



Decision

Matter of: Coast to Coast Computer Products, Inc.

File: B-417500; B-417500.2

Date: July 29, 2019

Rick Vogel for the protester.

Jaron Chriss, Esq., and Lindsay Collins, Esq., General Services Administration; and John W. Klein, Esq., and Sam Q. Le, Esq., Small Business Administration, for the agency.

Kasia Dourney, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that an agency, in a solicitation for the establishment of multiple blanket purchase agreements, has failed to meet the consolidation analysis requirements of the Small Business Jobs Act (SBJA) is denied where the plain language of the SBJA does not support the protester's assertion that such analysis was required.
2. Protest that an agency abused its discretion when it decided not to set a blanket purchase agreement solicitation aside for small businesses is denied where the agency's decision was reasonable.
3. Supplemental protest challenging the terms of the solicitation is dismissed as untimely where the alleged solicitation improprieties were apparent from the solicitation but were not protested prior to the closing time for submitting quotations.

DECISION

Coast to Coast Computer Products, Inc. (CTC), a small business of Simi Valley, California, protests the terms of request for quotations (RFQ) No. 47QTCA-19-Q-0009, issued by the General Services Administration (GSA) for the establishment of multiple-award blanket purchase agreements (BPAs) for information technology (IT) equipment, software, and ancillary supplies and services. The protester argues that the solicitation improperly consolidates numerous existing contracts for IT supplies and services, and that the agency failed to comply with a statutory requirement to consider the

consolidation's potential economic effect on small businesses. In addition, CTC alleges that certain terms of the solicitation are overly restrictive.

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

BACKGROUND

GSA issued the solicitation on March 4, 2019,¹ seeking quotations to provide IT equipment, software, and ancillary supplies and services. AR, Tab 28A, RFQ, at 1, 3. The RFQ was issued under the GSA's Federal Supply Schedule (FSS) utilizing Federal Acquisition Regulation (FAR) subpart 8.4 procedures, and was limited to vendors holding contracts under schedule No. 70, special item Nos. 132-8, 132-12, 132-32, 132-33, and 132-34. Id. at 3. The RFQ contemplated the establishment of nine fixed-price multiple-award BPAs, which GSA has named "second generation information technology" (2GIT) BPAs, to supply a "total solution" for IT equipment, software, and ancillary supplies and services.² Id. at 6-8. The value of purchases under the 5-year BPAs was estimated to be \$5.5 billion. Id. at 17. The proposed "total solution" was intended to provide a "one-stop-shop in the Information Technology market to meet the needs of the Air Force, Department of Defense (DOD) agencies, and other federal, state, local, regional, and tribal governments." Id. at 7.

As of the date the RFQ was issued, only the Department of the Air Force has designated the 2GIT BPAs as the mandatory acquisition vehicle for all its IT products; the 2GIT BPAs were to replace the Air Force's Network-Centric Solutions-2 (NETCENTS-2) indefinite-delivery indefinite-quantity (IDIQ) contract, previously utilized by the Air Force for its IT product needs.³ RFQ at 6. However, the 2GIT BPAs are expected to also be made available to other federal, state, local and tribal entities. COS ¶ 4. At the same time, the establishment of 2GIT BPAs "does not negate the remaining schedule 70 contract holders' schedule contracts"; importantly, both "small and large business[es] will continue to have the ability to obtain Schedule 70 contracts and

¹ The solicitation was subsequently amended 13 times, before it closed on May 6, 2019. Agency Report (AR), Tab 1, Contracting Officer's Statement (COS) ¶¶ 30-31.

² The requirements for 2GIT BPAs were included in four separate line items: data center (computer/store), end user, network (connect), and radio equipment. RFQ at 7-8.

³ The NETCENTS-2 Products IDIQ was used for the Air Force's acquisitions of IT products commercial off-the-shelf software and hardware. AR, Tab 6, Memorandum of Understanding between GSA and the Air Force, at 2. The Air Force was not utilizing GSA schedules for their IT requirements under the NETCENTS-2 Products IDIQ but rather, it was procuring the products on the unrestricted open market. COS ¶¶ 35-36. GSA points out that 2GIT BPAs bring a new source of business to the schedule program. Id.

compete for orders as they currently do. Government agencies may solicit their requirements as they have previously done prior to the 2GIT BPAs.” COS ¶¶ 36.

