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Decision

Matter of: Candor Solutions, LLC

File: B-418682.2

Date: September 15, 2020

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DIGEST

Protest challenging the agency's cancellation of a small business set-aside procurement in favor of an unrestricted competition is dismissed as untimely because a solicitation amendment put the protester on notice that any set-aside had been dissolved, and the protester did not timely challenge the agency's decision to cancel the set-aside for small businesses.

DECISION

Candor Solutions, LLC, a small business of Leesburg, Virginia, protests the cancellation of request for proposals (RFP) No. 1605DC-20-R-00021, which was issued by the Department of Labor (DOL), for the issuance of a task order to operate, maintain, and manage the Job Corps Data Center in Austin, Texas. Candor alleges that the cancellation of the solicitation, which it contends was set-aside for small business concerns, was improper because the agency failed to comply with the requirements in Federal Acquisition Regulation (FAR) 19.502-9 for withdrawing or modifying a small business set-aside procurement. The protester also contends that the agency's decision to cancel the small business set-aside procurement, and decision to procure the required services on an unrestricted basis, violated the agency's obligation to give priority to small business set-asides pursuant to FAR 19.203, and circumvented the agency's own market research and "rule of two" analysis pursuant to FAR 19.502-2(b).

We dismiss the protest because the protester's allegations are untimely.

BACKGROUND

The National Institutes of Health Information Technology Acquisition and Assessment Center (NITAAC), an office housed within the Department of Health and Human Services, National Institutes of Health (NIH), is authorized by the Office of Management and Budget to administer governmentwide acquisition contracts for information technology and supplies. Relevant here, NIH administers the Chief Information Officer-Solutions and Partners 3 (CIO-SP3) and CIO-SP3-Small Business (CIO-SP3-SB) contracts. The primary distinctions between the two contracts are the initial small business eligibility criteria for the CIO-SP3-SB contract, as well as the associated eligibility requirements and subcontracting limitations for orders set-aside for small businesses under the CIO-SP3-SB contract.¹ Currently, there are 335 contract holders (including 39 firms that have graduated as small business concerns) of the CIO-SP3-SB contract, and 52 contract holders (including 2 small businesses) of the CIO-SP3 contract. See NIH Brief in B-418682 at 1-2.

On March 25, 2020, DOL simultaneously issued two nearly identical solicitations in this procurement. Both RFPs shared the same DOL-issued solicitation number, as well as identical solicitation sections B, C, F, G, and J-M (and neither solicitation had sections D or E). The differences, therefore, were limited to solicitation sections A and I.

One solicitation was issued to holders of the CIO-SP3 contract (hereinafter, the “CIO-SP3 RFP”). The CIO-SP3 RFP’s section A cover page indicated that the procurement was unrestricted, and the clauses incorporated into section I did not indicate that any small business set-aside or preferences were applicable. Agency Report (AR) in B-418682, Tab 1, CIO-SP3 RFP at 1, 49-50. The CIO-SP3 RFP, however, incorporated FAR clause 52.219-14, Limitations on Subcontracting. *Id.* at 49. That clause, however, is used in solicitations set aside for small business concerns; it does not apply to an unrestricted procurement. See FAR clause 52.219-14(b). Additionally, the CIO-SP3 RFP’s section A schedule of supplies/services stated that “[t]his solicitation is ‘UNRESTRICTED’,” but also stated that “[North American Industry Classification System (NAICS)] Code 541513 *may* apply for this requirement,” and “[a]ny entity that does not meet this standard *will be removed from consideration for award.*” AR in B-418682, Tab 1, CIO-SP3 RFP at 1-2 (emphasis added).

