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Decision

Matter of: CEPEDA Associates, Inc.

File: B-418284

Date: February 24, 2020

Mark Leach, Mark W. Leach Law Firm, PSC, for the protester.
Paul Scheck, Esq., Department of the Navy, for the agency.
Lois Hanshaw, Esq., and Stephanie B. Magnell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's decision not to set aside a procurement for small businesses is denied, where the agency reasonably concluded that there was not a reasonable expectation of receiving offers from two or more small business concerns at fair market prices.

DECISION

CEPEDA Associates, Inc. (CEPEDA), a small business of Louisville, Kentucky, protests the terms of request for proposals (RFP) No. N64498-20-R-0002, issued by the Department of the Navy for advanced carbon dioxide removal units (ACRU) production units, associated special tools, and ACRU spare parts. CEPEDA contends that the procurement should have been set aside for small businesses under Federal Acquisition Regulation (FAR) § 19.502-2(b), also known as the Rule of Two.

We deny the protest.

BACKGROUND

The solicitation, issued on November 12, 2019, contemplates the award of one or more indefinite-delivery, indefinite-quantity contracts with hybrid fixed-price, fixed-price-incentive-fee, and cost-plus-fixed-fee contract line items.¹ Agency Report (AR), Tab 13, RFP at 106; Tab 14 RFP amend.1 at 1. The agency seeks one or more contractors to

¹ The solicitation was subsequently amended four times.

manufacture ACRU production units, associated special tools, and ACRU spare parts based on a technical data package for the submarine life support and ventilation systems branch of the Naval Surface Warfare Center Philadelphia Division (NSWCPD).² RFP at 9. The manufacture of ACRU production units is a new requirement, as no production units have been built to date. Id. The independent government estimate for the procurement is \$23,438,579. AR, Tab 11, Contracting Officer's (CO) Set-Aside Decision, at 4.

Prior to issuing the solicitation, in accordance with FAR § 19.502-4, Multiple Award Contracts and Small Business Set-Asides, the contracting officer engaged in various research activities in order to determine whether the agency was likely to receive proposals from two or more small businesses capable of performing the contract requirements. First, the agency considered the procurement history. AR, Tab 6, Market Research Memorandum, at 1. In this regard, the ACRU production units would follow an earlier contract for ACRU qualification units that were recently developed under a contract awarded to a large business on a sole-source basis. AR, Tab 11, CO's Set-Aside Decision, at 1-2. The Navy found that the procurement history did not provide a rationale to set aside the solicitation because the procurement of the ACRU qualification units was performed by a large business on a sole-source basis and the current solicitation is a new requirement. Id. at 2.

The contracting officer also conducted market research. On February 21, 2018, the agency held an industry day and answered questions from the three companies that attended: one large business and two small businesses--CEPEDA and Treadwell Corporation. AR, Tab 11, CO's Set-Aside Decision, at 2.

On May 30, the agency published a request for information (RFI) on the Federal Business Opportunities (FedBizOpps) website. AR, Tab 2, RFI, at 1. The RFI requested that respondents provide specific details regarding their ability to provide four ACRU production units and special tools, and to meet the requirements included in the draft statement of work. Id.

By the July 13 RFI closing date, the agency received capability statements from the same three businesses that attended industry day, including CEPEDA and Treadwell.³

² The NSWCPD is responsible for engineering support for the submarine atmosphere control, surface ship and submarine air circulation and temperature control, and collective protection systems. RFP at 10.

³ During the RFI response period, a third small business, Combustion Associates, Inc. (CAI), requested the technical data package and advised the Navy that it was working on a response to the RFI. CO Response to GAO RFI, at 1, 4. Our citations to the contracting officer's response are to the pages in the Adobe pdf version of the document provided by the agency. However, CAI did not respond to the RFI. AR, Tab 11, CO Set-Aside Decision, at 2.

AR, Tab 5, RFI Evaluation, at 1. The agency's subject matter expert (SME) reviewed the capability statements and, based on the responses received, found that CEPEDA was the only small business capable of providing the requirement at a fair market price.⁴ Id. at 4. Accordingly, based on its market research and the SME's evaluation, the Navy concluded on September 24 that the solicitation would be issued on an unrestricted basis; the Navy's small business advocate and the Small Business Administration's (SBA) procurement center representative concurred. AR, Tab 11, CO's Set-Aside Decision, at 5; Tab 7, Small Business Coordination Record, at 2.

Nearly a year later, on September 25, 2019, the agency issued a presolicitation notice on FedBizOpps indicating that the solicitation would be released in October. Protest, exh. 6, Presolicitation, at 1.⁵ On October 3, the protester filed an agency-level protest challenging the agency's decision not to set aside the solicitation. AR, Tab 10, CEPEDA's Agency-Level Protest, at 1, 3-4. As a result of that protest, the agency reviewed and confirmed the decision not to set aside the procurement for small businesses. AR, Tab 12, Navy Agency-Level Protest Decision, at 1-2. The agency denied that protest on November 8. Id. at 2.

On November 12, 2019, the solicitation was issued on an unrestricted basis.⁶ AR, Tab 14, RFP amend. 0001 at 1. CEPEDA timely filed a protest with our Office on November 18, prior to the RFP's December 13 closing date.

DISCUSSION

CEPEDA asserts that the procurement should have been set aside for small businesses and that the agency failed to conduct adequate market research before determining not to set aside the procurement. Protest at 1, 5. Although not discussed here, we have

⁴ The SME discussed the technical and pricing issues in Treadwell's RFI that led the agency to conclude that Treadwell was not capable of performing the requirement at a fair and reasonable price. AR, Tab 5, RFI Evaluation at 2-3; Tab 11, CO Set-Aside Decision, at 2-5.

⁵ The record shows no additional action on the procurement between September 2018 and September 2019. The presolicitation noted that the SBA approved the agency's decision not to set aside the solicitation on September 24, 2018. Protest, exh. 6, Presolicitation, at 1.

⁶ The contracting officer explained that in the time since the SBA approved the decision to solicit on the basis of full and open competition, the maximum quantity of ACRUs and spare parts expected to be ordered increased from four to six and a small quantity of incidental engineering services were added to the statement of work. CO's Statement at 9. The contracting officer also states that no other significant changes to the requirement occurred and that the contracting officer knew of no market conditions or potential sources that would alter the agency's initial set-aside decision. Id. at 9-10. The protester has not challenged this statement.

considered all of the protester's ancillary arguments and find no basis to sustain the protest.⁷

Generally, under FAR § 19.502-2(b), a procurement with an anticipated dollar value of more than \$150,000 must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns and award will be made at a fair market price. A contracting agency's investigation to determine the availability of responsible small business concerns for set-aside purposes must address not only the existence of small businesses that might submit proposals, but also their capability to perform the contract at a fair market price. Global Tech. Sys., B-411230.2, Sept. 9, 2015, 2015 CPD ¶ 335 at 15. The fact that multiple small businesses are identified in the course of market research is not necessarily determinative of an offeror's capability to perform the requirement. Plateau Software, Inc., B-416386, Aug. 24, 2018, 2018 CPD ¶ 291 at 7.

While there is no particular required method of assessing the availability of capable small businesses, the assessment must be based on facts sufficient to establish its reasonableness. Id. The decision whether to set aside a procurement may consider factors such as procurement history, recommendations of small business specialists, and market surveys that include responses to sources sought announcements or RFIs. American Custom Meats, LLC, B-409564, June 12, 2014, 2014 CPD ¶ 195 at 5. The determination as to whether there is a reasonable expectation of receiving offers from two or more small businesses that are capable of performing the required work is a matter of business judgment within the contracting officer's discretion that we will not disturb absent a showing that it was unreasonable. Information Ventures, Inc., B-400604, Dec. 22, 2008, 2008 CPD ¶ 232 at 3.

Here, the agency employed several methods to ascertain whether to set aside the procurement for small businesses. The agency gauged the interest from possible small businesses by publishing an RFI and considered the three responses to that RFI. AR, Tab 11, CO Set-Aside Decision at 2. Specifically, the agency found that Treadwell's RFI showed that it was not capable of providing the requirement at a fair market price. Id. at 2-5. Based on a review of the RFI responses, the agency then concluded that it was unlikely to receive adequate proposals from two or more small businesses. Id. at 5. Additionally, the agency's decision to issue the solicitation on an unrestricted basis considered the requirement's procurement history and received support from small business officials from both the Navy and SBA. Id. at 1-2, 5; Tab 7, Small Business Coordination Record, at 3. Given the record, we find that the agency's decision not to

⁷ For example, while acknowledging that three small businesses expressed interest in the solicitation, the protester nevertheless contends that the agency created a "chilling effect" on small business participation by indicating in a response to an industry day question and in the RFI posting that the solicitation would not be set aside for small businesses. Comments at 10-11. We find that this ground fails to allege a violation of procurement laws or regulations and dismiss it for failure to state a valid basis of protest. 4 C.F.R. § 21.5(f).

set aside the procurement for small business concerns was reasonable. CardioMetrix, B-260747, July 18, 1995, 95-2 CPD ¶ 28 at 2.

In its comments on the agency report, the protester does not dispute the agency's conclusion that CEPEDA was the only interested small business capable of performing the requirement at a fair and reasonable price. In this regard, rather than challenge the agency's conclusion that Treadwell is not capable of performing the agency's requirement, CEPEDA instead defers any substantive response, including issues related to price competitiveness, to Treadwell because "Treadwell is in the better position to comment regarding the [agency's] analysis." See Comments at 3, 11 n.1. As a result, CEPEDA fails to demonstrate that the contracting officer lacked a reasonable basis for concluding that offers at a fair market prices from at least two capable small businesses could not reasonably be expected.⁸ Rice Servs., Inc., B-411540, B-411540.2, Aug. 20, 2015, 2015 CPD ¶ 260 at 3; CardioMetrix, supra.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁸ To the extent the protester asserts that the agency could have conducted more rigorous market research with regard to CAI, see, e.g., Comments at 11, we disagree. In our view, the protester has not demonstrated that the measures taken by the agency in deciding not to set aside the solicitation for small businesses were unreasonable. CEPEDA has failed to show any defects in the agency's market research that precluded small businesses from expressing interest in competing for this requirement. As to CAI, the record shows that while it expressed interest in the procurement, ultimately, it did not submit a capability statement. CO Response to GAO RFI at 1, 4; AR, Tab 11, CO's Set-Aside Decision, at 2. Thus, we find no basis to question the reasonableness of the agency's market research and subsequent decision not to set aside this requirement for small businesses.