a small business of San Antonio, Texas, protests the terms of request for proposals (RFP) Nos. N69450-19-R-1919, and N69450-19-R-1910, issued by the Department of the Navy for base operations support (BOS) services for the Naval Air Station, Jacksonville, Florida (FL), and the Naval Station Mayport, Jacksonville, FL, referred to as the Jacksonville BOS (JBOS II), and the Mayport BOS (MBOS II), respectively.¹ CoSTAR, the incumbent contractor, has been providing the BOS services to these installations under the Regional Base Operations Support (RBOS) II contract. The protester challenges the agency's decision to now offer these

¹ Both requirements are identical and include all labor, supervision, management, tools, materials, equipment, facilities, transportation, incidental engineering, and other items necessary to perform the following services: custodial; pest control; integrated solid waste management; grounds maintenance and landscaping; and other related services. JBOS Agency Request for Summary Dismissal (May 23, 2019), Tab 3, JBOS RFP at 5; MBOS Agency Request for Summary Dismissal (May 31, 2019), Tab 3, MBOS RFP at 2.

requirements to the Small Business Administration (SBA) for procurement under the 8(a) program, asserting that the agency's actions violated applicable regulations.

We deny the protest.

BACKGROUND

In September 2018, the agency began planning for the transition of the RBOS II contract to two separate requirements (JBOS II and MBOS II), each servicing a different geographic area of responsibility (AOR). Contracting Officer's Statement/ Memorandum of Law (COS/MOL) at 4. To this end, the agency performed market research to identify firms capable of satisfying the MBOS II and the JBOS II requirements. Because both the MBOS II and the JBOS II requirements were located within northeast Florida, involved similar services, and were estimated to have a similar annual dollar value, the agency used the same market research information to identify potential contractors for both requirements.² Id.

As part of its market research, the agency first considered the viability of obtaining the MBOS II and JBOS II requirements using General Services Administration's (GSA) Base Maintenance and Operation (BMO) multiple award contracts (MACs). In connection with its consideration of using the BMO MACs, in November 2018, the agency performed a search of the GSA's BMO Zone III contractors, located in Florida, Georgia, North Carolina, and South Carolina, and identified 18 firms holding a BMO small business MAC, that were qualified to perform janitorial, landscaping and grounds maintenance, pest control, and waste management and recycling duties, including five 8(a) firms. Agency Report (AR), Tab D, GSA Zone III SB Search; COS/MOL at 4. However, because the terms and conditions of the GSA BMO MACs did not appropriately align with the agency's current requirements, the agency did not utilize this contract vehicle. COS/MOL at 5.

The agency next sought to identify potential vendors by analyzing responses to a sources sought notice issued in September 2018, for similar services for the Naval Facilities Engineering Command Southeast Division (NAVFAC SE) Kings Bay BOS II (KBOS II) requirement, located in close proximity to northeastern Florida. AR, Tab R, KBOS Sources Sought Analysis. According to the agency, the KBOS II requirement included similar custodial, grounds maintenance, integrated solid waste management, and pest control services; however, it also included a pavement clearance requirement, and had a higher annual value than the present requirements. COS/MOL at 5. Based on the agency's KBOS II sources sought response data, the agency identified six firms that appeared to be capable of performing the JBOS II and MBOS II requirements, including two 8(a) firms. Id.

² The agency represents that during the acquisition planning phase, it estimated the value of the MBOS II procurement as [DELETED], and the JBOS II procurement as [DELETED]. COS/MOL at 2.

The agency also searched for potential firms using the Dynamic Small Business (DSB) Search engine to identify additional small businesses and 8(a) firms capable of performing the requirements. AR, Tab N, SBA, DSB Search 8(a); COS/MOL at 5. In addition, the agency reviewed the NAVFAC SE Fiscal Year 2019 (FY19) Regional Acquisition Strategic Plan (RASP) tracking spreadsheet, which contained all current facility support contracts within the NAVFAC SE AOR. AR, Tab Q, FY19 Appendix D RASP Excerpt; COS/MOL at 5. Based on these searches, the agency concluded that there were eight contracts in the NAVFAC SE AOR, with an annual value greater than \$2M, that include services similar to the present requirements, one of which was performed by an 8(a). Id.

The information collected from the market research led the agency to conclude there were multiple 8(a) concerns capable of performing the JBOS II and MBOS II requirements and that they could be set-aside for competitive 8(a) procurements. The agency summarized the above-described market research on the Department of Defense (DD) Forms 2579, Small Business Coordination Report (SBCR) for the JBOS II and MBOS II requirements. AR, Tab F, DD Form 2579, SBCR for JBOS II; Tab E, DD Form 2579, SBCR for MBOS II. The DD 2579 forms recommended competitive 8(a) set-asides (for both the MBOS II and the JBOS II requirements), and were signed by the NAVFAC SE Assistant Deputy for Small Business. The SBA Procurement Center Representative (PCR) concurred with both recommendations. Id. In deciding to set-aside these procurements for 8(a) concerns, the agency concluded that, according to 13 C.F.R. § 124.504(c)(1)(ii), each of the MBOS II and the JBOS II requirements should be considered a “new” requirement, because the total value for each requirement was at least 25 percent lower than the value of the current RBOS II contract. COS/MOL at 6. As “new” requirements, they could be accepted under the 8(a) program without the need for SBA to assess the potential impact of the set-asides on small business concerns. See 13 C.F.R. § 124.504(c).

