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Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Smiths Detection, Inc.

File: B-420110; B-420111

Date: November 5, 2021

Jonathan D. Shaffer, Esq., and Ashley N. Amen, Esq., Smith Pachter McWhorter PLC, for the protester.
Christopher J. Reames, Esq., Tom McGivern, Esq., and Michael Kiffney, Esq., Department of Homeland Security, for the agency.
Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging an agency's requirement for offerors' products to be added to the agency's qualified products list (QPL) by January 4, 2022, in order to be eligible for award as unduly restricting competition is denied where the qualification deadline is reasonable and consistent with the agency's legitimate needs.

2. Protest alleging that the agency may engage in a *de facto* sole-source procurement by requiring that eligible products be added to the agency's QPL by January 4, 2022, and that the agency has unreasonably delayed the protester's ability to qualify by that date are dismissed as premature where the protester's products currently remain eligible for qualification.

DECISION

Smiths Detection, Inc., of Edgewood, Maryland, challenges the terms of requests for proposals (RFP) Nos. 70T04021R7672N041 and 70T04021R7672N042, issued by the Department of Homeland Security, Transportation Security Administration (TSA), for checkpoint property screening computed tomography systems. Smiths alleges that the agency's requirement for offerors to have their systems added to the agency's qualified products list (QPL) by January 4, 2022, is unduly restrictive of competition.

We deny the protests in part and dismiss in part.

BACKGROUND

TSA is responsible for protecting the country's transportation systems. In order to meet its mission within the aviation transportation environment, TSA implements technology and processes utilized in and near the passenger screening checkpoint to deter and mitigate existing and evolving risks and threats, and employs multiple resources to screen passengers and their carry-on baggage. TSA currently uses advanced technology (AT) x-rays as the primary screening system at passenger screening checkpoints. The existing systems, however, have become increasingly limited in terms of their ability to reliably and efficiently detect new and evolving threats. Agency Report (AR), Tab 11, Acq. Plan, at 892.[1] TSA estimates that there are more than 2,000 AT systems fielded at more than 450 airports nationwide that are nearing the end of their estimated useful lifespan of ten years and will need to be replaced. *Id.* at 894.

As an improvement to the existing AT systems, TSA intends to acquire and utilize computed tomography (CT) systems, which utilize x-ray imaging technology and sophisticated computer algorithms to develop a three dimensional image, to conduct checkpoint screening of carry-on bags at U.S. airports. When passengers submit their property for screening, a series of rolling tables and conveyors direct the property through the CT system where multiple x-ray images are captured and assembled into a three dimensional image. CT technology allows for a more thorough visual analysis by transportation security officers and the detection of a broader range of threats without having to open passenger bags. *See* Memo. of Law, exh. A, Program Manager Decl., ¶¶ 8-9; *L3 Security and Detection Sys., Inc.*, B-417463, B-417463.2, July 8, 2019, 2019 CPD ¶ 248 at 1-2. TSA has already acquired 300 CT systems for high-risk airports from the protester, with deployments occurring between November 2019 and April 2021. Memo. of Law, exh. A, Program Manager Decl., ¶ 11.

To meet mission needs beyond the 300 CT systems acquired to date, TSA intends to separately procure three additional system configurations under the agency's Checkpoint Property Screening System (CPSS) program: (1) base-size systems; (2) mid-size systems; and (3) full-size systems. The different system configurations are necessary to provide flexibility for installation and operations at airport checkpoint facilities with varying sizes, passenger demand volumes, and activity profiles. The CPSS base systems, which will generally have the same hardware components as the 300 systems already delivered by Smiths, will also need to meet more rigorous functional and other requirements. The mid-size systems, in addition to meeting the CPSS base system requirements, will also include ancillary equipment such as ingress and egress conveyors and an operator-initiated auto-diverter that will permit a transportation security officer to divert bags with suspicious items to a separate conveyor for manual inspection. Lastly, the full-size systems, in addition to meeting the capabilities of the CPSS mid-size systems, will also include an automated conveyance

[1] References to page numbers for agency report exhibits are to the Bates numbering provided by the agency.

system with parallel divestiture, automated bin return, and a high threat containment device. *See, e.g.*, Memo. of Law, exh. A, Program Manager Decl., ¶ 14; AR, Tab 11, Acq. Plan, at 895, 897.

