



GAO

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: DNO Inc.

File: B-406256; B-406256.2

Date: March 22, 2012

Anne B. Perry, Esq., Louis D. Victorino, Esq., and Ryan E. Roberts, Esq., Sheppard Mullin Richter & Hampton LLP, for the protester.

Michael Gurwitz, Esq., Department of Agriculture; and Sam Q. Le, Esq., Small Business Administration, for the agencies.

Pedro E. Briones, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency decision not to set aside for small business concerns a contract for a pilot program to compile a list of approved fruit and vegetable vendors for domestic food nutrition assistance programs is sustained where agency's decision was based on insufficient efforts to ascertain, and inaccurate assumptions of, small business capability to perform the contract.

2. In a best value procurement, a solicitation that requests unit pricing from offerors without identifying what each unit reflects or against what quantity the proposed unit prices would be applied to determine an evaluated price for each offeror, does not provide sufficient information to allow a common basis for evaluating proposed prices.

DECISION

DNO Inc. of Columbus, Ohio, protests the terms of request for proposals (RFP) No. 2000000700 issued by the Agricultural Marketing Service, Department of Agriculture (USDA), for fresh fruits and vegetables. DNO, a small business, contends that the RFP should have been set aside for small business concerns and that the RFP is defective because it fails to provide estimated quantities.

We sustain the protest.

BACKGROUND

On November 1, 2011, USDA published a request for information (RFI), soliciting comments on a proposed pilot program for the purchase of fresh produce for domestic food nutrition assistance programs. See Agency Report (AR), Tab E, RFI, at 1; Notice to Trade, at 10. The RFI states that the pilot program will be conducted in Michigan and Florida to test a new method for purchasing and delivering fresh fruits and vegetables in useable quantities directly to schools and other grantees. See AR, Tab E, RFI. The agency also published responses to questions and comments submitted by interested vendors, regarding, among other things, the impact of the pilot program on small businesses, including small and local growers, farmers, vendors, and producers. See, e.g., AR, Tab E, Stakeholder Letter, Oct. 19, 2011, at 34-39; Teleconference Notes, Nov. 16, 2011, at 11-16. USDA informed vendors that the pilot program was open to any entity or offeror, but that the agency was working with its Office of Small and Disadvantaged Business Utilization to set up future meetings in Michigan and Florida to reach out to small farmers. See AR, Tab E, Teleconference Notes, Nov. 16, 2011, at 13-14.

The agency states that the main objectives of the pilot program are to use existing structures to deliver fresh fruits and vegetables to schools as quickly as possible, as these are perishable products with a very short shelf-life, and to provide schools with the greatest degree of options and flexibility to obtain fresh produce throughout the year. AR at 13. In this regard, the agency asserts that the pilot program must allow a full range of available products and a wide variety of sources to test the process flow before expanding the program nationwide. See id. at 5, 9.

On November 23, the agency issued the RFP on an unrestricted basis for the award of multiple, indefinite-delivery/indefinite-quantity (ID/IQ), fixed-price contracts with economic price adjustment to supply fresh fruits and vegetables to various USDA supported school systems in Michigan and Florida as part of the pilot program. See RFP at 1, 108. The RFP informs offerors that award of the contracts will be on a best value basis considering the following evaluation factors, listed in descending order of importance: technical information; past performance; price; and management and workforce practices and policies. Id. at 133.

The statement of work (SOW) in the RFP describes the contract requirements. In this regard, offerors were informed that the contractor would be required to actively market to, and fill orders from, specified school districts for blueberries, grapes, oranges, carrots, lettuce, apples, and related products (e.g., sliced, packaged apples). SOW at 117. Offerors were also informed that, prior to contract award or issuance of a purchase order, offerors and/or their suppliers and facilities

would be audited for good agricultural practices (GAP), good handling practices (GHP), and USDA Plant Survey and Food Defense Systems.¹ See RFP at 113.

As relevant here, the RFP instructed offerors to propose unit prices for each produce item. Id. at 101-06, 130. The unit prices are to be inclusive of all costs associated with producing the product minus any delivery-related additional costs. Id. at 130. Offerors were advised that their unit prices would be compared to market prices. Id. at 132. The solicitation, however, does not identify estimates for the contract line items or define units against which unit prices would be applied. See id. at 107, 113-116, 129-135; Schedule; SOW. Offerors are also required to indicate any constraints applicable to minimum order requirements or maximum delivery order capacities. Id. at 130.

DISCUSSION

DNO objects to the agency's decision to not set aside the RFP for small business concerns, arguing that there is a reasonable expectation that the agency will receive offers from two or more small businesses at fair and reasonable prices. Protest at 7-8. In this regard, the protester contends that the agency failed to perform any reasonable acquisition planning and market research. Supp. Protest at 2; Supp. Comments at 2-3. According to the protester, USDA not only failed to seek information regarding the number of small businesses capable of performing the contract, but ignored data in its possession showing the existence of at least six qualified small businesses. Supp. Comments at 3. DNO also complains that the agency did not coordinate the procurement with the Small Business Administration (SBA). Supp. Protest at 3.

The agency contends that it conducted adequate acquisition planning and market research, noting that it published information about the pilot program and sought stakeholder input through nearly eight months of meetings and teleconferences with Michigan and Florida state and local school representatives, fruit and vegetable growers, producers, wholesalers, distributors, and local produce and farming advocates. See Supp. AR at 5; Contracting Officer's (CO) Supp. Statement at 2-4. The agency asserts that, based on its knowledge and experience, discussions with industry, and research of similar Department of Defense (DOD) procurements, it "does not believe that in general, small business concerns by themselves . . . are capable of fulfilling the requirements of entire school systems on a nationwide basis,

¹ Offerors were also required to identify their subcontractors, including growers, processors, and distributors, and specific locations where the produce was grown, processed, and shipped. RFP at 129.

and thus cannot fulfill a major component of the pilot program.”² AR at 11. According to the agency, the majority of fruits and vegetables for the school lunch program are currently provided by large businesses, and limiting the pilot program to small businesses would greatly restrict opportunities for schools to obtain produce from all available vendors. See CO’s Statement at 10. USDA also states that it does not believe that there is a sufficient number of GAP and GHP certified small growers to meet the supply needs of schools throughout the school year. AR at 13.

Contracting officers generally are required to set aside for small business all procurements exceeding \$150,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns. Federal Acquisition Regulation (FAR) § 19.502-2(b). A partial set-aside must be made if a total set-aside is not appropriate, the requirement is severable into two or more economic production runs or reasonable lots, and one or more small business concerns are expected to have the technical competence and productive capacity to satisfy the set-aside portion at a reasonable price. FAR § 19.502-3(a). FAR § 19.202-2 generally requires contracting officers, before issuing solicitations, to make “every reasonable effort to find additional small business concerns” and to maximize small business participation.

As a general matter, we regard such a determination as a matter of business judgment within the contracting officer’s discretion that we will not disturb absent a showing that it was unreasonable. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53 at 2. However, a contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the work. Safety Storage, Inc., B-280851, Oct. 29, 1998, 98-2 CPD ¶ 102 at 3. Our Office will review a protest to determine whether a contracting officer has made such efforts. Library Sys. & Servs./Internet Sys., Inc., B-244432, Oct. 16, 1991, 91-2 CPD ¶ 337 at 7. In this regard, we have found unreasonable the determination to issue a solicitation on an unrestricted basis where that determination is based upon outdated or incomplete information. McSwain & Assocs., Inc.; Shel-Ken Properties, Inc.; and Elaine Dunn Realty, B-271071 et al., May 20, 1996, 96-1 CPD ¶ 255 at 2-4. While the use of any particular method of assessing the availability of small businesses is not required,

² Currently, USDA supported school systems can purchase fresh fruits and vegetables directly from vendors or through the DOD Defense Supply Center, Fresh Fruit and Vegetable Program. See AR, Tab E, Information Sheet, Fresh Produce Pilot for Schools in Michigan and Florida, at 1; CO’s Statement at 2; CO’s Supp. Statement at 8. According to the agency, USDA chose to conduct the pilot project in Michigan and Florida, before expanding the project nationally, because schools in those states had complained about the distribution of produce under the DOD program. See CO’s Supp. Statement at 8.

and measures such as prior procurement history, market surveys and/or advice from the agency's small business specialist and technical personnel may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement, American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3, the assessment must be based on sufficient facts so as to establish its reasonableness. Safety Storage, Inc., supra.