Accordingly, on March 6 and 11, the agency offered the MBOS II and the JBOS II procurements, to the 8(a) program as new requirements. AR, Tab J, MBOS II SBA Offer Letter at 2 (Mar. 6, 2019); Tab K JBOS II SBA Offer Letter at 2 (Mar. 11, 2019). In accordance with Federal Acquisition Regulation (FAR) § 19.804-3, the SBA accepted the MBOS II and JBOS II requirements into the 8(a) program on March 7, and on March 13, respectively. AR, Tab L, MBOS II SBA 8(a) Acceptance Letter (Mar. 7, 2019); Tab M, JBOS II SBA 8(a) Acceptance Letter (Mar. 13, 2019).

The agency posted the pre-solicitation notices/synopses for both solicitations on March 15. In response to a communication from CoSTAR regarding these procurements, on April 8, the agency notified CoSTAR that “the new requirements [had] been accepted by the SBA into the 8(a) Business Development Program.” AR, Tab W, Agency Notification to CoSTAR of 8(a) Acceptance (Apr. 8, 2019). Both solicitations were issued on April 9, and included provisions indicating that the requirements were being solicited as competitive 8(a) set-asides. JBOS II RFP at 5; MBOS II RFP at 2.

Prior to the solicitation closing dates of May 17 for the JBOS II RFP, and May 23 for the MBOS II RFP, CoSTAR filed two protests with our Office, contesting the terms of the solicitations.³ The protester argued that, with regard to both solicitations, the agency violated regulations by offering the requirements to the SBA for acceptance into the 8(a) program. JBOS II Protest (B-417581) at 2; MBOS II Protest (B-417602) at 2. The agency represents that it received [DELETED] proposals from 8(a) firms for each of the requirements by the respective solicitation closing dates. COS/MOL at 7-8.

DISCUSSION

CoSTAR contends that the agency improperly set aside these two requirements under the 8(a) program. According to the protester, the agency's market research was flawed, and the agency therefore violated FAR § 19.502 in concluding that there were two or more viable 8(a) firms interested in competing for these two solicitations. CoSTAR also challenges the agency's determination that these requirements were new requirements in accordance with 13 C.F.R. § 124.504(c)(ii)(C).⁴

The Small Business Act affords the SBA and contracting agencies broad discretion in selecting procurements for inclusion in the 8(a) program, and we will not consider a protest challenging a decision to place a requirement under the section 8(a) program absent a showing by the protester of possible bad faith on the part of government

³ The initial protests contained identical grounds of protest. Our Office previously dismissed CoSTAR's assertion of bias or bad faith on the part of the agency on the ground that the protester's allegations were not supported by convincing proof beyond inference or supposition. Cyberdata Techs., Inc., B-417084, Feb. 6, 2019, 2019 CPD ¶ 34 at 6. In this regard the protester must present facts reasonably indicating beyond mere inference and suspicion, that the actions complained of were motivated by a specific malicious intent to harm the protester. Lawson Envtl. Servs., LLC, B-416892, B-416892.2, Jan. 8, 2019, 2019 CPD ¶ 17 at 5 n.5. We also dismissed the protester's argument that taxpayers were hurt by the agency splitting this requirement into two separate solicitations, due to resultant higher prices, as failing to include sufficient information to establish the likelihood that the agency in these instances violated applicable procurement laws or regulations. Finally, we dismissed CoSTAR's challenge to the relaxation of certain specifications in the solicitations on the ground that our Office generally will not review a protest that has the purpose or effect of reducing competition to the benefit of the protester. B-417581, Electronic Protest Docketing System (EPDS) Docket Entry No. 24, Notice of Summary Dismissal of Certain Issues (July 3, 2019); B-417602, EPDS Docket Entry No. 16, Notice of Summary Dismissal of Certain Issues (July 3, 2019).

⁴ CoSTAR's protest and supplemental protest raised numerous allegations. While our decision here does not discuss each and every argument, we have considered all of the protester's assertions and find none furnish a basis for sustaining the protest.

officials, or that specific laws or regulations have been violated. 4 C.F.R. § 21.5(b)(3), C. Martin Co., Inc., B-292662, Nov. 6, 2003, 2003 CPD ¶ 207 at 3.

As noted above, CoSTAR first argues that the agency violated FAR § 19.502-2 by unreasonably concluding that there were two or more viable 8(a) contractors interested in competing for these solicitations. JBOS II Protest (B-417581) at 5; MBOS II Protest (B-417602) at 5. The protester argues that while “there may be one 8(a) that is qualified,” that this 8(a) set aside “violates the [r]ule of 2 and is an improper sole source.” Id. Subsequently in its comments, the protester argues that the agency’s market research has “not reasonably identified a single viable 8[(a)].” Comments and Supp. Protest at 1.

As noted by the SBA in its response to our Office, the protester’s reliance on FAR § 19.502-2(b) is misplaced because FAR § 19.502-2(b) does not govern the acceptance of requirements under the 8(a) program.⁵ SBA Comments (July 12, 2019) at 2. Rather, this regulation pertains to whether or not a requirement must be set aside for small businesses. FAR § 19.502-2(a),(b); Synchrogenix Information Strategies, LLC, B-414068.4, Sept. 8, 2017, 2017 CPD ¶ 283 at 3-4. Accordingly, the protester’s alleged violation of FAR § 19.502 does not provide a basis to sustain the protest.

Although not specifically argued by the protester, we note that the protester’s general arguments regarding the adequacy of the agency’s market research could arguably implicate FAR § 19.203(c), which requires contracting officers to consider the results of an agency’s market research in determining which socioeconomic program to use for an acquisition, to include the 8(a) program.⁶ FAR § 19.203(c),(d).

As detailed above, the record reflects that the contracting officer considered the results of her market research when making the set-aside decision to include: GSA’s BMO Zone 3 Contractors (which included five 8(a) firms) (AR, Tab D, GSA Zone III SB Search); an analysis of responses submitted for similar services issued in September 2018, for the NAVFAC SE KBOS II requirement (including two 8(a) firms) (AR, Tab R, KBOS Sources Sought Analysis); the Dynamic Small Business Search engine (AR, Tab N, SBA, DSB Search 8(a); and a review of the NAVFAC SE FY19 RASP tracking spreadsheet (which included one 8(a) firm) (AR, Tab Q, FY19 Appendix D RASP Excerpt); COS/MOL at 5. The protester, while disagreeing with the agency’s findings, has not provided our Office any basis to conclude that the agency has violated any regulations in this regard. Therefore this protest ground is denied.

⁵ Our Office solicited SBA’s views regarding these protests. The SBA provided comments on these protests on July 12, 2019.

⁶ Section 19.800 of the FAR requires contracting officers to comply with FAR § 19.203 prior to deciding to offer an acquisition under the 8(a) program. FAR § 19.800(d).

CoSTAR next argues that the agency improperly determined that the JBOS II and MBOS II were new requirements and, as a consequence failed consider the potential impact of the set-asides on small businesses, such as CoSTAR, as required by 13 C.F.R. § 124.504(c), prior to accepting the requirements under the 8(a) program. In this regard, the protester contests the facts supporting the agency's determination that these requirements were considered new.

Under the Small Business Act's implementing regulation, the SBA may not accept any procurement into the section 8(a) program if doing so would have an adverse impact on an individual small business, a group of small businesses in a specific geographical location, or other small business programs. 13 C.F.R. § 124.504(c); Ohana Industries, Ltd., B-404941, June 27, 2011, 2011 CPD ¶ 125 at 4. The adverse impact review process is designed to protect small business concerns that are performing governing contracts awarded outside the 8(a) program. Id. The SBA regulations explicitly provide that an adverse determination need not be performed where a new requirement is offered to the 8(a) program. 13 C.F.R. § 124.504(c)(1)(ii)(D); Ohana Industries, Ltd., supra.

GAO's Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, protests based on alleged improprieties in a solicitation must be filed prior to the closing date for receipt of proposals in order to be timely under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(1). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4.

According to the protester, it was not until it reviewed the agency report that it had a reason to protest the basis for the agency's determination that these requirements were considered new. We find this argument unavailing. The record reflects that the agency notified CoSTAR that these "new requirements [had] been accepted by the SBA into the 8(a) Business Development Program" in an April 8 letter responding to CoSTAR's inquiries about these procurements. AR, Tab W, Agency Notification to CoSTAR of 8(a) Acceptance (Apr. 8, 2019). In addition, the solicitations both indicated that these were competitive 8(a) set-asides. Accordingly, any protest challenging the offer and acceptance of these requirements into the 8(a) program, to include the determination that the requirements are exempt from an adverse impact analysis because they were considered "new" requirements, is untimely because CoSTAR filed its protest after the closing date for the solicitation, which clearly indicated that these were competitive 8(a) set-asides. Suntek Systems, Inc., B-412265, Dec. 22, 2015, 2016 CPD ¶ 6 at 4. We therefore dismiss this protest ground.

The protest is denied.

Thomas H. Armstrong
General Counsel