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Decision

Matter of: BryMak & Associates, Inc.

File: B-418491.2

Date: June 16, 2020

John C. Dulske, Esq., Joanne Zimolzak, Esq., Bonnie Kirkland, Esq., and Ryan Sullivan, Esq., Dykema Gossett PLLC, for the protester. Howard A. Smith, Esq., Department of the Navy, for the agency. Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly canceled solicitation as corrective action in response to another offeror's protest is denied where the record shows the agency reasonably determined that a restrictive term in the solicitation may have limited competition and that cancellation was appropriate corrective action.

DECISION

BryMak & Associates, Inc., of Clarksville, Tennessee, a small business, protests the termination of its contract, and the cancellation of request for proposals (RFP) No. N40085-19-R-9134, issued by the Department of the Navy, Naval Facilities Engineering Command, for facility investment services at Marine Corps Air Station Cherry Point, Oak Grove, and other outlying fields, in North Carolina.¹ BryMak argues that the Navy lacked a valid basis to terminate its contract, cancel the RFP, and issue a new solicitation.

We deny the protest.

¹ We identify BryMak as a small business based on its representation, but express no view on its small business size status because challenges to a business's small business size status are outside the scope of our bid protest jurisdiction. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1). A protest challenging BryMak's status as a small business was dismissed by the Small Business Administration after the Navy announced the corrective action at issue in this protest. Protest at 4.

BACKGROUND

The RFP, issued July 8, 2019, sought proposals from service-disabled veteran-owned small businesses (SDVOSB) to provide services for a base period and 4 option years under a fixed-price and fixed-unit-price indefinite-delivery, indefinite-quantity (IDIQ) contract.² Agency Report (AR), Tab 3, RFP amend. 3 (Final Solicitation) at 7-10.

The RFP provided that a contract would be awarded to the offeror that submitted the proposal offering the best value considering price and four non-price factors. *Id.* at 268. The first three non-price factors (management approach; recent, relevant experience of the firm; and safety) were weighted equally. *Id.* at 269. The combined weight of those three was equal to the fourth non-price factor: past performance on recent, relevant projects. *Id.* Finally, price was equal in importance to the combined weight of the four non-price factors. *Id.*

The RFP instructed offerors to provide information for evaluation under each factor. Under the recent, relevant experience of the firm factor, the RFP requested information on from one to five relevant projects “where the offeror served as the prime contractor, that are similar in size, scope, and complexity to the work requirements specified in the solicitation.” *Id.* at 272. With regard to the projects, the RFP advised that “experience of proposed subcontractors will not be considered,” and that “the Offeror’s experience as a subcontractor will not be considered.” *Id.* The RFP also contained what was marked as a “NOTE,” which advised offerors as follows:

Subcontractor experience may be provided for specific work elements only if that subcontractor is proposed to perform work on this requirement. However, the offeror must demonstrate experience as prime contractor on at least one relevant project. Subcontractor experience will not be substituted for prime contractor experience in any case. Projects submitted for consideration shall be provided on Attachment D, Recent/Relevant Experience Form with details that include percentages of work completed for both prime and proposed subcontractors.

RFP amend. 4 at 20-21.

After receiving and evaluating proposals, the Navy selected BryMak’s proposal for award. Memorandum of Law (MOL) at 2. Another offeror, Government Contracting Resources, Inc., filed a protest with our Office on February 18, 2020, arguing that the award was improper because both its and BryMak’s proposals had been misevaluated. *Id.* The firm alleged that BryMak lacked prime contractor experience that should have resulted in an unacceptable rating under the recent, relevant experience factor, which would have precluded BryMak from receiving a favorable technical rating overall.

² The RFP stated that the “period of performance will be determined at the time of award.” RFP at 3.

On February 28, the Navy announced that it would take corrective action in response to the protest by terminating the contract award to BryMak and issuing a new solicitation. Our Office dismissed the protest as academic on the basis of the corrective action. *Government Contracting Resources, Inc.*, B-418491, Mar. 4, 2020 (unpublished decision). This protest followed.

