



Decision

Matter of: Ranger American of Puerto Rico, Inc.

File: B-418616

Date: July 2, 2020

Jonathan D. Shaffer, Esq., Mary Pat Buckenmeyer, Esq., and Todd M. Garland, Esq., Smith Pachter McWhorter PLC, for the protester.
Matthew Lane, Esq., Department of Homeland Security, for the agency.
Kasia Dourney, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's decision to set aside the procurement for small businesses is denied where the agency had a reasonable expectation that proposals would be received from at least two responsible small business concerns, and award would be made at a fair market price.

DECISION

Ranger American of Puerto Rico, Inc., of San Juan, Puerto Rico, protests the terms of request for proposals (RFP) No. 70FBR220R00000007, issued by the Department of Homeland Security, Federal Emergency Management Agency (FEMA) for security guard and patrol services to be performed in the Commonwealth of Puerto Rico. The protester, a large business, contends that the agency improperly issued the solicitation as a total small business set-aside.

We deny the protest.

BACKGROUND

The RFP, issued on February 22, 2020, sought proposals for armed security guard services at sites and facilities within a declared disaster area in Puerto Rico.¹ Agency

¹ On January 16, 2020, after the devastating earthquake on January 7, a major disaster declaration (DR-4473-PR) was issued for the Commonwealth of Puerto Rico.

Contracting Officer's Statement (COS) ¶ 2. These armed security guard services

(continued...)

Report (AR), Tab E, att. 1 to the RFP, Statement of Work (SOW) at 1. The solicitation was set aside for small business concerns and anticipated award of a labor-hour contract, for a base period of 90 days with three 60-day option periods, on a lowest-priced, technically acceptable basis.² AR, Tab D, RFP at 1; COS ¶¶ 11-12.

The RFP was issued pursuant to Federal Acquisition Regulation (FAR) parts 12 and 13, utilizing the guard level II security personnel labor category. COS ¶ 9. The solicitation was assigned North American Industry Classification System (NAICS) code 561612, Security Guards and Patrol Services.³ RFP at 5.

Prior to issuing the RFP, the agency conducted market research. First, the agency reviewed the acquisition history for armed security guard services under DR-4473, and acquisition history for similar services related to a previous major disaster declaration in Puerto Rico, under DR-4339. COS ¶ 4; AR, Tab L, Market Research Report. Further, the agency reviewed a 2017 market research report for level II armed security guard services prepared by the Department of Homeland Security (DHS); consulted experienced security managers and subject matter experts for prior procurements; and conducted searches for small business companies providing similar services in the databases maintained by the General Services Administration (GSA) and the Small Business Administration (SBA), as well as searches on Dun & Bradstreet and Google. *Id.*

As a result of its market research efforts, the agency identified four small business concerns that performed the services sought by the RFP.⁴ COS ¶ 5; AR, Tab L, Market Research Report at 4. In addition, the contract specialist for the procurement conducted a search of the System for Award Management's (SAM) database, for small businesses registered under NAICS code 561612 in the Commonwealth of Puerto Rico,

(...continued)

procured by FEMA in support of DR-4473-PR are intended to safeguard federal employees, visitors, and property at disaster-related sites and facilities. COS ¶ 3.

² While the contracting officer indicates in her statement that the RFP anticipated "award of a fixed-price contract," the solicitation provides that FEMA anticipated award of a labor-hour contract for all contract line item numbers. *Compare* COS ¶ 11 *with* RFP at 7.

³ The NAICS code scheme is used by the federal government to identify and classify specific categories of business activity that represent the lines of business a firm conducts. See FAR 19.102; *BlueStar Energy Solutions*, B-405690, Dec. 12, 2011, 2011 CPD ¶ 275 at 3 n.2.

⁴ Specifically, the four small businesses that are identified in the report are: Commonwealth Security, Sheriff Security Services, Inc., AGMA Security Services, Inc., and St. James Security Services LLC. AR, Tab L, Market Research Report at 4.

and identified at least four more small businesses that the agency expected would be capable of performing the work. COS ¶¶ 6.

Based on the market research, which established that there were eight small businesses capable of performing the requirement, the contracting officer determined that the solicitation should be set aside for small business concerns.⁵ COS ¶¶ 7. The RFP was issued on beta.SAM.gov, the single, government-wide point of entry, as a small-business set-aside.

On March 1, 2020, Ranger filed an agency-level protest, challenging FEMA's set-aside determination. By the March 2 closing date, FEMA received ten proposals, eight of which were determined to be from eligible small businesses, based upon the SAM representations and certifications under NAICS code 561612.⁶ COS ¶¶ 14; AR, Tab N, Proposal Checklist. On March 18, FEMA dismissed Ranger's agency-level protest. This protest followed.

DISCUSSION

Ranger argues that the agency decision to set the procurement aside for small business concerns was improper because there is no reasonable basis to expect proposals from at least two responsible small business concerns at a fair market price.⁷ Protest at 1.

