



Decision

Matter of: Phoenix Environmental Design, Inc.

File: B-418304

Date: March 2, 2020

C. Chad Gill for the protester.
Sheryl L. Rakestraw, Esq., Department of the Interior, for the agency.
Jacob M. Talcott, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's failure to solicit protester is denied where agency's decision was reasonable.
2. Protest alleging agency improperly awarded purchase order to large business concern is dismissed where protester fails to show that awardee's quotation, on its face, demonstrated that awardee was not a small business.

DECISION

Phoenix Environmental Design, Inc., a service-disabled veteran-owned small business of West Richland, Washington, protests the issuance of purchase order No.140F0120P0004, by the Department of the Interior, United States Fish and Wildlife Service, to Wilbur-Ellis Co., of Twin Falls, Idaho, for the supply of herbicide. The protester contends that the agency unreasonably excluded it from the competition. The protester also contends that the agency improperly awarded the purchase order to a large business despite setting aside the procurement for small businesses.

We deny the protest in part, and dismiss it in part.

BACKGROUND

On October 10, 2019, the Southeast Idaho National Wildlife Refuge Complex (NWRC) notified the agency's contracting office of an urgent requirement for fifteen gallons of Esplanade 200SC herbicide or an equivalent product. Contracting Officer's Statement (COS) at 1-3; Memorandum of Law (MOL) at 1. Award was to be made to the responsible small business that could provide the requested product on the delivery

date at the lowest price. COS at 2. To allow for a quicker receipt of the herbicide, the agency allowed delivery by common carrier or pickup by the agency within 150 miles of the Southeast Idaho NWRC. Id. at 1.

The contracting officer explains that the herbicide is to assist in the restoration of native habitats following an unplanned wildfire. Id. at 1. The wildfire destroyed a portion of “cheatgrass,” which is one of the most prevalent invasive species in the area. Id. The control of cheatgrass is imperative to giving native plants the opportunity to reestablish in the area. Id. According to the agency, time was of the essence for this procurement because the soil conditions following a wildfire are ideal for controlling the spread of cheatgrass as herbicide is more readily absorbed into the soil due to the absence of leaf litter. Id. The agency needed the herbicide no later than October 25 because there was concern that a “freezing event” could occur, which would greatly diminish, if not eliminate, the efficacy of the herbicide. Id.

Consistent with the requirements of Federal Acquisition Regulation (FAR) § 13.003 and § 13.104, the contracting officer solicited quotations from three small business. Id. at 2. One was a local vendor; the other two were sources that had submitted the lowest prices in response to a prior solicitation (RFQ No. 140F0118Q0036) for multiple herbicides that was set aside for small businesses. Id. While Phoenix had submitted a quotation in response to RFQ -0036, its price was not among the lowest. Id. at n.1. In fact, the contracting officer asserts that Phoenix’s price placed it sixth in line for award, out of seven vendors, for the RFQ -0036 acquisition. Id. Therefore, Phoenix was not solicited for this procurement.

The contracting officer issued an oral solicitation to these three small businesses on October 15, and the three vendors responded the same day. Id. at 2. The contracting officer gave Wilbur-Ellis verbal notice to proceed on October 16, and the agency issued a formal purchase order on October 17. Id. at 3. The Southeast Idaho NWRC picked up the herbicide from the contractor’s facility on October 18. Id. On October 22, Phoenix emailed the contracting officer and asked that the agency cancel the award. Id. After the agency informed Phoenix that it would not cancel the award, Phoenix filed an agency-level protest on October 25. Id. The agency denied the protest on November 12. Id. Phoenix filed this protest with our Office on November 21. Protest at 1.

DISCUSSION

Phoenix contends that it should have been solicited for this requirement because over the past few years, it has repeatedly expressed interest in competing for the agency’s herbicide requirements. The protester also contends that the agency improperly awarded the purchase order to a large business concern despite setting aside the procurement for small business concerns. For reasons discussed below, we deny the protest in part, and dismiss it in part.

Soliciting Competition under FAR part 13

When, as here, an agency uses simplified acquisition procedures, it is not required to use full and open competition to conduct the procurement. 41 U.S.C. §§ 3301(a), 3305. Instead, the agency is required to promote competition to the maximum extent practicable. FAR § 13.104. This standard generally may be met through the solicitation of at least three sources. Omni Elevator Co., B-246393, Mar. 6, 1992, 92-1 CPD ¶ 264 at 2. That said, an agency does not satisfy its obligation to obtain competition to the maximum extent practicable where it unreasonably fails to solicit other responsible sources that request the opportunity to compete. Bosco Contracting, Inc., B-270366, Mar. 4, 1996, 96-1 CPD ¶ 140 at 3. When an agency deliberately excludes a source that requested the opportunity to compete, our Office will evaluate whether the agency acted reasonably. Id.

Here, there is no dispute that the protester requested that the agency solicit it for all of the agency's herbicide requirements under North American Industry Classification System (NAICS) code 325320. COS at 5. The agency argues, however, that to the extent it excluded the protester from the competition, such exclusion was reasonable. Id. We agree that, under the circumstances here, the agency acted reasonably.

As discussed above, an agency may satisfy its obligation to promote competition to the maximum extent practicable under simplified acquisition procedures by soliciting at least three sources. FAR § 13.104(b). Here, the Southeast Idaho NWRC provided the contracting officer with a list of three suggested local firms to provide the required herbicide. COS at 2. Upon discovering only one was listed as a small business, the contracting officer chose two additional firms that submitted two of the lowest prices under RFQ -0036. Id. The contracting officer then solicited these three vendors for the subject procurement. Id.

Even though the agency selected three vendors, Phoenix argues that the agency should have solicited it as well because Phoenix repeatedly expressed interest in all of the agency's herbicide requirements. Protest at 1. As previously mentioned, if an agency excludes a source that requested the opportunity to compete, our Office determines whether that exclusion was reasonable. Bosco Contracting, supra, at 4. Here, the record reflects that the contracting officer considered Phoenix when reviewing the list of vendors from RFQ -0036. COS at 2 n.1. The contracting officer decided not to solicit Phoenix for the subject procurement because the contracting officer selected only two of the lowest quotes from RFQ -0036, and Phoenix was sixth in line for award under that solicitation. Id. at 2 n.1, 6. In addition, given the urgency of the requirement, the agency contends that it needed to limit the number of vendors in order to expedite this procurement. MOL at 6; COS at 5. Given these factors, we find reasonable the contracting officer's explanation for excluding Phoenix from the subject procurement.

Small Business Status Determination

Phoenix also contends that the agency awarded the purchase order to a large business despite setting aside the purchase order for small businesses. We dismiss this ground of protest.

Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

With respect to this protest ground, the Small Business Act gives the Small Business Administration (SBA), not our Office, the conclusive authority to determine matters of small business status for federal procurements, and as a result, we will dismiss a protest challenging the size status of the awardee. 4 C.F.R. § 21.5(b)(1). A limited exception applies where a protester argues that the awardee's quotation shows, on its face, that the awardee is not eligible for award as a small business; we will review the reasonableness of the contracting officer's decision not to refer the matter to the SBA. McGoldrick Constr. Servs. Corp., B-409252.2, Mar. 28, 2014, 2014 CPD ¶ 114 at 5 n.4.

Here, the contracting officer stated that he verified the awardee's representation and certification that it was a small business. Protest at 11. The protester does not allege that anything on the face of the awardee's quotation should have led the contracting officer to question these representations. In other words, the protester has failed to allege sufficient facts to establish the likelihood that it would prevail on this claim.

The protest is denied in part, and dismissed in part.

Thomas H. Armstrong
General Counsel