The second solicitation was issued to holders of the CIO-SP3-SB contract (hereinafter, the “CIO-SP3-SB RFP”). The CIO-SP3-SB RFP’s section A cover page indicated that the procurement was set-aside for small businesses, and the section A schedule of supplies/services stated that “NAICS Code 541512 *may* apply for this requirement,” and that “[a]ny entity that does not meet this standard *will be removed from consideration for award.*” AR in B-418682, Tab 2, CIO-SP3-SB RFP at 1-2 (emphasis added). As with

¹ The CIO-SP3 and CIO-SP3-SB contracts were established prior to implementation of 15 U.S.C. § 644(r) and FAR 16.505(b)(2)(F), which empower a contracting officer to set-aside orders for small businesses under multiple award contracts. See NIH Brief in B-418682 at 2 n.1.

the CIO-SP3 RFP, section I incorporated FAR clause 52.219-14, Limitations on Subcontracting, but similarly did not include any of the FAR's small business set-aside or preference clauses. *Id.* at 49-50.

On April 20, DOL issued a single, identical set of vendor questions and answers as amendment 1 to the respective RFPs. Relevant here, DOL responded to several questions regarding the applicability of size limitations and how the agency intended to evaluate proposals and make a single award where it appeared to have simultaneously issued a small business set-aside RFP and an unrestricted RFP for the same requirement. In questions and answers 1 and 2, DOL confirmed that offerors holding a CIO-SP3-SB contract would need to meet the applicable size standard to be eligible for award. Req. for Dismissal, attach. B, RFP, amend. No. 1, Questions and Answers 1-2. In contrast, DOL made clear that no size standard was applicable to offerors holding a CIO-SP3 contract. Specifically, DOL responded to the following question:

Q87. The Standard Form 1449 has Unrestricted checked off in Box 10, however, a size standard is listed in the same box. Can you confirm that there is no size standard for this bid?

A87: Correct for Unrestricted.

Additionally, a vendor specifically inquired how the agency would evaluate and make a single award when the same requirement was being procured via a small business set-aside procurement and an unrestricted procurement. DOL confirmed that it was soliciting proposals for the same requirement, and would make a single award to the proposal representing the best value to the government; the agency did not represent that it would set-aside the procurement for small business concerns or otherwise apply any evaluation preference for small businesses. Specifically, DOL responded to the following question:

Q86: We have received the [CIO-SP3-SB RFP] from one of our partners and realize that this is the same exact RFP that is released under Unrestricted. We are wondering why this RFP has been released under both Unrestricted and SB. How do you plan to award it knowing that this is a single award opportunity?

A86: That is correct. We are going to evaluate ALL the proposals (from Unrestricted and SB) and make an award to the one vendor who has offered the best value to the government.

Prior to the closing date for proposals, another small business offeror, DV United, LLC, filed a protest with our Office challenging the agency's acquisition approach. Asserting that the CIO-SP3-SB RFP was issued as a set-aside for small businesses, and noting that the agency was also soliciting proposals on an unrestricted basis for the same requirement under the CIO-SP3 RFP, DV United argued that DOL's acquisition approach was improper because it could result in the issuance of an order to other than

a small business. DV United argued that allowing other than small businesses to compete for and ultimately receive an award in connection with a procurement that was set-aside for small businesses violated applicable set-aside rules. DV United also argued that, even if such an acquisition approach was reasonable, the fact that offerors under the two different solicitations were subject to different size standard certification and limitation on subcontracting provisions imposed unfair inequities on the offerors. See Protest of DV United, LLC (B-418628) at 2-5.

Our Office invited NIH to participate in DV United's protest, and specifically asked NIH, DOL, and the protester to address two relevant questions: (1) whether DOL could simultaneously issue two solicitations under different indefinite-delivery, indefinite-quantity contracts for a single requirement; and (2) assuming it was allowable to do so, whether it was reasonable for the solicitations to be subject to different size certification requirements and limitations on subcontracting? NIH responded that it does not interpret the rules applicable to the suite of CIO-SP3 contracts to prohibit issuing solicitations under the different contracts for the award of a single requirement. NIH, however, noted a number of policy-related concerns that procuring agencies should consider before pursuing such an acquisition approach, including:

- Multiple pools can confuse contractors about what is happening with the award;
- Simultaneous acquisitions across pools result in a large number of proposals (and associated proposal costs) that would otherwise be limited to smaller number of quoters under one [CIO-SP3 contract];
- This approach can give contract holders the impression that NITAAC is not administering and running the [CIO-SP3 contracts] effectively or efficiently; and
- Solicitations without a guarantee of award go against the spirit of how NITAAC wishes to do business as a partner to other government agencies and the [CIO-SP3] contract holders.

NIH Brief in B-418682 at 4-5.

As to the second question, NIH did not directly offer an opinion about the materiality of DOL's imposition of size certification requirements and subcontracting limitations to offerors under the CIO-SP3-SB RFP, but it recognized that variations in requirements could present challenges for procuring agencies as well as for offerors. NIH explained that agencies have the discretion not to set aside task order procurements under the CIO-SP3-SB contract (or, alternatively, have the discretion to set-aside task order procurements for small businesses under the CIO-SP3 contract). Therefore, NIH strongly recommended that a procuring agency wishing to solicit proposals from both CIO-SP3 and CIO-SP3-SB contract holders should designate both solicitations as either being unrestricted or set-aside. In this regard, NIH explained that since DOL stated that

it intended to procure this requirement on an unrestricted basis, DOL could have indicated when posting the CIO-SP3-SB RFP using NIH's electronic system that the procurement was being issued on an unrestricted basis.² See *id.* at 2-3, 6-7.

Based on the policy concerns raised in NIH's brief, DOL notified our Office of its intent to cancel the CIO-SP3-SB RFP, and proceed with the procurement limited to the CIO-SP3 contract holders. See Agency Report in B-419682 at 2. DV United subsequently withdrew its protest. See DV United, LLC Notice of Withdrawal. Upon cancellation of the CIO-SP3-SB RFP, Candor filed this protest with our Office.

DISCUSSION

Candor challenges the agency's cancellation of the CIO-SP3-SB RFP, and decision to proceed with the procurement limited to the CIO-SP3 contract holders. The protester first contends that the CIO-SP3-SB RFP had been set aside for small businesses, and therefore DOL could only cancel the solicitation in accordance with the requirements of FAR 19.502-9. Candor alleges that DOL failed to make the requisite findings and coordinate with the appropriate DOL and Small Business Administration authorities prior to cancellation. The protester also challenges the agency's decision to proceed with the procurement limited only to CIO-SP3 contract holders. Candor alleges that the procurement should be set-aside for small business concerns.

DOL seeks dismissal of Candor's protest, arguing that Candor's challenges are based on the incorrect factual predicate that this procurement was set aside for small business concerns. Specifically, DOL argues that it should have been apparent to the protester no later than the issuance of amendment 1 to both solicitations that the agency did not intend to set aside in whole or in part this procurement for small business concerns when it specifically notified offerors that the agency was simultaneously soliciting proposals from both small and unrestricted businesses and would make a single best-value determination. DOL, therefore, argues that the protester's challenges at this time that the agency is not complying with the rules applicable to small business set-aside

² DOL represents that it wished to solicit proposals from both CIO-SP3 and CIO-SP3-SB contract holders in order to maximize competition, as each contract had a different pool of potential offerors. DOL further represented that it never intended to set-aside the CIO-SP3-SB RFP for small business concerns. Rather, DOL contends that it mistakenly believed that it needed to mark the CIO-SP3-SB RFP as being a set-aside in order to comply with the CIO-SP3-SB contract requirements. See Req. for Dismissal, exh. A, Contracting Officer's Statement at 3-4. Candor contests these points, arguing that DOL's intent is irrelevant where it specifically marked the CIO-SP3-SB RFP as being a set-aside. We need not resolve this disputed point because, as addressed below, amendment 1 clearly conveyed to offerors that DOL would not conduct this procurement in accordance with applicable set-aside rules, and Candor failed to timely challenge this patent issue prior to the closing date for proposals.

procurements are effectively untimely challenges to the agency's prior notice to offerors that the agency was not setting this procurement aside for small business concerns.³

Candor opposes dismissal. The protester primarily asserts that its protest does not challenge the agency's decision to issue solicitations under two different contract vehicles, but rather challenges the agency's decision to cancel the small business set-aside RFP. Candor argues that the CIO-SP3-SB RFP, regardless of whether DOL intended to do so, was set aside for small business concerns, and the agency never adequately conveyed to offerors that it was withdrawing or modifying the set-aside status of the procurement until the agency cancelled the CIO-SP3-SB RFP.

In what appears to be an alternative argument, Candor also contends that, even if amendment 1 suggested that the procurement was not set aside for small businesses, the protester reasonably understood that DOL "intended to compete this procurement using the CIO-SP3 Small Business [contract] and that small business awards would be, at the very least, prioritized, because the agency was moving forward under the [CIO-SP3-SB RFP] and the [CIO-SP3-SB RFP] was not amended to remove the small business set aside language." Opp. to Req. for Dismissal at 3-4.

For the reasons that follow, we find that amendment 1 put potential offerors on notice that the agency was not setting aside the award for small business concerns, and therefore Candor could and should have challenged the agency's apparent dissolution of the set-aside at that time. Because Candor waited to challenge the agency's actions until after proposals were submitted and the agency ultimately cancelled the CIO-SP3-SB RFP, we dismiss the protest as untimely.⁴

³ Under our Bid Protest Regulations, a protester is generally required to timely raise its concerns that a solicitation has not been set aside for small businesses or otherwise does not provide a required priority or preference for small business concerns prior to the closing date for the receipt of proposals. 4 C.F.R. § 21.1(a)(1); *Precision Prosthetics, Inc.*, B-401023, Apr. 9, 2009, 2009 CPD ¶ 83 at 4 n.1; *Goel Servs., Inc.*, B-310822.2, May 23, 2008, 2008 CPD ¶ 99 at 2. As discussed herein, even accepting the protester's contention that the original CIO-SP3-SB RFP was set aside for small business concerns, the April 20 amendment put offerors on notice that DOL was not in fact setting aside the procurement. Under our timeliness rules, Candor was required to protest the introduction of this alleged patent solicitation defect by the revised closing date of April 30. 4 C.F.R. § 21.1(a)(1). Instead, Candor did not file its protest until June 22, which was after the agency cancelled the CIO-SP3-RFP.

⁴ Candor also argues that our Office should consider its protest under the significant issue exception to our timeliness rules. Pursuant to 4 C.F.R. § 21.3(c), our Office may consider an otherwise untimely protest where good cause is shown or where the protest raises a significant issue of widespread interest to the procurement community. In order to prevent our timeliness rules from becoming meaningless, however, exceptions are strictly construed and rarely used. *Hawker Beechcraft Def. Co., LLC*, B-406170, Dec. 22, 2011, 2011 CPD ¶ 285 at 4 n.4. While the factual circumstances involving

The timeliness rules in our Bid Protest Regulations reflect the dual requirements of providing parties with a fair opportunity to present their cases, and resolving protests expeditiously without unduly disrupting or delaying the procurement. *CSRA LLC*, B-417635 *et al.*, Sept. 11, 2019, 2019 CPD ¶ 341 at 7. Under these rules, a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1). Where alleged improprieties do not exist in the initial solicitation, but subsequently occur (e.g., via an amendment to the solicitation), they generally must be protested not later than the next closing time for receipt of proposals following the incorporation. *Id.*; *VetsTec, LLC*, B-418164, Nov. 7, 2019, 2019 CPD ¶ 384 at 4 n.5. We have previously applied this provision of our timeliness rules to dismiss as untimely a protest where the protester did not challenge prior to the next closing date an amendment making a solicitation initially issued as a small businesses set-aside an unrestricted procurement. See *Clean Keepers Rubbish Removal, Inc.*, B-216540, Oct. 22, 1984, 84-2 CPD ¶ 436.

The record here leaves little doubt that DOL's acquisition approach was facially flawed. As addressed above, the initial CIO-SP3 and CIO-SP3-SB RFPs were internally contradictory about whether this procurement was set aside in whole or in part for small business concerns. For example, the CIO-SP3 RFP simultaneously stated that it was issued on an unrestricted basis while also stating that an applicable size standard "may apply" and offerors failing to meet the standard would be eliminated from consideration for award. AR, Tab 1, CIO-SP3 RFP at 1-2. On the other hand, the CIO-SP3-SB RFP indicated that it had been set aside for small business concerns, but failed to incorporate any applicable small business set-aside clauses. AR, Tab 2, CIO-SP3-SB RFP at 1-2, 49-50.

If these inconsistencies in the initial RFPs were insufficient to put Candor on notice as to the material ambiguity with respect to the set-aside status of the procurement, amendment 1 should have made clear to Candor that the agency was not setting aside the award for small business concerns. As addressed above, DOL unequivocally notified offerors that (1) only small business holders of the CIO-SP3 contract would be required to certify as small under the applicable size standard, and (2) DOL would make a single award from all the proposals submitted by small business offerors and those submitted by other than small business offerors. See Req. for Dismissal, attach. B,

DOL's issuance of two solicitations for a single requirement is novel, the underlying legal questions--for example, whether the government has made a reasonable determination not to set aside a procurement for small businesses--are not novel and have been the subject of numerous prior GAO decisions. Thus, resolution of these questions would not materially add to our body of decisions. Furthermore, as discussed herein, the defects in the agency's acquisition approach were patent and another small business offeror readily pursued its challenge to the patent defects at the appropriate time. Therefore, we also find no good cause to excuse Candor's failure to timely pursue its concerns with the agency's decision not to set aside the procurement for small businesses.

RFP, amend. No. 1, Questions and Answers 86-87. In other words, DOL unequivocally indicated its intent not to comply with the applicable small business set-aside rules and instead consider all proposals under both solicitations, and “make an award to the one vendor who has offered the best value to the government.” *Id.*, Question and Answer 87.

At this point, it should have been readily apparent to Candor--as it was to DV United, which timely filed a protest with our Office--that DOL, to the extent it ever intended to set aside the procurement for small business concerns, was not limiting the competition to small business concerns. Indeed, amendment 1’s unequivocal clarification that other than small businesses would be allowed to compete is directly antithetical to a small business set-aside. See FAR 19.501(a)(1) (“The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A ‘set-aside for small business’ is the limiting of an acquisition exclusively for participation by small business concerns.”).

Confronted with the irreconcilability of its position that this procurement was set aside for small businesses with DOL’s clear statement that other than small businesses would be eligible to compete for and receive award of the resulting order, the protester argues in response to amendment 1 that “Candor understood that while identical solicitations had been issued, the agency would prioritize making an award to small businesses, consistent with FAR § 19.203.” *Opp. to Req. for Dismissal* at 2. This argument provides no succor to the protester.

First, Candor’s interpretation finds no support in either the RFP’s evaluation criteria, which includes no preference or other special consideration for small businesses, or in the plain text of amendment 1, which stated that proposals from both small business and other than small business offerors would be evaluated on a best-value basis with no indication of any small business preference. *Req. for Dismissal*, attach. B, RFP, amend. No. 1, Question and Answer 86.

Additionally, and more damaging to the protester’s position, is its concession that Candor understood at the time amendment 1 was issued that DOL had also issued an unrestricted solicitation for the same requirement and would not conduct the procurement as a small business set-aside, versus merely providing a preference for small businesses. The protester effectively concedes that, notwithstanding its belief that the initial CIO-SP3-SB RFP had been set aside for small businesses, it understood that DOL conveyed to offerors via amendment 1 that it would not comply with the requirements associated with a small business set-aside procurement. Under our timeliness rules, it was incumbent on Candor to challenge the agency’s notification via its April 20 amendment that the agency was abandoning any set-aside for this procurement by the revised April 30 proposal submission deadline. 4 C.F.R. § 21.2(a)(1); *Clean Keepers Rubbish Removal, Inc.*, *supra*. Rather than timely challenging the agency’s decision to abandon any set-aside for this procurement at that time--as another offeror timely did--Candor elected to compete anyway. To the extent Candor wishes to now litigate the merits of the agency’s decision to abandon the

set-aside for this procurement, those arguments are patently untimely where they were submitted more than two months after the proposal submission deadline.

The protest is dismissed.

Thomas H. Armstrong
General Counsel