Relevant here, TSA on April 2, 2021, issued RFP No. 70T04021R7672N041 for CPSS base-size systems (the Base RFP) and RFP No. 70T04021R7672N042 for CPSS full-size systems (the Full-Size RFP). The RFPs contemplate the establishment of single-award basic ordering agreements (BOA), one each for the base and full-size systems, in accordance with Federal Acquisition Regulation (FAR) section 16.703.[2] The initial Base RFP contemplated the delivery of 15 base-size systems, with the option for additional orders for up to 413 additional base-size systems and ancillary equipment. The Base RFP also includes program management, warranty, maintenance, and logistics support requirements, as well as optional additional tasks. The RFP contemplates the establishment of a BOA with (i) a 2-year base period for warranty, maintenance, and logistics services, (ii) a 3-year base period for the systems and ancillary equipment and program management services, and (iii) eight, 1-year option periods for program management and warranty, maintenance, and logistics support requirements. AR, Tab 1A, Base RFP, at 5-8, 10. The total optional quantities of the base-size systems was increased to 453 via Base RFP amendment two. AR, Tab 7A, Base RFP, amend. No. 2, at 641. The Full-Size RFP is identically structured as the Base RFP, with the exception that the Full-Size RFP contemplates the delivery of CPSS full-size configuration systems. AR, Tab 1B, Full-Size RFP, at 51-54, 56; Tab 8B, Full-Size RFP, amend. No. 2, at 704.

Both RFPs incorporated qualification requirements in accordance with FAR clause 52.209-1, Qualification Requirements. Thus, offerors' products must complete qualification testing and be added to the agency's qualified products list (QPL) in order to be eligible for award. The CPSS qualification process includes six steps, including subjecting the systems to explosive certification testing, integration and implementation testing, field testing, and initial operational test and evaluation. Memo. of Law, exh. A, Program Manager Decl., ¶ 19; AR, Tab 17, CPSS Qualification Management Plan. On March 3, 2020, TSA released the QPL for CPSS increment 1 Base and Full-size configurations inviting vendors to submit their qualification data packages for their respective systems. Smiths submitted qualification data packages for both its Base and Full-size configurations in August and September, respectively. *See, e.g.*, Memo. of Law, exh. A, Program Manager Decl., ¶ 24; AR, Tab 15, Smiths's June 11 Letter to Contracting Officer, at 986-87 (addressing status of Smiths's QPL reviews). To date, Smiths's products are undergoing qualification review.

[2] The RFPs state that TSA "intends to issue a single order award" resulting from each solicitation, but that TSA "reserves the right to make multiple awards or no award at [the] Government's discretion." AR, Tab 1A, Base RFP, at 44; Tab 1B, Full-Size RFP, at 90.

The principal issue at stake in this protest is the current deadline for obtaining QPL qualification. The initial RFPs, issued on April 2, 2021, required successful QPL qualification by no later than October 31, 2021.[3] *See* AR, Tab 1A, Base RFP, at 36 ("Failure to complete the testing requirements under the associated QPL Window on or before **October 31, 2021** will result in the proposal being determined as 'non-responsive' and removed from further award consideration."); Tab 1B, Full-Size RFP, at 82 (same). The RFPs, however, recognized that it was possible that no offeror would obtain QPL qualification by the deadline. Specifically, both RFPs stated:

> In the event no proposed products or systems are successfully on the associated QPL by **October 31, 2021**, no BOAs for the subject technology shall be issued. In this instance, the TSA reserves the right to cancel this BOA Order solicitation or seek approval to continue the award process per FAR 52.209-1 -- Qualification Requirements. If the TSA determines to proceed with an award, the resulting contract action(s) of this RFP shall be a "C" type contract rather than a BOA Order. All applicable terms and conditions of the BOA shall be included in addition to the terms outlined in the RFP. All references to a "BOA Order" shall be replaced with "Contract."

AR, Tab 1A, Base RFP, at 36; Tab 1B, Full-Size RFP, at 82.

On June 11, Smiths wrote to the contracting officer to request a 10-week extension to the RFPs' October 31 QPL deadline. In its letter, Smiths outlined delays in the QPL review process that it believed were attributable to TSA. AR, Tab 15, Smiths's June 11 Letter to Contracting Officer, at 986-87. Smiths represented it believed that other firms similarly experienced delays in the QPL process, and that the extension would "provide the TSA with the opportunity to review and consider a broader field of candidates for this proposal." *Id.* at 987. On June 25, TSA amended the RFPs to extend the QPL qualification deadline as the protester requested, to January 4, 2022. AR, Tab 7A, Base RFP, amend. No. 2, at 641; Tab 7B, Full-Size RFP, amend. No. 2, at 648. Amendment two also extended the proposal submission deadline to August 31, 2021. AR, Tab 7A, Base RFP, amend. No. 2, at 645; Tab 7B, Full-Size RFP, amend. No. 2, at 652.

On August 24, Smiths again wrote to the contracting officer seeking another extension to the RFPs' QPL deadline, this time until [DELETED] 2022. Smiths's letter included updated schedule forecasts from TSA personnel responsible for the QPL qualification process indicating that Smiths's base and full-size systems would not likely obtain

[3] TSA clarified in its response to questions and answers that the October 31, 2021, deadline was only for eligibility for the specific BOAs contemplated by the RFPs. The agency represented that the QPL process would continue on a rolling basis, such that vendors that did not obtain qualification by the RFPs' deadlines could continue through the QPL process in order to be eligible for future procurements. AR, Tab 4A, Base RFP, amend. No. 1, 367; Tab 4B, Full-Size RFP, amend. No. 1, at 392.

qualification until the end of [DELETED] 2022 and [DELETED] 2022, respectively. AR, Tab 12, Smiths's Aug. 24 Letter to Contracting Officer, at 936-37. Smiths again explained its belief that "allowing more time for candidates to complete the QPL process, will provide the TSA with the most competitive environment, allowing access to the broadest possible field of candidates." *Id.* at 936. In response to Smiths's request, the contracting officer responded that: "[a]s your request pertains to an open competitive procurement, any updates made to the Base and Full RFPs will be publicized via an amendment directly to the RFP postings on SAM.gov." AR, Tab 13, Aug. 25 Email from Contracting Officer, at 940. On August 30, Smiths filed these pre-award protests in advance of the RFPs' August 31 proposal deadlines.

DISCUSSION

Smiths argues that the current QPL qualification deadline of January 4, 2022, is unduly restrictive of competition. The protester primarily contends that the date is unreasonable because it is likely that several offerors, including Smiths, will be unable to attain the required qualification by that date. Thus, the protester contends that the deadline should be extended in order to promote additional competition. For the reasons that follow, we find no basis on which to sustain the protest at this time.

Procuring agencies are required to specify their needs in a manner designed to permit full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agencies' legitimate needs (or as otherwise authorized by law). 41 U.S.C. § 3301(a); *Erickson Aero Tanker*, B-411306.2, B-411306.5, July 29, 2015, 2015 CPD ¶ 226 at 5. Where a protester challenges a specification or requirement as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the specification or requirement is reasonably necessary to meet the agency's needs. *Air USA, Inc.*, B-409236, Feb. 14, 2014, 2014 CPD ¶ 68 at 3. We examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. *AAR Airlift Grp., Inc.*, B-409770, July 29, 2014, 2014 CPD ¶ 231 at 3. Additionally, where matters of human life and safety are involved, our Office affords considerable deference to the judgements of the agency's technical experts. *Complete Parachute Solutions, Inc.*, B-415240, Dec. 15, 2017, 2018 CPD ¶ 2 at 4.

TSA represents that there are currently more than 2,200 legacy screening systems in use at more than 450 airports throughout the United States that have exceeded--or soon will exceed--their estimated useful life of 10 years and are in need of replacement. Memo. of Law, exh. A, Program Manager Decl., ¶ 7. The agency further explains that upgrading these legacy systems to the new CT systems contemplated under the RFPs is necessary to promote TSA's mission of ensuring safety and security. *See id.*, ¶ 6 ("Capability gaps in [transportation security equipment] manifest as a significant, persistent risk to passenger safety and commercial aircraft survivability arising from an in-flight adversary attack."); AR, Tab 11, Acq. Plan, at 892 ("Current property screening technologies have become increasingly limited in terms of its ability to reliably and efficiently detect new and evolving threats to civil aviation . . . TSA has a need to detect

a broader range of homemade explosives and greatly reduced threat mass, reduce false alarm rates, automate detection for explosive threats and prohibited items. . . .”). TSA represents that QPL qualification by January 4, 2022, is necessary to permit the agency to move forward with awards in the second quarter of fiscal year 2022 to avoid delaying the deployment of “critical CT capabilities to airports nationwide,” which would “continue to leave a vulnerability gap in checkpoint screening.” Memo. of Law, exh. A, Program Manager Decl., ¶ 35.

We note that Smiths does not specifically object to the requirement for QPL qualification, or seriously contest that the agency has a reasonable need to upgrade the current systems deployed for the promotion of safety and security. Indeed, the protester suggests that TSA could fulfill its imminent requirements under the protester’s existing contract under which it has previously delivered 300 CT systems (although such systems do not ostensibly meet the CPSS program’s enhanced requirements). *See* Comments at 3. Rather, the protester’s primary objection is based on its belief that the pool of available competitors will likely increase if the agency were to delay fulfilling its reasonable requirements.

The fact, however, that a requirement may be burdensome or even impossible for a particular firm to meet does not make it objectionable if the requirement properly reflects the agency’s needs. *Blue Origin Florida, LLC*, B-417839, Nov. 18, 2019, 2019 CPD ¶ 388 at 10. And, while a contracting agency must solicit proposals in a manner designed to achieve full and open competition, an agency does not have to delay satisfying its own needs in order to allow a particular offeror more time to develop the ability to meet the government’s requirements.[4] *Id.*; *see also* FAR 9.202(e) (“The

[4] Smiths also alleges that the agency has engaged in disparate treatment because other potential offerors are further along than Smiths in the QPL process. *See, e.g.*, Protest (B-420110) at 8. This argument, however, does not demonstrate that similarly situated offerors were treated unequally by the agency. Rather, Smiths merely complains that offerors ahead of it in the QPL queue have a competitive advantage due to being further along in the QPL process.

Agencies, however, are not required to equalize another competitor’s advantage where that advantage is not the result of preferred treatment or other unfair action by the government. *Blue Origin Florida, LLC*, *supra*, at 10; *AdaRose, Inc.*, B-299091.3, Mar. 28, 2008, 2008 CPD ¶ 62 at 4-5. To the extent that Smiths subsequently attempted to bolster its initial insufficient allegations with speculation of improper agency actions, such rank speculation is legally and factually insufficient. 4 C.F.R. §§ 21.1(c)(4), 21.5(f). Furthermore, even assuming the allegations were sufficient, they would nevertheless be premature because to date no firm has in fact successfully completed the QPL process. *See* Memo. of Law, exh. A, Program Manager Decl., ¶ 34 (stating that “the current QPL applicant qualification schedules *continue to indicate a high probability of at least one* and possibly multiple vendors successfully completing the qualification” processes by January 4, 2022) (emphasis added). We have recognized that no competitive prejudice can generally flow from alleged disparate

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contracting officer need not delay a proposed award in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.").

Again, Smiths's primary objection is not that the agency lacks the immediate need for the scanners, but rather, Smiths advocates for the agency to wait a bit longer to maximize the field of competition. As explained above, however, an agency need not forgo meeting current needs solely based on the prospect of enhanced future competition. We find the balance to be struck between meeting current needs versus waiting for a larger field of competition, to weigh heavily in favor of TSA's exercise of its discretion to move forward with its procurement given the agency's undisputed need to address current critical matters of public safety. Thus, on the current record, we find no basis to object to TSA's imposition of a QPL requirement or to the current deadline for QPL qualification that would allow TSA to move forward with the deployment of critical security capabilities at airports nationwide.

The protester also raises two collateral lines of potential objections to the agency's acquisition timeline and approach. For the reasons that follow, we find these alternative lines of objection premature at this time.

First, Smiths suggests that TSA's procurement actions may result in a *de facto* sole-source procurement if only one source is approved by the RFPs' QPL deadline. In this regard, we have recognized that where only one source is currently capable of furnishing the required goods or services, but other firms are developing capability to meet the agency's requirements, the agency should only procure its immediate needs using noncompetitive procedures. *See, e.g.*, *Raytheon Co.--Integrated Defense Sys.*, B-400610 *et al.*, Dec. 22, 2008, 2009 CPD ¶ 8 (denying protest where the agency did not extend sole-source contracts' periods of performance past the time at which competitive procurements would be feasible to meet the agency's needs); *Honeycomb Co. of Am.*, B-227070, Aug. 31, 1987, 87-2 CPD ¶ 209 (sustaining protest where the agency proposed to issue a sole-source contract with a 4-year period of performance where the urgency basis was not well supported, and the agency acknowledged it could take steps to improve competition). In other words, we have explained that in a situation where competition does not exist but will exist in the near future, the Competition in Contracting Act of 1984, 41 U.S.C. § 3301, requires agencies to purchase, in the noncompetitive environment, only what is necessary to satisfy needs that cannot await the anticipated competitive environment. *Ricoh Corp.*, B-234655,

(...continued)
treatment with respect to other unsuccessful offerors. *Environmental Chem. Corp.*, B-416166.3 *et al.*, June 12, 2019, 2019 CPD ¶ 217 at 6 n.5. In other words, unless and until Smiths can establish that (a) the agency engaged in unequal treatment, and (b) it has been prejudiced as a result of another firm becoming eligible for award as a result of such unequal treatment and Smiths was unable to achieve qualification in time to be eligible for award, our consideration of any such allegations would be premature.

July 5, 1989, 89-2 CPD ¶ 3 (sustaining protest where agency issued a *de facto* sole source award for four years of requirements where at least four firms were currently developing compliant products and anticipated being able to offer the products in less than 10 months).

At this point, however, it is premature for our Office to address any such arguments as it is impossible to know whether only a single source will be qualified by the January 4, 2022, deadline. In this regard, it is currently just as likely that TSA could have (a) no qualified sources by the deadline, such that TSA will need to extend the QPL deadline or cancel the procurement, *see* AR, Tab 1A, Base RFP, at 36; Tab 1B, Full-Size RFP, at 82, or (b) multiple qualified sources by the deadline, such that this line of argument is rendered irrelevant, *see Blue Origin Florida, LLC*, *supra*, at 11-12 (denying arguments relying on this line of decisions where the agency reasonably anticipated receiving at least four proposals from eligible offerors). Furthermore, even assuming that only one firm is qualified by the deadline and TSA elects to move forward with awarding a contract, our Office cannot reasonably assess, at this juncture, whether the agency is improperly circumventing competition requirements by acquiring goods in excess of its immediate needs where competition is imminent. In this regard, our Office cannot evaluate the reasonableness of such a contract action before the action is taken. Because resolution of such questions now would be purely hypothetical, we dismiss them as premature. *Quantico Arms & Tactical Supply, Inc.*, B-400391, Sept. 19, 2008, 2008 CPD ¶ 173 at 3 n.5.

Additionally, Smiths has argued that TSA has failed to discharge its obligations to promptly and fairly administer the QPL qualification process. When imposing a qualification requirement, a procuring agency is required to ensure that a potential offeror is provided, on request, a "prompt opportunity" to demonstrate its ability to meet the standards specified for qualification. 41 U.S.C. § 3311(b)(4); FAR 9.202(a)(2)(ii). A procuring agency must also ensure that the potential offeror seeking qualification is "promptly informed" whether qualification is attained, and, if not attained, is "promptly furnished" specific information about why qualification was not attained. 41 U.S.C. § 3311(b)(6); FAR 9.202(a)(4). Our consideration of whether an agency has reasonably discharged its obligations to provide prompt qualification review is necessarily fact-intensive. *Compare Rotair Indus., Inc.*, B-224332 *et al.*, Mar. 3, 1987, 87-1 CPD ¶ 238 (sustaining protest where, despite the agency's reasonable flight safety concerns and the protester's failure to submit complete technical data in all cases, the agency failed to reasonably explain why the source approval process remained pending after 22 months) *and Pacific Sky Supply, Inc.*, B-225513, Mar. 30, 1987, 87-1 CPD ¶ 358 (same, where agency delayed referring product to user agencies for evaluation for approximately 4 months) *with Barnes Aerospace Grp.*, B-298864, B-298864.2, Dec. 26, 2006, 2006 CPD ¶ 204 (denying protest allegation that agency unduly delayed review and approval of the protester's source approval request where, notwithstanding a four month delay in reviewing the final package, the record demonstrated that the agency's cognizant approving engineering was delayed due to other higher-priority assignments) *and Mercer Products & Mfg. Co., Inc.*, B-230223, June 13, 1988, 88-1 CPD ¶ 560 (same, where protester failed to establish that the agency's proposed 230-day period for

approving alternative items was unreasonable, and the protester was a primary cause of any resulting delays by failing to submit adequate supporting documentation).

As with its suggestion that TSA may potentially make a *de facto* sole-source award, Smiths's challenges to the agency's administration of the QPL process are similarly premature. We recognize that the current forecasted QPL schedule for Smiths's products anticipates qualification in [DELETED] and [DELETED] 2022, which would occur after the RFPs' January 4, 2022, QPL deadline. *See* AR, Tab 12, Smiths's Aug. 24 Letter to Contracting Officer, at 936-37. Despite this, however, we nevertheless find the protest premature. In this regard, as addressed above, TSA recognizes that no offeror may qualify by the January 4 deadline, and, thus, the agency might be forced to either extend the QPL deadline or cancel the procurements. Alternatively, it is possible that TSA, in the interests of promoting competition and to avoid potential protracted protest litigation from disappointed offerors, expedites its review and approves Smiths's products by the January 4 (or an extended) deadline. At this point, a decision by our Office as to the reasonableness of the agency's QPL consideration of Smiths's products, while that process remains fluid and ongoing, is premature.

The protests are denied in part and dismissed in part.

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