⁵ The agency noted in its market research report that "[d]ue to the size of the contract and timeline it is recommended that [a] [s]et aside be utilized for this contract and if the company cannot meet the specifications that we open the bid for all companies in Puerto Rico that can meet the requirements." AR, Tab L, Market Research Report at 5.

⁶ Specifically, seven offerors were determined to be eligible small businesses upon receipt of proposals and one, True Guard Services, was determined to be an eligible small business after submitting updated representations and certifications. COS ¶¶ 14 n.1.

⁷ As an initial matter, we recognize Ranger's standing to challenge the agency's decision to issue the RFP as a small business set-aside. Ranger states that when it filed its agency-level protest on March 1, FEMA dismissed the protest on the basis that the protester "is not a small business concern and lacks standing as an interested party to challenge the terms of the solicitation." Protest at 6. Under our regulations, an interested party means "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 4 C.F.R. § 21.0(a)(1). Our Office has recognized a large business as an interested party to challenge an agency's decision to set aside a procurement for small businesses, provided that the protester: (1) submits its protest prior to the due date for proposals, and (2) alleges that it could have submitted a proposal had the procurement been subject to fair and open competition. 4 C.F.R. § 21.2(a)(1); see, e.g., *Adams and Assocs., Inc.*, B-409680, B-409681, Apr. 22, 2014, 2014 CPD ¶ 131 at 2-3; (continued...)

The protester alleges that no small business in Puerto Rico has the financial resources to be able to pay their employees for 30 to 90 days of “Level II, bilingual, armed officers” services, nor would a small business be in a position “to maintain credit lines in the millions of dollars” in order to do so. Protest 8-9. Ranger also contends that small businesses “lack a formal corporate structure sufficient to maintain the complexity of over 1,800 daily manhours required by the contract.” *Id.* at 8. In sum, Ranger alleges that the agency’s market research was inadequate, and thus, the agency’s decision to set the requirement aside was unreasonable.

FEMA responds that it conducted significant market research that was adequate to support the set-aside decision. The agency maintains that based on its market research, it had a reasonable expectation that it would receive proposals from at least two responsible business concerns, at a fair market price. Memorandum of Law (MOL) at 4. Moreover, FEMA argues that Ranger’s challenge is broad and conclusory, “fails to show a clear abuse of discretion” by the contracting officer and instead amounts to only disagreement with the contracting officer’s well-supported business judgment. *Id.* at 3. The agency also contends that since eight responsible small business concerns submitted offers by the deadline for receipt of proposals, its expectation was realized. *Id.* at 10-11.

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. While the use of any particular method of assessing the availability of small businesses is not required, the agency must undertake reasonable efforts to locate responsible small business competitors. *Commonwealth Home Health Care, Inc.*, B-400163, July 24, 2008, 2008 CPD ¶ 140 at 2.

The decision whether to set aside a procurement may be based on an analysis of factors such as the prior procurement history, the recommendations of appropriate small business specialists, and market surveys that include responses to sources sought announcements. *Id.* at 3. In making set-aside decisions, agencies need not make actual determinations of responsibility or decisions tantamount to determinations of responsibility; rather, they need only make an informed business judgment that there is a reasonable expectation of receiving acceptably priced offers from small business concerns that are capable of performing the contract. *Ceradyne, Inc.*, B-402281, Feb. 17, 2010, 2010 CPD ¶ 70 at 4. Because a decision whether to set aside a procurement is a matter of business judgment within the contracting officer’s discretion,

(...continued)

Ace-Federal Reporters, Inc., B-241309, Dec. 14, 1990, 91-2 CPD ¶ 438 at 3-6. Here, Ranger is an interested party to challenge the agency’s decision to set aside the procurement for small businesses, because if we were to sustain the protest, the protester would be permitted to compete for award.

our review is limited to determining whether that official abused his or her discretion. *Id.*; *Vox Optima, LLC*, B-400451, Nov. 12, 2008, 2008 CPD ¶ 212 at 5. The legal standard for our review of such a decision requires business judgment about a reasonable likelihood of small business competition, and thus recognizes that a contracting officer may set aside a solicitation even where a skeptical competitor can identify contrasting information that could arguably justify rejecting the set-aside, and holding a full and open competition instead. See, e.g., *Encompass Grp. LLC*, B-296602, B-296617, Aug. 10, 2005, 2005 CPD ¶ 159 at 4 (protest denied where record supported small business set-asides notwithstanding protester's allegation that market research was insufficient).

Here, we find reasonable the agency's market research and the contracting officer's resulting set-aside decision. As described above, the agency's market research included a review of the prior acquisition history for armed security guard services under DR-4473, and under DR-4339, the previous disaster declaration; review of a 2017 DHS market research report for level II armed security guard services; consultations with managers and subject matter experts for prior procurements; and searches of the GSA's and SBA's websites. AR, Tab L, Market Research Report at 2. In addition, the agency conducted searches on SAM.gov, researched eleven small businesses identified in the SAM database, and identified additional small businesses listed under the NAICS code 561612. *Id.* at 4. In total, the agency identified eight small businesses that would be capable of performing the work sought by FEMA. MOL at 2.

Ranger questions this determination by the agency in several respects. First, Ranger claims that "the raw number" of small businesses identified by the agency is "not control[ling]," and argues that instead, the agency is required to evaluate whether those businesses have the "capability to perform contract" requirements, which, according to the protester, FEMA failed to assess. Protester's Comments at 2, 9, 11 citing *Plateau Software, Inc.*, B-416386, Aug. 24, 2018, 2018 CPD ¶ 291 at 7 (for the proposition, according to Ranger, that the "fact that multiple small businesses are identified in the course of market research is not necessarily determinative.").

We find the protester's arguments in this regard without merit. At the outset, we note that *Plateau Software, Inc.*, *supra*, cited by Ranger, concerned a case challenging the agency's determination not to set aside a procurement for specialized scientific and engineering technical assistance services--a decision that is fully within the contracting officer's discretion. See, e.g., *Management Consulting, Inc.*, B-409332, Mar. 5, 2014, 2014 CPD ¶ 89 at 4 (decision whether to set aside a procurement is a matter of business judgment within the contracting officer's discretion, and our review is limited to ascertaining whether that official abused his or her discretion). We specifically confirmed in *Plateau* that it was within the contracting officer's discretion not to set the procurement aside, based on the conclusion that the agency could not expect proposals from two capable small businesses, notwithstanding receiving responses from four small businesses to the agency's sources-sought notice; and found no abuse of discretion. *Plateau Software, Inc.*, B-416386, Aug. 24, 2018, 2018 CPD ¶ 291 at 11. Moreover, as discussed above, neither the FAR nor the decisions of our Office require

an agency to make actual determinations of responsibility (or decisions tantamount to determinations of responsibility) in making set-aside decisions; rather, a contracting officer need only make a reasonable business judgment that at least two prospective small business offerors capable of performing the work are likely to submit proposals. See *Ceradyne, Inc., supra*. Here, we find that the contracting officer reasonably exercised her business judgment in concluding that there are capable small businesses in Puerto Rico which are expected to submit acceptable proposals.

Second, the protester attempts to distinguish *Ceradyne, Inc.*, stating that the facts in that case “involved a task order awarded under an indefinite-delivery/indefinite-quantity [IDIQ]. . . contract,” where “the agency has already identified responsible small business concerns for award of task or delivery orders under the umbrella IDIQ”; while here, “[i]n contrast, the protested solicitation . . . does not involve an underlying IDIQ contract for which small business concerns have previously been determined to be responsible.” Protester’s Comments at 12-13. We disagree. We have followed the *Ceradyne* reasoning in numerous other decisions, not limited only to procurements concerning task orders under IDIQ contracts. See, e.g., *KNAPP Logistics Automation, Inc.*, B-406303, March 23, 2012, 2012 CPD ¶ 137; *Analytical Graphics, Inc.*, B-413385, Oct. 17, 2016, 2016 CPD ¶ 293; *Planet Depos LLC*, B-411142, May 26, 2015, 2015 CPD ¶ 165. Accordingly, the protester’s assertion in this regard lacks merit.

Third, the protester contends that, nevertheless, “any capability statements submitted by small businesses asserting their ability to meet FEMA’s requirements are inadequate,” given the agency’s experience with “poor performance” of Puerto Rican small businesses after hurricane Maria in 2017.⁸ We find those contentions speculative and without support.

Ranger refers to only one specific business, AGMA Security Service, that allegedly “failed to comply with the contract requirements or failed to fully compensate employees due to lack of funding.” Protest at 12. As FEMA points out, and we agree, Ranger’s allegations appear to be based entirely on anonymous sources and “vague references to industry knowledge”; further, as the agency correctly notes, “[e]ven if the extensive market research were wrong about one of those small businesses, there would still be at least seven responsible small business concerns” capable of performing the requirements. MOL at 5.

In our view, the record provides adequate support for the reasonableness of the conclusion that small business competition could be expected here, resulting in award

⁸ In its protest, Ranger alleges that “[a]fter Hurricane Maria in September 2017, FEMA similarly sought to issue total small business set aside contracts for emergency services in Puerto Rico, with disastrous results. The majority of the contractors failed to comply with the contract requirements or failed to fully compensate employees due to lack of funding. As a result . . . FEMA was forced to obtain Ranger American’s services to correct numerous mistakes committed by small business concerns that lacked sufficient funding and other resources to perform the work.” Protest at 9.

being made at a reasonable price. Although the protester disagrees with the contracting officer's judgment, Ranger's disagreement in this regard does not show that the agency abused its discretion. See, e.g., *York Int'l Corp.*, B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282 at 7 (receipt of offers from small businesses supports an agency's determination to set aside a procurement for small businesses).

The protest is denied.

Thomas H. Armstrong
General Counsel