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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Future Solutions, Inc.

File: B-293194

Date: February 11, 2004

Vanessa Navarro, for the protester.

Jonathan S. Baker, Esq., Environmental Protection Agency; Thedlus L. Thompson, Esq., General Services Administration; John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that procurement should have been set aside for small businesses is denied, where the agency reasonably determined that the items to be procured were available under the Federal Supply Schedule (FSS); agencies need not consider small business programs when purchasing from the FSS.
2. Protest that agency unreasonably and unfairly evaluated protester's response to "sources sought" notice to small business Federal Supply Schedule vendors to ascertain their capability of meeting the agency's requirements is denied, where the protester does not rebut the agency's reasons for determining that the protester lacked the requisite capability, but argues that it was treated disparately from other vendors who were solicited to submit quotations for the services; the protester was on a footing completely different from the vendors whose quotations were solicited, and its response did not have to be considered in the same way as the other vendors' quotations because it was solicited for a different purpose.
3. General Accounting Office will not consider merits of protest that agency improperly bundled its office supply requirements in violation of the Small Business Act where the protester has not demonstrated a reasonable possibility that it was prejudiced by the bundling.

DECISION

Future Solutions, Inc. (FSI) protests the award by the Environmental Protection Agency (EPA) of a blanket purchase agreement (BPA) for office supplies to

Corporate Express, Inc., pursuant to request for quotations (RFQ) No. DC-03-00233. FSI, a small business concern, argues that the requirements should be set aside for small business concerns and that it was not given an equitable opportunity to compete for this requirement. FSI also contends that the consolidation of the agency's office supply requirements into the BPA constitutes improper bundling.

We deny the protest.

The RFQ contemplated award of a BPA for the procurement of office supplies, with an emphasis on environmentally preferable products (EPP)¹ and products of organizations for the blind or other severely handicapped as authorized by the Javits-Wagner-O'Day Act, 41 U.S.C. § 46-48c (2000). These products will be provided to approximately 2,000 purchase cardholders, within approximately 70 EPA facilities, located in the contiguous United States. The vendor selected for award of the BPA was required to be a current holder of a contract under the General Services Administration's (GSA) Federal Supply Schedule (FSS) 75 IIA, Office Supplies Products and Equipment. The items covered by the RFQ included all general office supplies offered under Special Item Number 75 200. The base term of the BPA was 1 year, with four 1-year options, and a maximum 15 months of award-term incentive options.

In January 2003, the EPA obtained and evaluated the quotations and oral presentations of four large business FSS 75 IIA contractors. On May 22, the agency issued a "sources sought" notice seeking information on the capability of small business FSS 75 IIA contractors for consideration for the BPA. Capability statements were limited to 5 pages, and were to address the BPA's statement of work and 10 other specific capabilities. EPA received capability statements from nine small business FSS contractors, including FSI. Based on her review, the contracting officer determined that none of the small business respondents would be able to perform the BPA's requirements. Although the EPA's Office of Small and Disadvantaged Business Utilization (OSDBU) concurred with this determination, the OSDBU requested that the contracting officer participate in a teleconference with two of the small business respondents (not including FSI), so that the contracting officer could obtain additional information that might demonstrate that these small business FSS vendors could meet the requirements. After the teleconference, the contracting officer again concluded that no small business FSS contractors could meet the RFQ requirements. The contracting officer then reevaluated the quotations

¹ EPP is defined in Executive Order 13101 as "products or services that have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose."

from the four large business FSS contractors and awarded the BPA to Corporate Express, Inc. on October 23.²

FSI argues that the agency's purchase from the FSS should have been set aside for small business concerns and that EPA's failure to do so violates Federal Acquisition Regulation (FAR) § 19.502-2(b), which generally requires an agency to set aside acquisitions for small businesses where there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns.

However, no statute or regulation required the agency to set aside this requirement for small businesses in lieu of purchasing from FSS vendors. Indeed, FAR § 8.404(a)(1) as it read when the solicitation for this BPA was issued, provided in pertinent part:

Parts 13 [simplified acquisition procedures] and 19 [small business programs] do not apply to orders placed against [FSS], except for [a provision not relevant here]. Orders placed against a Multiple Award Schedule . . . using the procedures in this subpart are considered to be issued using full and open competition

(i) Ordering offices need not seek further competition, synopsise the requirement, make a separate determination of fair and reasonable pricing, or consider small business programs.³

This provision obviates the need for agencies to apply small business set-aside procedures, where, as here, they are purchasing from the FSS. Information Ventures, Inc., B-291952, May 14, 2003, 2003 CPD ¶ 101 at 2.

FSI also argues that its response to the agency's "sources sought" notice was not reasonably evaluated, that the 5-page limit on its response was unreasonable, and

² On October 20, the Small Business Administration (SBA) requested that the EPA noncompetitively award the requirement to FSI, a certified 8(a) concern, under SBA's 8(a) program. In a letter dated November 4, the contracting officer replied to the SBA that the requirement had already been awarded and that it was not otherwise suitable for a noncompetitive 8(a) award.

³ This FAR provision was amended effective October 20, 2003 to specifically recognize that the requirements of FAR § 19.202-1(e)(1)(iii) pertaining to bundling, which implemented the Small Business Act, 15 U.S.C. § 631(j)(3) (2000), were applicable to FSS orders under FAR subpart 8.4. For the reasons stated below, we do not decide whether the bundling requirements implementing the Small Business Act were applicable to this acquisition.

that its response was evaluated in a prejudicially disparate manner inasmuch as the large business vendors were given the opportunity to make oral presentations and have discussions.

The FSS program provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. FAR § 8.401(a). Section 259(b)(3) (2000) of title 41 of the United States Code provides that the procedures established for the GSA's multiple award schedule program (that is, the FSS program) satisfy the general requirement in 41 U.S.C. § 253(a)(1) for use of competitive procedures if participation in the program has been open to all responsible sources, and orders and contracts under the FSS procedures result in the lowest overall cost alternative to meet the needs of the government. Use of the FSS in lieu of conducting a full and open competition is premised on following the FAR Subpart 8.4 procedures to reach a determination regarding what the agency's needs are and which FSS vendor meets those needs at the lowest overall cost. Savantage Financial Servs., Inc., B-292046, B-292046.2, June 11, 2003, 2003 CPD ¶ 113 at 6; Delta Int'l, Inc., B-284364.2, May 11, 2000, 2000 CPD ¶ 78 at 4.

Here, FSI was on a footing completely different from the four large businesses whose quotations were solicited. This was so because EPA determined that the large businesses had the capability of performing the BPA requirements whereas EPA had doubts whether any small business could perform these requirements. Thus, EPA, in accordance with FAR § 8.404(b)(2), conducted a competition among the four solicited large businesses to determine which one represented the best value.⁴ Because the agency solicited at least three qualified vendors, there was no legal requirement for EPA to issue the "sources sought" notice to the small business vendors to determine whether any had the capability of satisfying the BPA requirements. Without endorsing the course that EPA took, we note that the agency was not considering whether any of the small business responses represented the best value, but only determining whether any of the small businesses had the capability that would justify their being solicited for a quotation. Accordingly, we do not believe that EPA was obligated to consider FSI's response to the "sources sought" notice in the same manner that it evaluated the large business vendors' responses to the RFQ.

Nevertheless, having requested that small businesses respond to the "sources sought" notice, EPA was required to evaluate the small business responses in a reasonable manner. Based on our review, we find that the agency did so, and it had a reasonable basis for determining that FSI did not show that it had the capability of satisfying the BPA requirements. In this regard, after noting that FSI's response was

⁴ We understand the BPA is for orders below the applicable FSS maximum ordering threshold.

“difficult to evaluate” because it was not in accordance with the 10 capability areas listed the “sources sought” notice, EPA found that either FSI failed to address or did not sufficiently address several of these areas. For example, while FSI’s response to the “sources sought” notice stated that a recycling program for the toner cartridges and batteries “will be established,” the agency noted that FSI’s response did not include any mention of its track record with similar recycling programs or any plans detailing how its recycling plan would work. In addition, even though FSI stated that it has thousands of “green” products available for purchase, the agency noted that FSI did not mention how many of the products available on its on-line ordering system met the EPA’s EPP criteria. EPA also noted that although FSI touted its knowledge and environmental capabilities, it “did not have correct information on EPA’s paper requirements.” EPA also found that FSI’s “on-line system is very far from [EPA’s] requirements.” Finally, FSI’s response failed to mention a commitment by the firm to the development and utilization of “green” delivery vehicles and fleet maintenance programs, a training module, or the firm’s implementation of Environmental Management Systems plans. Agency Report, Tab 6, Review of Small Business Submission in Response to Sources Sought, at 2.

Rather than specifically rebutting the agency’s comments, FSI primarily responds that it was treated disparately from the solicited large business vendors, who were not subject to the same page limitation and were accorded the opportunity to make oral presentations and have discussions, and that the noted deficiencies in FSI’s response were due to the 5-page limitation. However, as indicated above, the agency did not have to treat FSI in the same manner as it did the vendors that it had solicited for quotations because of the more limited purpose of the “sources sought” notice to ascertain if any small business vendors could possibly satisfy the BPA requirements and given that EPA was not required to issue this notice. Moreover, inasmuch as FSI does not specifically outline what additional information it would have included in its response, had it been given additional pages in which to respond, we cannot conclude that FSI was prejudiced by the page limitation. Based on our review, FSI has not shown that the agency’s determination that it lacks the capability to perform the work under the BPA was unreasonable.

FSI finally contends that the agency’s bundling of its office supplies requirements into the BPA violates provisions of the Small Business Act, 15 U.S.C. § 631(j)(3), which requires agencies to avoid unnecessary and unjustified bundling of contract requirements that preclude small business participation in procurements as prime contractors.

We will not consider this aspect of FSI’s protest because there is no showing that FSI was prejudiced by the bundling of the requirements. Competitive prejudice is an essential element of every viable protest and where no prejudice is evident from the record, we will not sustain a protest. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Lithos Restoration, Ltd., B 247003.2, Apr. 22, 1992, 92-1 CPD ¶ 379 at 5. Where the record does not demonstrate that, but for the agency’s actions, the protester would have had a reasonable chance of receiving the award, our Office will

not sustain a protest, even if a deficiency in the protest is found. MCS Mgmt., Inc., B-285813, B-285882, Oct. 11, 2000, 2000 CPD ¶ 187 at 9.

In this instance, while the protester argues that the bundling would adversely affect small business firms, many of whom are currently performing work included in the bundled procurement, the protester has failed to demonstrate that the consolidation significantly inhibits or precludes its ability to compete. In fact, FSI claimed that it can perform the entirety of the bundled requirements. In this regard, FSI stated that it responded to the "sources sought" notice "with full confidence that we could perform all aspects of the contract and more" and that "FSI is very qualified for this BPA," and the record shows that FSI, through SBA, attempted to noncompetitively obtain this work under the 8(a) program. Protest at 8; Protester's Comments at 8. We conclude, therefore, that the protester has not made a showing of competitive prejudice as a result of the bundling of the agency's office supply requirements.

The protest is denied.

Anthony H. Gamboa
General Counsel