



Decision

Matter of: SageCare, Inc.

File: B-418325

Date: March 5, 2020

David M. Snyder, SageCare, Inc., for the protester.
Jacqueline Neumann, Esq., Matthew Vasquez, Esq., May Sena, Esq., and Howard M. Kaufer, Esq., Defense Logistics Agency, for the agency.
Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency failed to provide sufficient time for offerors to submit proposals is denied where the record does not demonstrate that the amount of time provided was unreasonable.
 2. Protest challenging the agency's use of a requirements contract in this procurement is denied where the record does not demonstrate that the agency's exercise of discretion was unreasonable.
-

DECISION

SageCare, Inc., a small business, of Tampa, Florida, protests the terms of request for proposals (RFP) No. SPE605-20-R-0202, issued by the Defense Logistics Agency (DLA), for various fuel products. SageCare alleges a variety of errors in the solicitation.

We deny in part and dismiss in part the protest.

BACKGROUND

The solicitation was issued on October 18, 2019, under Federal Acquisition Regulation (FAR) part 12 and subpart 13.5, for the supply and delivery of various fuel products for the Department of Defense and federal civilian agencies in Connecticut, Maine,

Massachusetts, New Hampshire, New York, and Pennsylvania. RFP at 1-2.¹ The solicitation contemplated the award of fixed-price requirements contracts for 11 contract line item numbers (CLINs). Id. at 2. All CLINs were set-aside for small business concerns. Id. at 16. The ordering period for the contracts was from the date of contract award to March 31, 2021. Id. at 2, 5, 133. The solicitation advised that each CLIN would be evaluated and awarded separately on a lowest-price, technically acceptable basis, considering technical capability and price. Id. at 138. Initial proposals were due on November 18, 2019 at 3:00 p.m. Eastern Time (ET). Id. at 4.

On November 18, at 1:08 p.m. SageCare submitted its proposal via email. In the email transmitting its proposal, SageCare also submitted a letter to the contract specialist that it characterized as SageCare's exceptions and objections to the terms of the solicitation. Protester's Response to Agency Request for Dismissal, attach. A, Proposal and Objections. At 2:59 p.m. (also on November 18), SageCare sent another email to the contract specialist with an agency-level protest. Agency Report (AR), Tab 6, SageCare Agency Protest Email. This agency-level protest included, verbatim, the arguments raised in SageCare's exceptions and objections letter. AR, Tab 6A, SageCare Agency Protest.

On November 21, the agency responded to SageCare's agency-level protest. AR, Tab 8, Agency Protest Decision. The agency dismissed one protest ground as a matter of contract administration, and the remaining grounds were dismissed as untimely. Id. at 1-2. Specifically, the agency explained that the contract specialist did not receive the email with SageCare's agency-level protest until 4:09 p.m. ET, after the solicitation's 3:00 p.m. ET deadline for receipt of proposals. Id. at 1.

On December 2, SageCare filed its protest with our Office raising the same arguments that it raised in its agency-level protest.

DISCUSSION

SageCare raises several challenges to the reasonableness of the agency's conduct of this procurement and to the terms of the solicitation. As discussed below, we deny two of the allegations and dismiss the remaining protest grounds because they fail to state a valid basis of protest.² Although we do not specifically address all of SageCare's

¹ The solicitation was amended twice. All citations to the solicitation are to the final version as provided by the agency and to that version's electronic pagination.

² During the development of its protest, SageCare submitted what it identified as a "supplemental protest" that it labeled as B-418325.2, alleging that the agency improperly declined to reconsider its decision to dismiss SageCare's agency-level protest. Our Office did not docket this filing as a new protest because our Office does not review an agency's decision not to reconsider an agency-level protest. Electronic

arguments, we have fully considered all of them and find they afford no basis on which to sustain the protest.³

Timeliness

As a preliminary matter, DLA maintains that SageCare's protest to our Office was untimely because its agency-level protest was not timely filed with the agency and was filed more than 10 days after adverse agency action. Agency Request for Dismissal; Memorandum of Law (MOL) at 3-6. We disagree. Where a protest first has been timely filed with a contracting activity, any subsequent protest to our Office, to be considered timely, must be filed within 10 calendar days of "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3). Here, the record shows that SageCare's agency-level protest (which was filed at 2:59 p.m. on November 18) was received by the agency's servers prior to 3:00 p.m., the cut-off time for receipt of proposals. AR, Tab 11, Declaration of Agency Information Technology Specialist, at 2-3; MOL at 5. Because SageCare's protest to the agency, challenging the terms of the solicitation, was filed prior to the time set for receipt of proposals, we consider the agency-level protest to have been timely filed. Sygnetics, Inc., B-404535.5, Aug. 25, 2011, 2011 CPD ¶ 164 at 4 n.1 (finding that because protester's email message was received by agency servers before the required time, protest was timely submitted).

Moreover, within 10 days of the agency's issuance of its November 21 decision dismissing SageCare's agency-level protest, SageCare filed a timely protest with our Office on December 2. 4 C.F.R. §§ 21.0(d), 21.2(a)(3); Masai Techs. Corp., B-400106, May 27, 2008, 2008 CPD ¶ 100 at 2. The agency argues that because it found SageCare's initial protest to DLA to be untimely, the subsequent protest to our Office must also be untimely. Agency Request for Dismissal at 3. Because we find SageCare's initial protest to the agency (as well as the subsequent protest to our Office) to have been timely filed, we do not further address this argument by the agency.

Requirements Contract

SageCare first objects to the agency's decision to use requirements contracts as the vehicle for this procurement because, according to the protester, the contracts lack consideration. Specifically, the protester contends that the solicitation does not guarantee that the government will fulfill all its fuel requirements from the awardee. As

Protest Docketing System (EPDS) No. 19, Notice of Ruling on Agency's Request for Dismissal.

³ For example, SageCare argued that the agency improperly dismissed its agency-level protest as untimely. Protest at 1; Protester's Comments at 3. Whether the agency reasonably considered AeroSage's agency-level protest is not properly for our consideration because it has no bearing on the validity of the challenged solicitation before our Office. AeroSage, LLC; SageCare, Inc., B-415607 et al., Jan. 3, 2018, 2018 CPD ¶ 11 at 3 n.4.

a result, the contracts--according to the protester--are actually basic ordering agreements or blanket purchasing agreements, and should be solicited as such. Protest at 2-3; Protester's Comments at 4-5.

The determination of the best method of accommodating an agency's needs is primarily within the agency's discretion. Repaintex Co., B-415390.4, B-415390.5, June 21, 2018, 2018 CPD ¶ 227 at 3. The selection of a contract type is the responsibility of the contracting agency. URS Fed. Support Servs., Inc., B-407573, Jan. 14, 2013, 2013 CPD ¶ 31 at 4. Our role is not to substitute our judgment for the contracting agency's, but instead to review whether the agency's exercise of discretion was reasonable and consistent with applicable statutes and regulations. Id. A protester's disagreement with the agency's judgment does not show that the agency's judgment is unreasonable. Data Monitor Sys., Inc., B-415761, Mar. 6, 2018, 2018 CPD ¶ 79 at 4.

A requirements contract provides for filling all actual purchase requirements of designated government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor. FAR §16.503(a). An agency may issue a requirements contract when it anticipates recurring requirements but cannot predetermine the precise quantity of services needed during a definite period. Id.; see also JRS Staffing Servs., B-408202, July 16, 2013, 2013 CPD ¶ 175 at 2.

A requirements contract is formed when the seller has the exclusive right and legal obligation to fill all of the buyer's needs for the goods or services described in the contract. JRS Mgmt., B-401524.2, Jan. 12, 2010, 2010 CPD ¶ 25 at 2. The promise by the buyer to purchase the subject matter of the contract exclusively from the seller is an essential element of a requirements contract. Id. A solicitation will not result in the award of an enforceable requirements contract where a solicitation provision disclaims the government's obligation to order its requirements from the contractor and therefore renders illusory the consideration necessary to enforce the contract. Id. (citing Sea-Land Serv., Inc., B-266238, Feb. 8, 1996, 96-1 CPD ¶ 49 at 5).

Here, the solicitation included FAR clause 52.216-21, Requirements, which states as relevant here "[e]xcept as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule." RFP at 77-78. SageCare does not allege that the solicitation contains any provisions disclaiming the government's obligation to order its requirements from the eventual awardee or awardees, whose contract, or contracts, will quite clearly provide the consideration required for enforceability. Rather, SageCare only argues that the government, historically, has not ordered all of its requirements from the requirements contract holders. See Protester's Comments at 4. On this record, the protester's contention that the government will not purchase all its requirements from the awarded contractors is not supported by the language of the RFP. SageCare has failed to demonstrate the agency's exercise of its discretion in selecting a requirements contract

in this procurement was unreasonable, and this allegation is denied. URS Fed. Support Servs., Inc., *supra*.

Submission Response Time

SageCare next argues that the solicitation does not provide sufficient time to prepare proposals. Protest at 5, 6; Protester's Comments at 5.

Agencies generally must allow at least 30 days from the date of issuance of the solicitation for the receipt of offers. FAR § 5.203(c). However, an agency may allow fewer than 30 days to respond to a solicitation where, as here, it is acquiring commercial items. *Id.*; FAR § 12.205(c). When acquiring commercial items, the contracting officer should afford potential offerors a reasonable opportunity to respond considering the circumstances of the acquisition, such as the complexity, commerciality, availability, and urgency of the individual acquisition. FAR § 5.203(b); Richen Mgmt., LLC, B-410903, Mar. 10, 2015, 2015 CPD ¶ 105 at 2.

The contracting officer has the discretion to determine the time allotted for proposal preparation, and GAO "will not object to that determination unless it is shown to be unreasonable." Coulson Aviation (USA), Inc., B-411306 *et al.*, July 8, 2015, 2015 CPD ¶ 214 at 11. The protester has the burden to show the time allotted was inconsistent with statutory requirements, was unreasonable, or precluded full and open competition. See AeroSage, LLC, B-415893, B-415894, Apr. 17, 2018, 2018 CPD ¶ 142 at 5.

Here, the RFP was issued on October 18, 2019, and proposals were due on November 18, 2019. RFP at 1. The RFP thus provided a 31-day response time for receipt of initial proposals. SageCare has failed to provide factual or legal grounds as to why the RFP's response time was unreasonable, inconsistent with statutory requirements, or precluded full and open competition. Therefore, SageCare's allegation that the solicitation failed to provide sufficient time to submit proposals is denied. AeroSage, LLC, B-415893, B-415894, Apr. 17, 2018, 2018 CPD ¶ 142 at 5-6.

Remaining Allegations

We dismiss SageCare's remaining protest grounds, because, as filed with our Office, they do not establish a valid basis for challenging the agency's actions.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. Our role in this regard is to review whether a procurement action constitutes a "violation of a procurement statute or regulation." 31 U.S.C. § 3552. To achieve this end, our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will

provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B 407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

SageCare argues that the solicitation's "bid parameters and estimated quantities are grossly inaccurate." Protest at 3. SageCare, on the one hand, asserts that many of the requirements are inflated to appear to be above the minimum annual requirements set forth in 41 C.F.R. § 101-26.602 (which, according to the protester, would require the acquisition for such requirements as "spot buys"), yet, on the other hand, argues that the requirements are also below the minimum annual requirements. Protest at 3; Protester's Comments at 5.

The regulation cited by SageCare provides instructions to requiring activities regarding the submission of fuel requirements to DLA. 41 C.F.R. §§ 101-26.602, 101-26.602-3. In particular, subsection 101-26.602-3(a)(1) states that estimated annual fuel requirements that are less than 10,000 gallons need not be submitted to DLA unless the requiring activity does not have the authority or capability to procure locally. Id.; see Bluehorse, B-412494, B-412494.2, Feb. 26, 2016, 2016 CPD ¶ 64 at 5.

Other than to allege that the annual estimated quantities are inaccurate, SageCare does not set forth a clear statement of how exactly DLA, or the requiring activities, have violated this regulation. Accordingly, we dismiss this ground for failure to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

SageCare next argues that the RFP improperly bundled requirements previously performed by small business concerns to artificially exceed the simplified acquisition threshold. Protest at 3-4; Protester's Comments at 5-6.

Under the Small Business Act, contracting agencies are required to "avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors" to the maximum extent practicable. 15 U.S.C. § 631(j)(3). The Small Business Act defines "bundling of contract requirements" as "consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern." 15 U.S.C. § 632(o)(2). See also FAR § 2.101.

Here, the solicitation provided that each CLIN would be evaluated and awarded independently from all other CLINs. RFP at 2, 138. Each CLIN was set-aside for small businesses. AR, Tab 1, Small Business Coordination Record, at 1. Therefore, since all the CLINs were set-aside for small businesses, SageCare, by definition, cannot establish that the solicitation improperly bundled requirements such that they would be unsuitable for award to a small business. See, e.g., AeroSage, LLC, B-416381, Aug. 23, 2018, 2018 CPD ¶ 288 at 3 n.2; AeroSage, LLC; SageCare, Inc., B-416279,

July 16, 2018, 2018 CPD ¶ 243 at 3 n.4. As a result, we dismiss this allegation for failure to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

Finally, SageCare asserts that all the requirements solicited under the RFP should be set aside for service-disabled veteran-owned small businesses to rectify DLA's failure to achieve its set-aside goals. Protest at 5; Protester's Comments at 6. An agency's alleged failure to meet its set-aside goals does not dictate that any particular procurement should be set aside. AeroSage LLC; SageCare, Inc., B-416279, July 16, 2018, 2018 CPD ¶ 243 at 6 n.8. We also dismiss this allegation for failure to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

The protest is denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel