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Decision

Matter of: Akira Technologies, Inc.

File: B-410898

Date: March 10, 2015

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GAO, participated in the preparation of the decision.

DIGEST

1. Protest arguing that solicitation should have been set aside for small businesses is dismissed as untimely because the face of the solicitation clearly established that awards were being reserved, not set aside, for small businesses, and the protester did not raise this grounds for protest until after the closing time for receipt of proposals.
 2. Protest that agency acted unreasonably when it did not reserve awards for HUBZone small business concerns is denied where the record shows that the agency's reserve strategy was reasonable and in accordance with applicable regulations.
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DECISION

Akira Technologies, Inc., of Washington, D.C., a Historically Underutilized Business Zone (HUBZone) small business, protests the terms of request for proposals (RFP) No. VA118-15-R-0558, issued by the Department of Veterans Affairs (VA) for information technology (IT) services.

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

BACKGROUND

The RFP, issued on November 19, 2014, anticipates the award of up to 20 indefinite-delivery/indefinite-quantity (IDIQ) contracts, each with a five-year base period and one, five-year option period. RFP at 19. The RFP seeks total IT services solutions, including the following major functional areas: program

management, strategy, enterprise architecture and planning; systems/software engineering; software technology demonstration and transition; test and evaluation; independent verification and validation; enterprise network; enterprise management framework; operations and maintenance; cyber security; training; IT facilities; and other solutions encompassing the entire range of IT requirements for the agency. Id. at 16. The RFP establishes a maximum total value of \$22.3 billion for all orders placed under the awarded contracts, to include the base and option period. Id. at 11.

As relevant here, the RFP provides that the VA intends to award up to 20 contracts, with four of those awards reserved for Service Disabled Veteran Owned Small Business concerns (SDVOSBs), four additional awards reserved for SDVOSBs or Veteran Owned Small Business concerns (VOSBs),¹ and four more awards reserved for small business concerns generally (i.e., without regard to socioeconomic status). Id. at 120. As discussed more fully below, the reserve strategy employed by the VA in the RFP is pursuant to section 1331 of the Small Business Jobs Act of 2010, which provides agencies the discretion to reserve one or more contract awards for small business concerns when using full and open competition in a multiple-award procurement. Pub. L. No. 111-240, 124 Stat. 2504 (codified at 15 U.S.C. § 644(r)(3)); see also Federal Acquisition Regulation (FAR) § 19.502-4(a) (implementing the Small Business Jobs Act provision regarding reservation of awards for small businesses); 13 C.F.R. § 125.2(e)(4) (Small Business Administration provisions regarding reservation of awards for small businesses).

Prior to issuing the RFP, the VA conducted market research over the course of several months to assess the interest and capabilities of small businesses to meet the agency's requirements. Contracting Officer Statement (CO Statement) at 3-6. More specifically, on July 29, 2014, the VA issued an RFI with a draft performance work statement (PWS) via the FedBizOpps website, requesting interested companies to provide capabilities statements tailored to the functional areas contained in the PWS. Agency Report (AR), Exhibit (Exh.) 10, RFI, at 1. The RFI also directed respondents to indicate their business size and socioeconomic status, whether they were interested in being a prime contractor or a subcontractor, and whether they could independently provide the entire range of services required. Id. In addition to requesting capabilities statements, the agency provided a spreadsheet with a detailed list of the functional areas contained in the PWS (68 in total), and directed respondents to indicate whether they were capable of

¹ While all SDVOSBs are also VOSBs, not all VOSBs are SDVOSBs. See 38 C.F.R. § 74.1 (defining SDVOSBs and VOSBs). Thus, the reserve strategy is intended to result in awards to at least eight VOSBs, with four of those awards going to SDVOSBs.

performing each functional area. Id.; AR, Exh. 11, RFI Spreadsheet. RFI responses were due August 28, 2014. AR, Exh. 10, RFI, at 1.

The VA received RFI responses from 240 companies, 138 of which were small businesses. AR, Exh. 9, Market Research Report, at 2. Of those small businesses, 97 expressed an interest in serving as a prime contractor and indicated that they could perform at least 50 percent of the work. Id. With regard to the small business socioeconomic categories relevant to this protest, the VA received responses from 74 VOSBs (65 of which were SDVOSBs) and 6 HUBZone small businesses.² Id. Of the 74 VOSBs that responded, 57 indicated that they were interested in being a prime contractor and could perform at least 50 percent of the work (51 SDVOSBs fell into this category). Id. By contrast, only four of the HUBZone small businesses respondents indicated that they were interested in serving as a prime contractor, and just three of those contractors indicated they could perform at least 50 percent of the functional areas required under the PWS. Id.

After identifying the socioeconomic status of the small businesses that responded to the RFI, the VA conducted a technical risk and a business risk analysis for each respondent. Under the technical risk assessment, the VA examined the companies' RFI responses as well as the companies' websites to assess the extent to which, in the agency's view, the company could perform the functional areas of the PWS. Id. The VA's business risk assessment was based on the companies' number of employees and a financial stability risk score, both of which were obtained from a commercial database. Id. at 2-3. The agency then combined the results of the technical and business risk analyses to produce an overall risk rating. Id. at 3. As relevant here, the VA categorized six SDVOSBs as low risk and an additional five VOSBs and one SDVOSB as medium risk. Id. The VA did not assess any of the HUBZone small businesses as being low or medium risk. Id. Based on prior procurement history, the number of RFI responses received from small businesses, and the VA's risk assessment, the agency determined that a total small business set-aside was not appropriate, but that it would reserve contract awards for small businesses, as described below. AR, Exh. 9, Market Research Report, at 4-5.

According to the RFP, after the agency establishes a competitive range from which to select offerors, the VA will implement its reserve strategy via a four-step process. RFP at 120-21. In step one, the VA will make awards to eight offerors without regard to business size. Id. In step two, the VA will award four contracts to SDVOSBs and four additional contracts to SDVOSBs or VOSBs, less the number of SDVOSBs and VOSBs awarded in step one. Id. For example, if five large businesses and three VOSBs (but no SDVOSBs) received awards under step one, the step two reserve awards would be made to four SDVOSBs and one SDVOSB or

² The agency's market research memo noted that some companies counted towards multiple socioeconomic categories.

VOSB, assuming a sufficient number of contractors in these socioeconomic categories remained in the competitive range. In step three, the VA will award contracts to up to four additional small businesses, regardless of their socioeconomic status. Id. With regard to step three, awards made to small businesses other than SDVOSBs and VOSBs in step one will satisfy a step three reserve award. Id. In step four, the VA reserves the right to make additional awards, reserved or unrestricted, if the agency determines doing so is in its best interest. Id. Thus, the RFP's reserve strategy is intended to result in awards to at least 12 small businesses, including eight VOSBs, four of which must be SDVOSBs, and four additional small businesses, regardless of socioeconomic status.³

Prior to the closing time for receipt of proposals, Akira filed this protest.

DISCUSSION

As an initial matter we dismiss as untimely Akira's contention in its supplemental protest that the agency should have set aside the procurement entirely for small businesses. Where a protester initially files a timely protest, and later supplements it with new grounds of protest, the later-raised allegations must independently satisfy our timeliness requirements, since our Regulations do not contemplate the piecemeal presentation or development of protest issues. Epsilon Sys. Solutions, Inc., B-409720, B-409720.2, July 21, 2014, 2014 CPD ¶ 230 at 11. In the instant protest, the RFP, from the date of issuance, clearly established that the procurement was not being set-aside for small businesses, but Akira did not raise this issue until after the closing date of the RFP. Akira claims that this basis for protest is timely because it is based on the agency's allegedly inadequate market research and documentation, which was revealed to the protester in the agency report. Supplemental Protest at 2, 7-8. Akira's initial protest, however, claims that there were numerous potential HUBZone small businesses capable of performing the RFP's requirement. Protest at 11-12. As such, prior to the RFP's closing date, the protester had all of the information it needed to challenge the agency's decision not to set aside the entire procurement for small businesses.⁴

³ Pursuant to 15 U.S.C. § 644(r)(2), the RFP also provides that following the award of the IDIQ contracts, the VA may conduct small business set-asides at the task order level.

⁴ In addition to being untimely, we also find that the protester abandoned this basis for protest. In its supplemental report, the agency specifically challenged as untimely the protester's contention that the entire procurement should have been set-aside for small businesses. Akira did not seek to rebut or otherwise challenge this argument. Under such circumstances, we view this argument as abandoned. Earth Res. Tech., Inc., B-403043.2, B-403043.3, Oct. 18, 2010, 2010 CPD ¶ 248 at 6.

Next, the protester argues that the agency acted unreasonably when it did not reserve awards specifically for HUBZone small businesses.⁵ Supplemental Protest at 8. We disagree. The Small Business Jobs Act and its implementing regulations provide that once an agency has determined it will use full and open competition for a multiple-award contract,⁶ the agency has considerable discretion in deciding whether to reserve awards for small businesses. 15 U.S.C. § 644(r)(3); FAR § 19.502-4(a) (establishing that when conducting multiple-award procurements using full and open competition, “contracting officers may, at their discretion,” reserve one or more contract awards for any of the small business programs); 13 C.F.R. § 125.2(e)(4) (providing that a “contracting officer may reserve one or more awards for small business where” certain conditions are met). This discretion includes reserving any number of contract awards, for any socioeconomic category of small businesses, or for small businesses generally. FAR § 19.502-4(a); 13 C.F.R. § 125.2(e)(4).

Here, the record shows that the VA received only six RFI responses from HUBZone businesses, only three of which indicated they were interested in serving as prime contractors and could perform more than 50 percent of the work. AR, Exh. 9, Market Research Report, at 2. While Akira argues that the list of contractors participating in industry day indicated that at least 29 HUBZone contractors were interested in the procurement, Protest at 12, the agency explains that it relied primarily on the RFI responses in determining its reserve strategy, because the industry day, which was conducted virtually, did not provide information as to companies’ capabilities or interest in being a prime contractor. CO Statement at 8-9. Additionally, as noted above, the VA assessed the HUBZone RFI respondents as representing greater than medium performance risk to the government, and the protester has not meaningfully challenged this assessment. On this record and given the broad discretion provided to agencies under the Small Business Jobs Act

⁵ In its initial protest, Akira argues that the VA acted unreasonably when it did not set aside awards for HUBZone small business concerns. Protest at 11-12. Akira’s subsequent filings make clear, however, that the protester is challenging the VA’s decision not to reserve awards for HUBZone small businesses. Supplemental Protest at 8-9.

⁶ As a general matter, for all procurements, including multiple-award procurements, before an agency can consider using full and open competition, it must first consider whether to set aside the entire procurement for small businesses. See FAR 19.502-2(b) (providing that contracting officers “shall set aside any acquisition over \$150,000 for small business participation” when certain conditions are met); 13 C.F.R. § 125.2(e)(1)(i) (“The contracting officer must set-aside a Multiple Award Contract if the requirements for a set-aside are met.”). Moreover, under 38 U.S.C. § 8127(d), the VA is required to give priority to VOSBs when setting aside procurements for small businesses.

and its implementing regulations, we have no basis to conclude that the agency acted unreasonably in not reserving any awards specifically for HUBZone business concerns.

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General Counsel