Prior to issuing the solicitation, GSA conducted market research, and concluded that the agency was not likely to receive quotations from two or more small businesses⁴ that could “provide a total solution for all four CLINS (contract line item numbers).” AR, Tab 12B, Market Research Report, at 12. Accordingly, the acquisition was not set-aside for small business, but, rather, encouraged small business participation by including “small business subcontracting goals” as an evaluation factor.⁵ RFQ at 50. The RFQ also provided that small business set-asides were allowed at the order level, at the discretion of the ordering office. Id. at 3. Moreover, recognizing that it would be difficult for one vendor--small or large--to satisfy all of the 2GIT requirements, the RFQ included a contractor teaming arrangement match-making form, to allow small businesses to seek out teaming partners, in order to satisfy the agency’s “total solution” approach. RFQ at 21.

Prior to the RFQ’s closing date of May 6, CTC filed this protest with our Office on April 22.⁶ CTC did not submit a quotation in response to the RFQ, either by itself or as part of a CTA. COS ¶¶ 5.

⁴ As implemented in the SBA’s regulations and the FAR, the small business rule of two requires agencies to set aside for small business participation a procurement valued over the simplified acquisition threshold if there is a reasonable expectation of receiving fair market offers from at least two small business concerns. 13 C.F.R. § 125.2(f)(2); FAR § 19.502–2(b).

⁵ Specifically, the quotations were to be rated on (a) achievement of small business subcontracting goals, and (b) the socioeconomic team makeup structure self-scoring assessment. RFQ at 50. According to the RFQ, small businesses and small business teams--called contractor teaming arrangements (CTAs) in the RFQ--were to automatically receive 600 points under the socioeconomic factor; specifically, 200 points for achieving the subcontracting goals and 400 points for socioeconomic team makeup structure. CTAs consisting of both small and large business members were to receive up to 300 points, depending on their small business composition and past performance in small business subcontracting. Id. at 50-51.

⁶ The protest was submitted through our electronic protest docketing system on Saturday, April 20, 2019, at 2:26 a.m. Eastern Daylight Time, and hence, was recognized by our Office as filed on the following Monday, April 22.

DISCUSSION

In its protest, CTC advances numerous arguments, essentially alleging that the solicitation's terms negatively impact small businesses;⁷ the RFQ improperly consolidates numerous existing contracts for IT supplies and services; and that the agency failed to conduct a small business impact analysis before the consolidation of its contract requirements, as required under the Small Business Jobs Act of 2010. Protest at 3. Additionally, the protester claims that the agency should have set the requirement aside for small business concerns. *Id.* at 5. In its supplemental protest, CTC also asserts that the RFQ violates FAR subpart 8.4 requirements for the establishment of a BPA.⁸ In addition, the Small Business Administration (SBA) echoes the protester's arguments, stating that the BPA improperly consolidates orders for which many schedule 70 contract holders would be able to compete, and that the proposed strategy "subverts congressionally mandated competition by setting aside \$5.5 billion in IT orders for nine other-than-small business[es] and teams that receive spots on the BPA."⁹ SBA's Comments at 2. As discussed below, we disagree. We also dismiss the supplemental protest as untimely.

Consolidation Analysis Requirement under the Small Business Jobs Act

The protester complains that the agency failed to comply with the provisions of the Small Business Jobs Act of 2010 that require agencies to consider the effect on small businesses of the consolidation of an agency's contract requirements for over \$2 million. 15 U.S.C. § 657q; Pub. L. No. 111-240, 124 Stat. 2538 (Sept. 27, 2010). These provisions, in relevant part, provide as follows:

⁷ In addition, the *pro se* protester also alleges that the solicitation requirements are unduly restrictive to small business concerns regarding the breadth of original equipment manufacturers self-scoring assessments; market basket structure; and the International Organization for Standardization (ISO) 9001:2015 certification. Protest at 5-6. As it will be discussed below, we deny those protest grounds as we find that the agency sufficiently established that the challenged provisions were necessary and specifically tailored to the agency's requirements.

⁸ Specifically, CTC contends that the RFQ violates FAR § 8.405-3(a)(4) requirements because it fails to address the frequency of ordering, invoicing, requirements, delivery locations, and FAR § 8.405-3(a)(6), "requiring identification of participating agencies and their estimating requirements at the time that a BPA is established" Supp. Protest at 1.

⁹ Because CTC and the agency's contentions raise legal questions related to the Small Business Jobs Act, and the SBA regulations implementing it, our Office solicited and obtained the views of the SBA on these questions.

The head of a Federal agency may not carry out an acquisition strategy that includes a consolidation of contract requirements of the Federal agency with a total value of more than \$2,000,000, unless the senior procurement executive or Chief Acquisition Officer [satisfies certain requirements]¹⁰ before carrying out the acquisition strategy

15 U.S.C. § 657q(c)(1) (emphasis added).

Section 657q also defines the consolidation of contract requirements as the “use of a solicitation to obtain offers for a single contract or a multiple award contract . . . to satisfy 2 or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under 2 or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited” Id. § 657q(a)(2).

GSA did not conduct a consolidation analysis of its proposed 2GIT BPAs prior to issuing the RFQ. The agency’s primary response to the protester’s challenge is that a consolidation analysis was not required because the BPAs are not contracts; hence, the requirements of the Small Business Jobs Act do not apply here, to the establishment of BPAs. Memorandum of Law (MOL) at 6-8. In support, GSA relies on a final rule issued by the Department of Defense, GSA, and National Aeronautics and Space Administration (NASA), amending the FAR provisions to institute a government-wide policy on consolidation and bundling. 81 Fed. Reg. 67763 (Sept. 30, 2016). In the preamble, that final rule includes a discussion of BPAs, and clarifies that the statutory definition of “bundling of contract requirements” at 15 U.S.C. § 632(o), and of “consolidation of contract requirements” at 15 U.S.C. § 657q, as well as SBA’s implementing regulations at 13 C.F.R. § 125.1(c) refer only to “contracts” when addressing bundling and consolidation, and BPAs are not contracts. Id. at 67765. Accordingly, neither the statute nor the implementing regulations apply the requirement for a consolidation and bundling analysis to BPAs. Id. In a discussion of BPAs, that final rule further provides that orders under the BPAs are treated as contracts in SBA’s implementing regulations at 13 C.F.R. § 125.1(c). Id. In that context, the agency explains that orders against a BPA that meet the definition of consolidation may require a consolidation analysis. COS ¶ 34a; AR, Tab 50, GSA Consolidation and Bundling Frequently Asked Questions, at 2. Specifically, according to the contracting officer, if a single order over \$2 million is replacing two or more previous contracts, “the order will require a written determination for approval by the GSA Senior Procurement Executive” Id.

¹⁰ Prior to issuing a solicitation that involves consolidated contract requirements, agencies are required to conduct market research, assess and identify the impact of contract consolidation on small businesses, and make a written determination that the consolidation is “necessary and justified” and that “the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches” identified by the agency. 15 U.S.C. § 657q(c)(1), (2).

The SBA disagrees and argues that there is a consolidation here “because the eventual orders issued off the BPA will be limited to competition among the nine BPA awardees,” and the term “contract” in the consolidation definition “applies here to the IT70 contracts affected by the BPA.” SBA’s Comments at 2. Based on our review of the record, we do not view SBA’s interpretation as supported by the applicable authority.

Specifically, we note that the final rule cited above was issued after the SBA promulgated its regulations implementing the requirements of the Small Business Jobs Act on October 2, 2013, and revising the SBA’s regulations on contract consolidation and bundling. See 78 Fed. Reg. 61114 (Oct. 2, 2013). The final rule issued by DOD, GSA and NASA incorporated the regulatory changes made by the SBA. The SBA’s own regulations, at 13 C.F.R. § 125.1, provide that “contract” “has the same definition as set forth in FAR § 2.101” and “includes orders issued against Multiple Award Contracts and orders competed under agreements where the execution of the order is the contract (e.g., a Blanket Purchase Agreement (BPA), a Basic Agreement (BA), or a Basic Ordering Agreement (BOA)).” 13 C.F.R. § 125.1 (emphasis added). Accordingly, task orders issued under the BPA are contracts, but BPAs are not.

Previously, our Office addressed the consolidation analysis requirements under the Small Business Jobs Act with respect to the IDIQ contracts (see American Toner & Ink, et al., B-409528.7 et al., June 9, 2014, 2014 CPD ¶ 161 at 4-5 (protest of an award of IDIQ contracts for GSA's Office Supplies Third Generation program denied where the agency reasonably considered the potential impact of its procurement approach on small businesses, and reasonably concluded that the consolidation would result in substantial benefits to the government)) and tasks orders under IDIQ contracts (PB&A, Inc.; Env'tl. Synectics, Inc.--Costs, B-410074.3, B-410074.4, Sept. 15, 2015, 2015 CPD ¶ 285 at 5 (request for reimbursement of protest costs granted in part where the agency took corrective action after being advised by GAO at an alternative dispute resolution conference that the protest would be sustained based on the agency’s failure to conduct a consolidation analysis of its proposed contract requirements)) but not with regard to the establishment of BPAs. Our review of applicable statutory and regulatory authority reveals that a consolidation analysis is not required prior to establishment of a BPA-- which is not a contract, according to the SBA’s definition of a contract--but rather, that the required consolidation analysis is to be performed at the task order level. Accordingly, while practical implications of such an approach may prove burdensome to agencies, based on this record, we conclude that GSA was not required to perform a consolidation analysis prior to issuing the RFQ. Hence, we deny this protest ground.

Small Business Set-Aside

CTC also complains that the agency did not set aside the 2GIT requirement for small businesses. Protest at 5. The agency responds, and we agree, that a set-aside here was not required.

Agencies are not required to follow the small business rule of two when issuing orders or establishing BPAs under the FSS. See, e.g., American Relocation Connections, LLC, B-416035, May 18, 2018, 2018 CPD ¶ 174 at 4-6; see also Aldevra, B-411752, Oct. 16, 2015, 2015 CPD ¶ 339 at 5-7; Edmonds Sci. Co., B-410179; B-410179.2, Nov. 12, 2014, 2014 CPD ¶ at 336 at 7. In this regard, while contracting officers have discretionary authority to set aside for small business concerns orders placed against multiple-award contracts, or set aside a solicitation for establishing a BPA, they are not required to do so.

Here, the agency concluded that, based on the size and scope of the acquisition, a small business set-aside was not feasible. AR, Tab 12A, 2GIT Small Business Analysis Record Form 2689 Continuation, at 2. The agency also explains that it advised the SBA on December 3, 2018, that the 2GIT BPA would allow the agencies to set aside individual orders placed against the BPA at the order level. Id. at 3. Accordingly, we conclude that the agency's decision not to set aside the requirement was reasonable, and deny this protest ground.

Timeliness of the Supplemental Protest

We also note that CTC's supplemental protest alleging violations of FAR §§ 8.405-3(a)(4) and 8.405-3(a)(6) was filed on June 7, 2019, nearly a month after the closing date for the solicitation. The agency contends that the supplemental protest is untimely, and asserts that since the protester was on notice of both alleged improprieties in the solicitation from the moment the RFQ was first issued on March 4, 2019, continuing through the date of issuance of each of the RFQ amendments, the protester should have raised the supplemental protest grounds prior to the closing time for receipt of the quotations, to be considered timely. Supp. MOL at 6.

The protester responds that due to multiple modifications of the RFQ, it "could not contemplate any changes that the agency would be making during the solicitation period." Comm. Supp. MOL at 4. The protester also cites FAR § 33.103(e)--a regulation regarding an agency-level protest--in support of a proposition that "the agency and government may consider the merits of any protest which is not timely filed" if the protest raises issues significant to the agency's acquisition system, which, the protester alleges, is the case with its supplemental protest. Id.

However, our Bid Protest Regulations contain strict rules for the timely submission of protests, and require that protests of alleged apparent solicitation improprieties must be filed prior to the closing time for receipt of quotations. See 4 C.F.R. § 21.2(a)(1); Allied Tech. Group, Inc., B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 9 n.10. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. CDO Techs., Inc., B-416989, Nov. 1, 2018, 2018 CPD ¶ 370 at 5; Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. If the protester objected to the specific terms of the solicitation--or more precisely, believed that the solicitation improperly omitted certain requirements specified in FAR

§ 8.405-3(a)(4) and FAR § 8.405-3(a)(6)--it was required to raise this challenge prior to the time set for receipt of proposals, i.e., May 6. CTC, however, did not file its supplemental protest challenging these perceived solicitation defects until after the RFQ's closing date and time. Accordingly, we view them as untimely challenges to the terms of the solicitation, and dismiss them.

Other Allegations Regarding Allegedly Restrictive Requirements

Finally, the protester also makes other collateral arguments, contending that the solicitation included terms and conditions that were unduly restrictive to small business concerns. Protest at 5. Even though we do not specifically address every argument, we have considered them all and find no basis to sustain the protest on those grounds.

For example, the protester challenges the solicitation's requirement to obtain an ISO 9001:2015 certification within 10 months of award, as unduly burdensome and costly to small businesses. Id. at 6-7. In its response, the agency explains that orders to be placed by the Air Force under the 2GIT BPAs may involve national security requirements; hence, the requirement to supply ISO 9001:2015 certification from participating vendors "provides assurances that highly sensitive military programs will not be undermined by supply chain-related security vulnerabilities." MOL at 20.

The determination of a contracting agency's needs and the best method of accommodating them are matters primarily within the agency's discretion. Crewzers Fire Crew Trans., Inc., B-402530, B-402530.2, May 17, 2010, 2010 CPD ¶ 117 at 3; G. Koprowski, B-400215, Aug. 12, 2008, 2008 CPD ¶ 159 at 3. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. Cryo Techs., B-406003, Jan. 18, 2012, 2012 CPD ¶ 29 at 2; G. Koprowski, supra. Here, we conclude that the agency sufficiently established that the challenged provisions were necessary and specifically tailored to meet the Air Force's needs.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel