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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: National Industries for the Blind

File: B-409528.20

Date: July 2, 2014

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DIGEST

Protest that a solicitation for government-wide provision of office supply items fails to comply with the requirements of the Javits-Wagner-O'Day Act, 41 U.S.C. §§ 8501-8506, with regard to sales by vendors through brick and mortar stores, is denied, where the solicitation requires offerors to demonstrate that they are certified by AbilityOne, the entity responsible for administering programs under the Act, and where AbilityOne does not require additional restrictions for brick and mortar stores in the manner sought by the protester.

DECISION

National Industries for the Blind (NIB), of Alexandria, Virginia, protests the terms of request for proposals (RFP) No. GSQ02-14-R-SA0001, which was issued by the General Services Administration (GSA) for a full range of office supply items that will be available for order by participating federal agencies. NIB argues that the solicitation should be amended to reflect the protester's view that vendors who operate "brick and mortar" stores, that is physical stores where goods can be purchased, cannot comply with the Javits-Wagner-O'Day Act, 41 U.S.C. §§ 8501-8506, (JWOD Act).

We deny the protest.

BACKGROUND

This protest concerns the interpretation of the JWOD Act and its associated regulations and policies. The AbilityOne program, which is administered by the

Committee for Purchase from People Who Are Blind or Severely Disabled (Committee), implements the JWOD Act by providing employment opportunities, through the award of federal contracts, for people who are blind or have other severe disabilities. 41 C.F.R. § 51-1.3 (2014). The JWOD Act grants the Committee the exclusive authority to establish and maintain a procurement list of supplies and services provided by qualified non-profit agencies for the blind or disabled under the AbilityOne program.¹ 41 U.S.C. §§ 8502(a), 8503(a); see Federal Acquisition Regulation (FAR) Subpart 8.7.

As relevant here, the JWOD Act provides the following with regard to the procurement list:

An entity of the Federal Government intending to procure a product or service on the procurement list . . . shall procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled in accordance with regulations of the Committee and at the price the Committee establishes if the product or service is available within the period required by the entity.

41 U.S.C. § 8504(a). Federal agencies are required to obtain all supplies and services that are on the Procurement List from a central nonprofit agency (CNA), or its designated AbilityOne participating nonprofit agencies. FAR § 8.705-1(a). In addition, agencies “are not permitted to purchase commercial items that are essentially the same as commodities on the Procurement List.” 41 C.F.R. § 51-6.13(c).

NIB is designated by AbilityOne as a CNA that is charged with performing various functions in furtherance of the JWOD Act. Id.; see 41 C.F.R. § 51-3.1(a). As a CNA, NIB is responsible for distributing orders from federal agencies for products on the Procurement List among NIB’s associated state and local nonprofit agencies serving the blind. 41 C.F.R. § 51-3.2. One method by which NIB distributes such orders is by entering into prime contracts with Government agencies, and subcontracts with associated nonprofit agencies throughout the country. Protest at 2.

GSA issued the solicitation on January 31, 2014. The RFP seeks proposals for the award of multiple indefinite-delivery/indefinite-quantity contracts for GSA’s Office Supplies Third Generation (OS3) program, which is part of the agency’s effort to support GSA’s use of strategic sourcing while building a new, more sustainable

¹ References herein to AbilityOne are to the program, as administered by the Committee.

business model.² RFP at 2. The solicitation anticipates the award of approximately 24 contracts with fixed-unit-prices (with economic price adjustments), for a base period of 1 year and four 1-year options.³ Agency Report (AR) at 4; RFP at 2.

The OS3 procurement is the successor to GSA's Office Supplies Second Generation (OS2) program, which expired in May 2014. The OS2 program consisted of blanket purchase agreements (BPA) that were issued under GSA's multiple award schedule (also known as the Federal Supply Schedule) No. 75 for office supplies. AR at 1.

The goal of the OS3 program is to "provide [GSA's] customers with a wide and best range of commercial office products and services, faster delivery, and better reporting information on orders and products, at the lowest overall costs." RFP at 4. The OS3 program is designed to leverage industry purchasing volume power and dynamic pricing capabilities to the maximum extent, increase internal efficiencies and effectiveness in supporting customer requirements, and increase small business opportunities--resulting in lower cost to the government. Id. GSA estimates that agencies will spend \$1.25 billion under its OS3 contracts over the course of the 5-year contract term, including options. CO Statement at 1. The OS3 solicitation will be available for use by the entire Federal Government.⁴

The RFP anticipates separate awards under each of four contract line item numbers (CLIN). The overall requirements of the solicitation are divided among the CLINs, along with the associated preferences for small business categories. The solicitation states that for CLIN Nos. 1, 2 and 3, award will be made on a best-value basis. RFP, Statement of Work (SOW), at 2. For CLIN 4, award will be made to the lowest-priced, technically-acceptable offeror. Id.

At issue in this protest is CLIN No. 4, which provides:

² Strategic sourcing is a process that moves an organization away from numerous individual procurements for the same or similar products or services toward a broader aggregate approach. See STRATEGIC SOURCING: Selected Agencies Should Develop Performance Measures on Inclusion of Small Businesses and OMB Should Improve Monitoring, GAO-14-126, at 6-7 (Jan. 2014).

³ The government reserves the right to adjust the number of awards based upon receipt of successful qualified proposals. RFP at 4.

⁴ The OS3 contracts will not be mandatory sources for office supplies; federal customers will still be able to purchase office supplies from one of the more than 400 vendors who hold multiple award schedule contracts for these items. AR at 4.

CLIN Four (0004) (GSA On-the-Go)⁵: Contractors may propose a full catalog of general office supplies as specified in CLIN 0001 with added capability within the 10 largest U.S. Metropolitan Areas by population for same day delivery, secure desktop, expedited and/or brick/mortar store presence for onsite immediate delivery all within no more than 4 hours of order receipt.

RFP, SOW, at 4.

This CLIN anticipates a minimum of one award, and there is no preference for small businesses. Id. at 3-7. The solicitation establishes a Go/No-Go Factor for this CLIN which requires the offeror to demonstrate AbilityOne authorization. Id. at 36.

In March 2014, the agency issued responses to questions submitted by prospective offerors. The following question and answer (Q&A) concerned the AbilityOne requirements for products that are on the procurement list, and products that are considered “essentially the same” (ETS) as those on the list:

[Question] The requirement of AbilityOne and Essentially the Same (“ETS”) cannot be complied with in Contractors stores. Please confirm this is a requirement relative to CLIN0004. Below are various AbilityOne and ETS requirements cited throughout the RFP and SOW. The application of these requirements to in-store purchases would unnecessarily restrict competition.

[Answer] The AbilityOne requirements for the OS3 Purchasing channel do not apply to commercial brick and mortar stores however the government encourages AbilityOne items to be in commercial brick and mortar stores. ETS items must not be sold within the contractors’ Government designated portals. OS3 Government discounts will not apply to ETS items sold in commercial brick and mortar stores.

OS3 Q&As No. 80.1.c (Mar. 13, 2014).

NIB filed this protest on March 24, which was the same date the solicitation closed.

⁵ CLIN No. 4 covers the same catalog of general office supply requirements as CLIN No. 1, which requires offerors to propose their entire commercial catalog of general office products, paper, toner and ink. RFP, SOW, at 3-4.

DISCUSSION

NIB argues that Q&A No. 80.1.c improperly states that AbilityOne requirements do not apply to brick and mortar stores. The protester contends that AbilityOne's rules for vendors require firms that operate brick and mortar stores to offer only those products on the Procurement List, and to preclude the sale of ETS products. Protest at 9. As discussed further below, the protester argues that the RFP's failure to require offerors to block the sale of ETS products at commercial brick and mortar stores, in a manner analogous to the requirements for online sales, puts NIB at a competitive disadvantage. The protester requests that our Office recommend that GSA either cancel CLIN No. 4 with regard to the authorization of sales through brick and mortar stores, or amend the RFP's terms and conditions to require that contractors who operate brick and mortar stores "comply with all AbilityOne requirements" by implementing procedures to block the sale of commercial ETS. Protest at 9-10.

GSA's Request for Dismissal

In response to NIB's protest, GSA issued a clarification concerning Q&A No. 80.1.c., GSA Corrective Action Letter (Apr. 21, 2014), and argues that this corrective action rendered NIB's protest academic, and appropriate for dismissal. The agency noted that although the solicitation stated "numerous times" that offerors must be AbilityOne authorized, and that such authorization was the first technical Go/No-Go factor for CLIN No. 4, the clarification was issued to address "any misunderstanding" that may have arisen from its initial response to Question 80.1.c. Id. The clarification, which was issued on the Federal Business Opportunities website (www.fbo.gov), stated as follows:

Contractors operating brick and mortar stores must be AbilityOne certified and must comply with all AbilityOne requirements. However, the Government recognizes that not all items in a commercial vendor's brick and mortar store will be AbilityOne items.

Federal purchasers utilizing the OS3 Contract vehicle must adhere to Federal Statutes, Acquisition Regulations and Agency Guidance at the end user purchasing level, including instructions to purchasers issued pursuant to this solicitation and in GSA-led end user trainings.

Specifically, the [JWOD] Act, 41 U.S.C. §§ 8501-8506, requires the Government to purchase supplies or services on the Procurement List, at prices established by the Committee, from AbilityOne participating nonprofit agencies if they are available within the period required.

* * * * *

The addition of the brick and mortar and/or same day delivery requirement does not alter the mandatory character of the JWOD Procurement List items.

GSA Corrective Action Letter (Apr. 21, 2014), Tab 1, GSA Clarification Notice.

NIB argued that GSA's corrective action failed to address the fundamental issue raised in NIB's protest, that is, "how, if at all, CLIN 0004 offerors can comply with the JWOD Act in the context of 'brick and mortar' commercial stores." NIB's Objection to Agency's Corrective Action (Apr. 24, 2014) at 1. Our Office declined to dismiss NIB's protest as academic, and requested that GSA address NIB's argument that the JWOD Act requires the agency to amend the solicitation to preclude the purchase of ETS products from brick and mortar stores. GAO Response to Inquiry Regarding Standing (Apr. 25, 2014).

Consideration of the Merits

As discussed above, GSA clarified Q&A No. 80.1.c, explaining that contractors operating brick and mortar stores must be certified by AbilityOne, and must comply with AbilityOne requirements to be eligible for award under CLIN No. 4. GSA Corrective Action Letter (Apr. 21, 2014), Tab 1, GSA Clarification Notice. The agency contends that its clarification addressed the protester's arguments concerning compliance with the JWOD Act, and that no further revisions to the solicitation are needed.

NIB argues that GSA's clarification is not sufficient to ensure compliance with the JWOD Act, because AbilityOne does not have specific procedures to require brick and mortar stores to block sales of commercial ETS products.⁶ In this regard, NIB notes that AbilityOne requires prospective vendors of products on the Procurement List to be approved for such sales, and publishes Criteria for AbilityOne Distributors, which explains the process for approval; however, these criteria do not expressly address sales of commercial ETS products through brick and mortar stores.⁷ For this reason, the protester argues that GSA should either (1) cancel the solicitation

⁶ Although GSA in documents relating to this protest, and in solicitation documents, refers to AbilityOne "certified" organizations (see RFP, SOW, at 36), as discussed below, AbilityOne procedures contemplate that vendors become "authorized" to sell products on the Procurement List. We use these terms interchangeably in this decision.

⁷ AbilityOne's Criteria for AbilityOne Distributors and an application form are available at: <http://www.jwod.gov/distributors/application.html>.

provision that authorizes sales through brick and mortar stores, or alternatively, (2) amend the solicitation to require that offerors with brick and mortar stores not sell commercial items that are essentially the same as those on the Procurement List.

GSA responds that AbilityOne certifies vendors without regard to their method of sales (e.g., online or brick and mortar stores). The agency further contends that the absence of a specific approval for brick and mortar stores does not show that such vendors are ineligible for certification by AbilityOne, or that the solicitation's reliance on certification by AbilityOne violates the JWOD Act. For the reasons discussed below, we agree with the agency and find no basis to sustain the protest.

As relevant here, prospective vendors must explain how their ordering system precludes purchases of ETS, as follows:

The distributor must abide by the AbilityOne exclusivity principle, i.e., not to sell any commercial products to Federal customers if those products have been deemed "essentially the same" (ETS) as AbilityOne products. As a result, distributors should refrain from marketing both A- and B-List ETS commercial products on federal contracts, including the GSA Schedule and DoD E-Mall. . . . Distributors must be able to explain and demonstrate how [their] ordering system will automatically block commercial ETS products and substitute the appropriate AbilityOne products. An automated blocking system is strongly preferred.

Criteria for AbilityOne Distributors ¶ 3. Additionally, for electronic catalogs, the AbilityOne provisions state as follows:

The AbilityOne Program requires that electronic (on-line and/or CD) catalogs fully integrate AbilityOne products into all search features as well as other pages where applicable. . . . Removal of all ETS items is required if the site is dedicated to federal customers. If the electronic catalog is part of a distributor's commercial electronic catalog, the firm must still block the sale of ETS products to federal customers.

Id. ¶ 5.

NIB notes that the AbilityOne's authorization procedures do not specifically address the prohibition on the sale of ETS in the context of brick and mortar stores. In contrast, the provisions quoted above require vendors who offer products through

online systems to have a blocking system.⁸ Criteria for AbilityOne Distributors ¶¶ 3, 5. NIB also contends that the lack of a specific ETS enforcement provision in the RFP for brick and mortar stores places NIB at a disadvantage, because without such a provision, it is “highly likely” that large commercial firms would offer ETS products in their brick and mortar stores in violation of the JWOD Act. Protester’s Comments (Apr. 25, 2014) at 2. In addition, NIB argues that these commercial firms will likely offer “low ETS prices, name recognition, greater range of products, etc.” Id.

GSA argues that AbilityOne requirements apply to vendors without regard to a specific sales channel, e.g., online, or brick and mortar stores. AR at 3. GSA notes in this regard that the Criteria for AbilityOne Distributors does not set forth unique requirements for firms that operate brick and mortar stores, nor do the Criteria prohibit such firms from receiving authorization to be an AbilityOne distributor. For this reason, the agency contends, the solicitation as written complies with the JWOD Act because GSA may rely upon AbilityOne’s authorization agreements with vendors. AR at 6.

GSA notes that AbilityOne is the designated agency responsible for authorizing vendors to sell products under the AbilityOne program. AR at 5; 41 C.F.R. § 51-1.3. The AbilityOne Commission is responsible for “[e]stablish[ing] rules, regulations, and policies to assure effective implementation of the JWOD Act.” 41 C.F.R. § 51-2.2(a). GSA contends, and we agree, that to the extent unique requirements should be adopted for firms operating brick and mortar stores, those requirements must first be established in the vendor’s agreements approved by AbilityOne, and then negotiated with the authorized distributors.

With regard to the solicitation, GSA explains that offerors for CLIN No. 4 must demonstrate that they are an AbilityOne certified firm, RFP, SOW, at 36, and must provide GSA an authorization letter from AbilityOne; GSA, in turn, will confirm the authorization of each offeror with AbilityOne. Contracting Officer Statement (Apr. 30, 2014) at 1; RFP, Attach. 10, OS3 Checklist Information and Instructions for Solicitations at 4. AbilityOne’s confirmation of the authorization is considered the final determination in this matter; GSA has no discretion to second-guess AbilityOne’s authority in this area. Contracting Officer Statement (Apr. 30, 2014) at 1. The agency also states that it will conduct end-user training to reinforce the obligation of buyers with regard to the Procurement List.⁹ AR at 4.

⁸ Although the Criteria for AbilityOne Distributors provisions cited above could, arguably, apply to all vendors, both the protester and the agency appear to agree that the requirement to “automatically block commercial ETS products and substitute the appropriate AbilityOne products” applies only to online sales.

⁹ GSA states that there are already vendors operating brick and mortar stores under GSA office supply contracts (e.g., OS2) that are authorized by AbilityOne. AR at 3.

(continued...)

On this record, we find no basis to sustain the protest. We see no requirement in the JWOD Act, the FAR, or any regulations or policies issued by AbilityOne, that requires an agency such as GSA to include more specific solicitation provisions to block the purchase of ETS merchandise at commercial brick and mortar stores. Instead, the relevant statutes and regulations provide AbilityOne with the authority to set the requirements for vendors under the JWOD Act. Because the solicitation relies on AbilityOne's authorization agreements with commercial vendors, we find that the RFP complies with the JWOD requirements.

Finally, NIB argues that GSA improperly failed to reopen the competition following the clarification of the solicitation regarding brick and mortar stores. The protester argues that the clarification was a material revision to the terms of RFP, and that offerors would have likely required revisions to their proposals. NIB Response to Summary Dismissal Request (Apr. 24, 2014) at 3. We find no basis to sustain the protest based on this concern. Even if the agency's clarification could be construed as a new requirement, we find that the protester was not prejudiced because, as the protester has repeatedly stated, it cannot compete without a further amendment to the solicitation that would require offerors to block the sale of ETS products at commercial brick and mortar stores in a manner analogous to the requirements for online sales. See id. at 2-3; Protester's Comments (Apr. 25, 2014) at 2. Because, as discussed above, we find no basis to conclude that the agency was required to include such a solicitation provision, we find no basis to sustain the protest.

The protest is denied.

Susan A. Poling
General Counsel

(...continued)

The agency cites an email from an AbilityOne program liaison which indicates that AbilityOne may have been aware of the use of brick and mortar stores under the OS2 contract vehicle, but did not specifically object to GSA permitting this sales channel. AR at 2; Tab 2, see Email from AbilityOne Program Liaison to GSA CO (Apr. 2, 2014). This individual states that AbilityOne "had concerns" due to the "inability of that channel [brick and mortar stores] to provide AbilityOne products and prevent the sale of ETS products." AR, Tab 2, Email from AbilityOne Program Liaison to CO (Apr. 2, 2014). This individual also stated, however, that "[b]ecause we have been working on more pressing issues with GSA, and the perceived lack of significant volume through that channel, we have never really addressed this with GSA." Id. This response suggests that AbilityOne may, at some later date, attempt to address the issues presented by the use of brick and mortar stores to provide items on the Procurement List.