DISCUSSION

In its protest, BryMak contends that the Navy lacked a valid basis to take corrective action. In general, in a negotiated procurement the contracting agency need only demonstrate a reasonable basis to cancel a solicitation after receipt of proposals. *Greentree Transp. Co.*, B-403556.2, Dec. 7, 2010, 2010 CPD ¶ 293 at 3. The Navy argues that it had a reasonable basis to take corrective action: the RFP had contradictory terms about the evaluation of subcontractor experience, those terms did not accurately reflect the agency's needs, and reissuing the solicitation with accurate terms would provide for expanded competition among SDVOSBs.

BryMak raises several arguments that the Navy does not have a valid basis to cancel both the award to BryMak and the RFP, and to restart the procurement under a new solicitation. Protest at 9. First, BryMak maintains that the RFP should not have been cancelled because, at worst, the RFP was patently ambiguous about whether subcontractor experience would be considered. The firm argues that since no offeror challenged the ambiguity, the Navy did not have a valid reason to take corrective action based on the ambiguity. *Id.* at 7. Beyond that, BryMak argues that the RFP, as originally issued, restricted the consideration of subcontractor experience. The firm argues that this restriction was reasonable in the context of a set-aside, because doing so would ensure that the awardee would be sufficiently experienced to perform and manage performance. *Id.* at 8. BryMak also argues that, given the level of participation of other companies at a site visit during the agency's pre-award planning, it is evident that adequate competition occurred, thereby undermining the agency's ostensible concern that the RFP limited competition. *Id.*

In response, the Navy argues that it reasonably exercised its discretion to take corrective action because "the conflicting language may have inadvertently limited competition as [potential] offerors may have believed that in no case could they offer qualifying subcontractor experience to demonstrate necessary experience under [the experience factor]." Contracting Officer's Statement at 3; see also MOL at 2. The Navy also argues that the protester's notion of adequate competition is based solely on the number of companies that attended a site visit. The agency asserts that reliance on the number of companies that attended a site visit is immaterial because the corrective action provides the prospect of increased competition. *Id.* at 5. Specifically, the agency explains that a potential offeror that lacked prime contractor experience but nevertheless could show "experience using a qualified subcontractor . . . may have opted not to submit an offer, as it did not believe that the terms of the solicitation allowed for the use of subcontractor experience." *Id.* The Navy argues that it was then within the agency's discretion to reissue the RFP without the restriction on considering

subcontracting experience, thereby increasing competition for the agency's requirement by permitting competition from firms that had not submitted proposals under the canceled RFP. *Id.* at 6.

The record supports the reasonableness of the Navy's decision to cancel the solicitation. We agree that the Navy had a reasonable basis to conclude that, by doing so, it would provide for increased competition by SDVOSB firms that lacked experience as a prime contractor but would be able to submit subcontractor experience and otherwise meet the agency's standards under a less restrictive solicitation. In view of the discretion that the Navy has in making such a decision, BryMak's main arguments that the agency had to show that it was either at risk of a successful protest, or that the Navy obtained adequate competition under the canceled solicitation and should therefore be required to continue the procurement, are unpersuasive. It is sufficient that the Navy has shown that one term of the RFP excluded the consideration of some experience, and that the Navy determined that the result was inconsistent with the agency's needs which, properly expressed, would allow for fuller competition.

When an agency concludes that a solicitation does not reflect its requirements, canceling the solicitation is reasonable, especially where issuing a revised solicitation presents the potential for increased competition. *North Shore Med. Labs, Inc.; Advanced BioMedical Labs., LLC*, B-311070, B-311070.2, Apr. 21, 2008, 2008 CPD ¶ 144 at 4; *see also KAES Enters., LLC--Protest & Costs*, B-402050.4, Feb. 12, 2010, 2010 CPD ¶ 49 at 2 (when an agency determines that a solicitation does not accurately reflect its needs, there is a reasonable basis for the agency to cancel the solicitation). Accordingly, the protest provides no basis for our Office to question the Navy's discretion to take corrective action to ensure that the RFP reflects its needs and to further the goal of fuller competition.

The protest is denied.

Thomas H. Armstrong
General Counsel