



Decision

Matter of: TMI Management Systems, Inc.

File: B-401530

Date: September 28, 2009

Terrence M. O'Connor, Esq., Albo & Oblon, LLP, for the protester.
Wayne A. Keup, Esq., for Madison Services Inc., an intervenor.
Audrey H. Liebross, Esq., Department of Homeland Security, for the agency.
Christina Sklarew, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency's misclassification of a procurement for facilities support services on the Federal Business Opportunities Internet website under a "miscellaneous" product classification code improperly deprived the protester of an opportunity to respond to the agency's solicitation and was not consistent with the agency's obligation to use reasonable methods to obtain full and open competition.

DECISION

TMI Management Systems, Inc. of Easton, Pennsylvania, protests request for proposals (RFP) No. HSFEHQ-09-R-0046, issued by the Department of Homeland Security, Federal Emergency Management Agency (FEMA), for facility support services. TMI argues that FEMA's misclassification of the procurement on the Federal Business Opportunities (FedBizOpps) website prevented the firm from submitting a proposal.¹

We sustain the protest.

¹ The FedBizOpps website, www.fbo.gov, is the government-wide point of entry for the electronic publication of notices. Federal Acquisition Regulation (FAR) §§ 2.101, 5.003, 5.101, 5.201.

FEMA has a requirement for on-site facility support services for temporary housing units (THUs) located at temporary housing storage sites and staging areas.² TMI currently holds a blanket purchase agreement (BPA) with FEMA under which the firm has received orders to provide nearly identical support services.

In February, 2009, FEMA posted a presolicitation notice, announcing the agency's intention to issue a solicitation for facilities support services for its temporary housing units, on the FedBizOpps website under procurement classification code 99, "Miscellaneous."³ The notice also included North American Industry Classification System (NAICS) code 561210 (Facilities Support Services). Agency Report (AR), Tab 2, Presolicitation Notice, at 2. On April 10, FEMA posted a notice of the issuance of the RFP on the FedBizOpps website under the entry "Issuance of Final Solicitation," again under product classification code 99.

The RFP provided for award of a contract for THU services to supply the receipt, storage, preventative maintenance, transportation and disposition of housing units located at sites throughout the United States. Offerors were informed that the services would include administrative assistance; accountable property officer support; vehicle and equipment support; materiel handling support; THU operations support; transportation/equipment operation; and specialty support (such as providing electricians, welders, carpenters and mechanics to provide building maintenance and repair). RFP, Statement of Work (SOW), at C-2-C-5. All of the agency's presolicitation and solicitation notices were listed under product classification code 99 and included NAICS code 561210. The extended closing date for receipt of proposals was stated to be May 20.

TMI protested to our Office on June 26, after the closing date for receipt of proposals, that FEMA's classification of the RFP under a product (as opposed to service) code did not reasonably inform the protester or other firms of the procurement.⁴ TMI argues that the RFP should have been classified under either

² THUs are travel trailers and mobile homes used to shelter displaced disaster victims. See FEMA's Temporary Housing Unit Program and Storage Site Management, Department of Homeland Security, Office of Inspector General, No. OIG-09-85, June 2009.

³ Procurement classification codes are a system under which procurements are classified by product and service codes. FedBizOpps, Frequently Asked Questions. Services are classified under alphabetical letter-codes from B to Z, whereas products are classified under numerical codes from 10 to 99. The agency's use of the "99" code here thus indicated that it was acquiring goods, rather than services.

⁴ A search can be conducted on the FedBizOpps website by selecting terms from drop-down menus and/or inserting terms into search boxes. Among the drop-down choices are product and service classification codes, NAICS codes, and set-aside

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code M, “Operation of Government-Owned Facility,” or code R, “Professional, Administrative, and Management Support Services.”⁵ FEMA has suspended award of a contract pending our resolution of the protest.

The Competition in Contracting Act of 1984 (CICA) generally requires contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the government with the opportunity to receive fair and reasonable prices. 41 U.S.C. § 253(a)(1)(A) (2006). In pursuit of these goals, a contracting agency must use reasonable methods to publicize its procurement needs and to timely disseminate solicitation documents to those entitled to receive them. Kendall Healthcare Prods. Co., B-289381, Feb. 19, 2002, 2002 CPD ¶ 42 at 6. The official public medium for providing notice of contracting actions by federal agencies is the FedBizOpps website, which has been designated by statute and regulation as the government-wide point of entry. 15 U.S.C. § 637(e); 41 U.S.C. § 416; FAR §§ 2.101, 5.101(a)(1), 5.201(d). An agency’s notice must provide an “accurate description” of the property or services to be purchased and must be sufficient to allow a prospective contractor to make an informed business judgment as to whether to request a copy of the solicitation. See 15 U.S.C. § 637(f); Jess Bruner Fire Suppression, B-296533, Aug. 19, 2005, 2005 CPD ¶ 163 at 4. In this regard, the FAR requires agencies to use one of the procurement classification codes identified at the FedBizOpps website to identify services or supplies in its notices on FedBizOpps, see FAR § 5.207(e), and contracting officers must use the most appropriate classification category. See Gourmet Distributors, B-259083, Mar. 6, 1995, 95-1 CPD ¶ 130 at 2. We have found that an agency failed to effectively notify potential offerors of a procurement and to obtain full and open and competition under CICA, where the agency misclassified the procurement. See Frank Thatcher Assocs., Inc., B-228744, Nov. 12, 1987, 87-2 CPD ¶ 480 at 2-3 (misclassification of procurement in the Commerce Business Daily, formerly the official public medium for identifying proposed contract actions and now replaced by FedBizOpps).

Here, FEMA classified this acquisition for support services under a miscellaneous code for products, rather than services. FEMA’s contracting officer contends that none of the service codes appeared applicable to the support services for THUs sought here. We find, however, as explained below, that although no service code was an exact match, a number of service codes include services such as those

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designations. Other search parameters include, for example, active or archived status, dates, and key words. Once a product or service code (or codes) has been selected, the search is limited to procurements identified under that code or codes.

⁵ The TMI employee responsible for locating government solicitations stated during a telephone hearing conducted by the GAO attorney assigned to this protest that he generally searched for opportunities under classification code categories M and R.

solicited here, and FEMA does not reasonably explain why one of these service codes would not have been more appropriate than a miscellaneous product code, which indicated that the agency was procuring goods.

The SOW listed a number of services categories, including clerical and office support, vehicle and equipment maintenance and repair, material handling, maintenance and placement of THUs, and maintenance of buildings and facilities. RFP, SOW, at C-2-C-5. A number of service codes appear to encompass similar services, such as codes J, “Maintenance, Repair & Rebuilding of Equipment,” M, “Operation of Government-owned Facilities,” and R, “Professional, Administrative, and Management Support Services.”

FEMA’s contracting officer acknowledges that facilities support services described by NAICS code 561210 are often posted under code M, but she states that she did not use this code because “sites on which the services will take place” are not owned by FEMA, but leased from commercial or public entities. See AR, Contracting Officer’s Statement, at 1. The contracting officer also did not use codes J or R, because these codes included some services that were not solicited by the RFP. Id. at 2. Although we agree that none of the service codes is an exact match for the services solicited by the RFP, it is incumbent upon the agency to classify its procurement under the most appropriate category to promote competition. Gourmet Distributors, B-259083, supra, at 2-3. The agency has provided no reasonable explanation, and the record does not otherwise show, why code 99, a miscellaneous product code, is a better match than one of these service codes.⁶ In this regard, we found from our own review of the FedBizOpps website that a number of procurements that include NAICS code 561210 were classified under either code J, M, or R, but no procurement with this NAICS code was classified under code 99. In short, we find no reasonable basis for FEMA’s classification of this procurement under product code 99.

Notwithstanding the requirement to classify procurements accurately, FEMA argues that the availability of electronic search engines has “changed the issue of who is responsible for finding notice of an acquisition when it is misclassified.” AR at 3. Specifically, FEMA argues, citing our decision in Jess Bruner Fire Suppression, B-296533, supra, that “a prudent offeror would have found the announcement regardless of the product or service classification code because of the key words

⁶ In this regard, the Product and Service Codes Manual, August 1998, maintained by the Federal Procurement Data System, General Services Administration, describes the kinds of products under classification code category 99 as including signs and advertising displays, jewelry, collectors and historical items, smoker’s articles (e.g., ashtrays, lighters), ecclesiastical equipment, cemetery and mortuary equipment, and “miscellaneous items,” which the manual describes as including “[o]nly those items which cannot conceivably be classified in any existing classes.” See Product and Service Codes Manual, Aug. 1998, at 136-37.

used in the FedBizOpps announcement.” AR at 2. Our decision in Jess Bruner did not involve a solicitation posted on FedBizOpps under an improper classification code. Product and service codes are provided to make manageable searches of large numbers of procurements; that is, the classification codes allow potential offerors to narrow their searches in a meaningful way to find procurement opportunities. Misclassifying a procurement makes difficult, if not impossible, the task of locating procurement opportunities under other search terms. Here, because TMI reasonably relied in its search on the codes that most closely represented the types of services it could provide—M and R—as a means to narrow the search results, it could not have found this listing no matter what additional search terms it entered or selected.⁷ FEMA’s argument that a prudent vendor could have used various available search terms, such as the NAICS code, to locate the listing assumes the vendor would anticipate that the procuring agency might have misclassified the requirement and would therefore omit any product or service code from its search. We find this assumption unreasonable.

In conclusion, we find that FEMA’s misclassification of this procurement deprived TMI of an opportunity to respond to the RFP and that FEMA therefore did not use reasonable methods to obtain full and open competition as required by CICA. Frank Thatcher Assocs., Inc., supra, at 2-3.

We recommend that FEMA reopen the competition and reissue it with a synopsis posted on FedBizOpps under an appropriate classification. We also recommend that the protester be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d)(1) (2009). TMI should submit its certified claim for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Daniel I. Gordon
Acting General Counsel

⁷ Moreover, exacerbating FEMA’s misclassification of this procurement is the fact that FEMA listed the issuance of the RFP on FedBizOpps under the title “Issuance of Final Solicitation.” Such a general title provides no meaningful information about the nature of the procurement.