As part of our development of the record, we received comments from SBA. SBA complains that USDA breached an agreement that the procuring agency had with SBA with respect to conducting fruit and vegetable procurements for schools during the 2011-2012 school year. SBA Report at 14. Specifically, SBA reports that USDA agreed to set aside procurements for apple, blueberry and grape products and to set aside some procurements for carrots. SBA states that USDA's failure to set aside its purchases of apple, blueberry and grape products under this procurement violates this agreement. Id. at 14-15.

SBA also contends that USDA did not conduct the level of market research necessary to make a reasonable determination about whether two responsible small business concerns would submit offers. Id. at 1. In this regard, SBA states that USDA did not search available small business databases, including SBA's Dynamic Small Business Search database, despite the ease of doing so. Id. at 6, 11-12. According to SBA, its own search found 536 small businesses that appeared to be eligible vendors, including 339 small businesses under the relevant North American Industry Classification System code. Id. at 11. SBA also identified 43 recent or current federal agency procurements (including a number of DOD procurements) for fruits and vegetables that were set aside for small businesses. Id.

We find from review of the record that the agency did not reasonably consider whether the procurement should be set aside, either exclusively or partially, for small business participation. Although USDA conducted meetings and conference calls with interested stakeholders, and disseminated information about the pilot program, the record shows that little, if any of the agency's acquisition planning related to consideration of small business participation. Furthermore, while the agency "believes" that small business are not capable of performing the requirements, or that there are insufficient numbers of certified small growers, nothing in the contemporaneous record reflects any analysis or market research in that regard, even though the agency was aware of small business interest in the procurement based on questions submitted by vendors. Instead, the agency's assertions are based on assumptions, rather than on reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the work. Indeed, the agency concedes that there are between six and 13 USDA certified small businesses capable of participating in the procurement. See Supp. AR at 6; Agency Response to SBA's Comments, attach. B, at 1. USDA's own documents also state there are currently 45 DOD contracts in place with 38 small business produce wholesalers, including contracts in Florida and Michigan set

aside for small growers. AR, Tab E, DOD Fresh Program, at 95, available at www.fns.usda.gov/fdd/programs/dod/.

Moreover, we find no merit in the agency's suggestion that it need not set aside the procurement for this pilot program, because the goals of the pilot program (to allow maximum flexibility and a full range of sources) do not allow the procurement to be set aside. We are not aware of, nor has the agency identified, any laws or regulations that exempt procurements for pilot programs from the small business set aside requirements. See, e.g., Aalco Forwarding, Inc., et al. B-277241.16, Mar. 11, 1998, 98-1 CPD ¶ 75 (sustaining protest of size of partial set-aside under solicitation for pilot program); see also 2B Brokers et al., B-298651, Nov. 27, 2006, 2006 CPD ¶ 178 (protest that agency initiative to consolidate transportation and freight services was an impermissible bundling under the Small Business Act).

Accordingly, we conclude that USDA failed to make sufficient efforts to ascertain small business capability to perform the contract and did not make a reasonable effort to survey the market to ascertain whether there was a reasonable expectation that two or more responsible small business concerns would submit bids at fair market prices, before issuing the solicitation on an unrestricted basis, and we sustain the protest on this ground. Information Ventures, Inc., B-294267, Oct. 8, 2004, 2004 CPD ¶ 205 at 5 (protest challenging agency determination not to set aside procurement for small business concerns sustained where decision was based on unreasonably limited search of potential small business market); ACCU-Lab Med. Testing, B-270259, Feb. 20, 1996, 96-1 CPD ¶ 106 at 4 (agency did not perform adequate market survey, including a search of a relevant database, even though small businesses showed interest in solicitation, and agency provided no evidence to support its assertion that small businesses lack necessary expertise and will have difficulty meeting performance requirements).

Estimated Quantities

DNO also protests that the solicitation does not provide estimated quantities for each produce item. Protest at 8-9; Supp. Protest at 3. The protester argues that, without estimated quantities, the agency "cannot reasonably ascertain the actual likely price of each offeror's proposal, or, therefore, the relative price amongst the offerors (e.g., even where one offeror offers lower prices for one product, the agency will not be able to compare the relative prices of the offerors without estimating the overall quantities to be ordered between and among products)." Supp. Comments at 13.

The agency responds that it is impossible to include an estimate of its needs in the RFP because of the procurement strategy used and the nature of the pilot program. See AR at 21. In this regard, the agency states that the pilot program provides schools with an optional method to obtain fresh produce but that schools are not obligated to use the pilot program. See id. The agency adds that whether or not any orders are placed against a particular contract is entirely dependent on the

contractor's marketing efforts and the schools own decision-making. Id. According to the agency, USDA intends to award contracts to all offerors that can demonstrate an acceptable level of compliance with the evaluation factors and that propose reasonable prices. Id. at 22. In this respect, the agency states that pricing under each contract will change on a monthly basis to allow for an economic price adjustment and, as a result, the vendor offering the lowest overall price for each produce item can change monthly. Id. The agency also points out that it has already received three offers, suggesting that other offerors found information in the RFP to be adequate for preparation of proposals. Id. at 23.

Agencies are required to consider cost or price to the government in evaluating competitive proposals. 41 U.S.C. § 3306(c)(1)(B) (2011); see Kathpal Tech., Inc.; Computer & Hi-Tech Mgmt., Inc., B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6 at 9. While it is up to the agency to decide upon some appropriate, reasonable method for proposal evaluation, the method chosen must include some reasonable basis for evaluating or comparing the relative costs of proposals, so as to establish whether one offeror's proposal would be more or less costly than another's. See Aalco Forwarding, Inc., et al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 11. Where estimates are not reasonably available, an agency may establish a notional estimate, consistent with the RFP requirements, to provide a common basis for comparing the relative costs of the proposals. See High-Point Schaer, B-242616, B-242616.2, May 28, 1991, 91-1 CPD ¶ 509 at 6-8.

Here, we agree with DNO that the solicitation fails to provide sufficient information to allow a common basis for evaluating offerors' proposed prices. The RFP informs offerors that awards would be made on a cost/technical tradeoff basis. See RFP at 133 (evaluation factors, including price, identified in descending order of importance). In this regard, the solicitation also provides for a qualitative evaluation of the non-price factors. See id. at 134-35. Although the solicitation requests unit pricing from the offerors, the RFP does not identify what each unit reflects or against what quantity the proposed unit prices would be applied to determine an evaluated price for each offeror. Absent such information (which, as noted above, may be notional in the absence of better estimates), the agency has no meaningful way to evaluate the offerors' prices to determine their relative standing.

In its report, USDA states that it does not intend to make its award determinations on a cost/technical tradeoff basis. Rather, the agency states that it intends to award contracts to all offerors that can demonstrate an acceptable level of compliance with the evaluation factors and that propose reasonable prices. AR at 22. In essence, the agency contends that it will make awards without qualitatively comparing the merits of the offerors' technical and price proposals. This, however, is not consistent with the basis for award stated in the RFP. It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. Brican Inc., B-402602, June 17, 2010, 2010 CPD ¶ 141 at 4.

RECOMMENDATION

We recommend that USDA make a new determination of whether there is a reasonable expectation that two or more responsible small business concerns would submit offers at fair market prices. If the agency's research determines that it would receive such offers from two or more small business concerns, it should cancel the current solicitation, and reissue it as a total or partial small business set-aside. In any event, we recommend that the agency clarify its basis for award of contracts. If the agency intends to comparatively consider price in making its award determinations, USDA should provide for a common basis for evaluating price. We also recommend that DNO be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2011). DNO should submit its certified claims for costs directly to the contracting agency within 60 days after receipt of this decision. Id., § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel