



Decision

Matter of: AeroSage LLC; SageCare, Inc.

File: B-416279

Date: July 16, 2018

David M. Snyder for the protesters.
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DIGEST

1. Protest alleging that agency improperly bundled requirements is dismissed where the protesters have not shown that they were precluded from competing from the requirements or that the requirements are unsuitable for award to small businesses.
 2. Protest challenging the agency's decision not to set aside the procurement for small businesses is dismissed where the protesters do not demonstrate that they are interested parties to challenge the agency's decision.
 3. Protest challenging various terms of the solicitation as overly restrictive and/or unreasonable is dismissed where the protesters do not explain how the challenged terms prejudice their ability to submit a quotation or otherwise restrict competition.
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DECISION

AeroSage LLC, of Tampa, Florida, and SageCare, Inc., also of Tampa, Florida, each a service-disabled veteran-owned small business (SDVOSB), jointly protest the terms of request for quotations (RFQ) No. SPE605-18-Q-0201, issued by the Defense Logistics Agency (DLA) Energy, for the delivery of fuel products to four locations in New York. The protesters raise numerous challenges to the terms of the solicitation.

We dismiss the protest.

BACKGROUND

DLA issued the RFQ on April 9, 2018. The solicitation seeks quotations for the delivery of various fuel products to four locations in New York. RFQ at 5. As amended, the RFQ includes seven contract line item numbers (CLINs), each of which is for a specific fuel product to be delivered to a specific location. Id. at 5; RFQ, Amend. 001, at 3. The agency is soliciting the CLINs using full and open competition and assigned North American Industry Classification System (NAICS) code 324110, Petroleum Refineries, to the RFQ. RFQ at 3. The solicitation anticipates the award of multiple fixed-price indefinite-delivery requirements contracts with economic price adjustment with an ordering period beginning with contract award and ending on March 31, 2021.¹ Id. at 3, 84.

Vendors are permitted to submit quotations on a by-CLIN basis and the RFQ provides that each CLIN “will be evaluated and awarded independently from all other line items.” Id. at 88, 3 (“All line items included herein will be awarded to the Lowest Price Technically Acceptable quote on a line-by-line basis.”); Agency Resp. to GAO Req. for Clarification (hereinafter “Agency Resp. to GAO”), June 1, 2018, at 1 (“[V]endors could submit quotations on a CLIN-by-CLIN basis.”).²

The deadline for submission of quotations was 3:00 p.m. Eastern Time on April 20.³ RFQ at 1. On April 20, prior to the time set for receipt of quotations, AeroSage and SageCare, which have the same owner, filed this joint protest challenging various terms of the solicitation. On May 2, the agency requested dismissal of the protest. On May 5, the protesters filed a response objecting to dismissal of the protest.

DISCUSSION

The protesters raise numerous challenges to the terms of the solicitation, including allegations that DLA improperly bundled requirements, failed to set aside the solicitation for small business concerns, and included a variety of overly restrictive solicitation terms. For the reasons that follow, we dismiss the protest.

¹ Throughout the protest, the protesters mistakenly refer to the intended award as a blanket purchase agreement (BPA). See e.g., Protest at 1. There is no evidence in the record that the agency intends to issue a BPA.

² The record reflects that several vendors submitted quotations for fewer than seven CLINs. Agency Resp. to GAO, June 1, 2018, at 1, 2. Both AeroSage and SageCare submitted quotations for all seven CLINs. Id. at 3.

³ On April 20, DLA extended the deadline for submission of quotations to April 25. RFQ, Amend. 0002, at 1.

Bundling

The protesters argue that DLA unlawfully bundled requirements. Protest at 2. Specifically, the protesters assert that the RFQ combines requirements that have been or are being performed through “separate small” contracts. Id. We dismiss this ground for failure to state a valid basis of protest.

The Competition in Contracting Act (CICA) generally requires that solicitations permit full and open competition and contain restrictive provisions only to the extent necessary to satisfy the procuring agency’s needs. 10 U.S.C. § 2305(a)(1). An allegation of improper bundling under CICA reflects a claim that a contract combines separate requirements beyond what is necessary to meet the agency’s needs, thereby limiting the competition by excluding offerors that can only perform a portion of the requirement. See e.g., Manus Medical LLC, B-412331, Jan. 21, 2016, 2016 CPD ¶ 49 at 5; Major Contracting Servs., Inc., B-406980, Oct. 10, 2012, 2012 CPD ¶ 228 at 3-4.

Similarly, the Small Business Act provides that “each Federal agency, to the maximum extent practicable, shall . . . avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors.” 15 U.S.C. § 631(j)(3). The Small Business Act defines bundling of contract requirements as “consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern[.]” 15 U.S.C. § 632(o)(2). See also Federal Acquisition Regulation (FAR) § 2.101.

Here, the consolidation of requirements in the solicitation does not constitute bundling because the protesters, who are small business concerns, have not been precluded from competing. To the contrary, both protesters submitted quotations responding to the solicitation requirements, asserting that they are capable of performing all seven CLINs. Where, as here, small businesses have not been precluded from competing, we conclude the protest fails to state a valid basis of protest. Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f); Navarre Corp., B-414505.4, Jan. 4, 2018, 2018 CPD ¶ 15 at 4 n.3 (GAO will not consider bundling allegations where small business protesters represent that they are capable of performing the allegedly bundled requirements); see also, Manus Medical LLC, supra, at 5-6. Accordingly, this protest ground is dismissed.⁴

⁴ Additionally, given that the solicitation permits vendors to submit quotations on a by-CLIN basis and permits the agency to award contracts on a by-CLIN basis, the protesters further fail to establish that any requirements are bundled. AeroSage, LLC; SageCare, Inc., B-415267 et al., Dec. 13, 2017, 2017 CPD ¶ 383 at 3 n.4 (consolidation of requirements does not constitute bundling where an agency is permitted to award contracts on a by-CLIN basis).

Set-Aside Decision

The protesters also challenge the agency's decision not to set aside the procurement for small business concerns. Protest at 2. Specifically, the protesters contend that the Small Business Act requires acquisitions below \$150,000 to be reserved for small businesses. Protest at 2. The protesters further contend that any "individual purchase orders" issued under the resulting contract would not exceed \$150,000 "due to tank sizes." Id. Accordingly, the protesters argue that the procurement should be set aside for small business concerns. We dismiss this ground because the protesters are not interested parties to challenge the agency's set-aside decision.

Pursuant to the bid protest provisions of CICA, 31 U.S.C. §§ 3551-3556, only an "interested party" may protest a federal procurement. That is, a protester must be 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. 31 U.S.C. § 3551(2)(A); 4 C.F.R. §§ 21.0(a)(1), 21.1(a). Our regulations require a protester to affirmatively demonstrate that it is an interested party; a protester's failure to meet its obligation requires dismissal of the protest. 4 C.F.R. § 21.1(c)(5), 21.1(i); InSpace 21 LLC, B-410852, B-410852.3, Dec. 8, 2014, 2014 CPD ¶ 363 at 4. Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. AeroSage, LLC, B-414640, B-414640.3, July 27, 2017, 2017 CPD ¶ 233 at 5-6.

Here, DLA contends that, if it were to set aside the procurement for small business concerns, the nonmanufacturer rule would apply. Agency Req. for Dismissal, May 2, 2018, at 3. Under this rule, as it is applied to the NAICS code assigned here, prospective firms that are not refineries, such as AeroSage and SageCare, must offer the product of a small business refinery. 13 C.F.R. § 121.406(b)(1)(iv); AeroSage, LLC, B-415267 et al., supra, at 4; AeroSage, LLC, B-414640, B-414640.3, supra, at 6. See AeroSage, LLC, SBA No. SIZ-5820, Mar. 23, 2017, 2017 SBA LEXIS 29. Because neither protester represents that it would offer the product of a small business refinery,⁵ DLA argues that the protesters are not interested parties to challenge the agency's set-aside decision.

In response, the protesters argue that the nonmanufacturer rule does not apply to this procurement because "individual purchase orders" are below \$150,000. See generally Protest at 2; Protesters' Resp. to Agency Req. to Dismiss, May 5, 2018, at 1. In this respect, pursuant to 13 C.F.R. § 121.406(d), the nonmanufacturer rule does not apply to "small business set-aside acquisitions with an estimated value between \$3,500 and \$150,000."⁶

⁵ The protesters allege that no such refineries exist. Protest at 2.

⁶ On March 26, 2018, this provision of the regulations was amended to change the dollar thresholds to reference the micro-purchase and the simplified acquisition

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There is some dispute between the parties regarding how the estimated value of the acquisition should be determined. The protesters contend that the relevant value is the estimated value of the individual delivery orders. Protest at 2. Alternatively, the protesters argue that, once the CLINs are “unbundled,” the relevant value is the estimated value of each individual CLIN. Protesters’ Resp. to Agency Req. for Dismissal, May 5, 2018, at 3. DLA contends that the relevant value for purposes of determining whether the nonmanufacturer rule applies is the estimated value of the acquisition as a whole, not the individual CLINs or delivery orders. Agency Resp. to GAO, June 1, 2018. To support its position, DLA relies upon a decision from the Small Business Administration’s (SBA) Office of Hearings and Appeals (OHA), which interpreted a prior version of 13 C.F.R. § 121.406(d) and concluded that the dollar thresholds listed in the regulation apply “to procurements as a whole, not individual orders or contracts.” Agency Resp. to GAO, June 1, 2018, at 2 (citing AeroSage, LLC, SBA No. SIZ-5820, Mar. 23, 2017, 2017 SBA LEXIS 29 at *17).

Based upon the cited SBA decision, we reject the protesters’ contention that the relevant value is the estimated value of individual delivery orders. What is less clear from the SBA decision is whether, under the terms of the solicitation here, where vendors are permitted to submit quotations on a by-CLIN basis and the agency is permitted to award contracts on a by-CLIN basis, the relevant value is the estimated value of the procurement as a whole, i.e., the total estimated value of all seven CLINs, or the estimated value of each CLIN. In any event, we need not resolve this issue because, as the agency points out, both protesters proposed prices for the individual CLINs and for the procurement as a whole that exceed \$150,000.⁷ Agency Resp. to GAO, June 1, 2018, at 3. Accordingly, we conclude that the exception to the nonmanufacturing rule set forth in 13 C.F.R. § 121.406(d) does not apply.

Turning back to the basis for the agency’s request for dismissal, i.e., that the protesters are not interested parties to challenge the agency’s set-aside decision, we note that our Office does not review whether a firm can meet the nonmanufacturer rule, as such a determination is reserved for the SBA. 4 C.F.R. § 21.5(b)(1); AeroSage, LLC, B-415267 et al., supra, at 4. We will review, however, whether a protester is an interested party to challenge an agency’s decision not to set aside a procurement where the protester concedes that it cannot meet the nonmanufacturer rule or otherwise fails to affirmatively state that it will comply with that rule. Id.

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thresholds. 83 Fed. Reg. 12849, 12850 (Mar. 26, 2018). The amended regulation was not effective until May 25, 2018, see id. at 12849, and, thus, is inapplicable to this procurement.

⁷ DLA did not produce its independent government cost estimate, but rather, relied upon the protesters’ quotations to support its arguments.

In light of the protesters' failure to represent that they could perform the requirements of the resulting contracts absent a waiver of the nonmanufacturer rule, we conclude that AeroSage and SageCare are not interested parties to challenge DLA's decision not to set aside the procurement for small businesses or SDVOSBs. In fact, in prior protests brought by the protesters, we have reached the same conclusion under the same or similar facts. See e.g., id. at 4; AeroSage, LLC, B-414640, B-414640.3, supra, at 6. Accordingly, we dismiss this ground because the protesters are not interested parties.⁸

Requirement to List Small Business Refineries

Next, the protesters argue that the RFQ improperly requires vendors to identify the refineries from which they intend to source fuel. Protest at 2. In this respect, the RFQ provides that a vendor "shall provide a list of the names and addresses of the small business refineries where it intends to source all fuel types being solicited, if applicable." RFQ at 4. The protesters allege that this requirement is "impossible" because "[t]here are no small refineries, domestic or foreign[.]" Protest at 2.

We dismiss this ground as factually and legally insufficient. The RFQ does not require vendors to source fuel from small business refineries to be eligible for award. Thus, the protesters cannot--and do not--establish how the challenged solicitation term prejudices their ability to submit a quotation or otherwise restricts competition. In fact, as noted above, both protesters submitted quotations. For this reason, the protest fails to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

Inaccurate Annual Estimated Quantities

The protesters further allege that the total estimated quantities of fuel products listed in the RFQ are grossly inaccurate and that, as a result, the government has failed to comply with "the annual estimate, minimum quantities, and requirement estimated direction" in 41 C.F.R. § 101-26.602. Protest at 2. See also, Protesters' Filing, May 31, 2018, at 2. In this regard, the protesters allege that the "assisted acquisition procurement of gasoline and fuel oils is improper[.]" Protest at 2.

As relevant here, the cited regulation provides instructions to requiring activities regarding the submission of fuel requirements to DLA.⁹ 41 C.F.R. §§ 101-26.602,

⁸ The protesters also contend that the procurement should be set aside for SDVOSBs in order "to correct the sustained inability" of DLA to "meet SBA minimum SDVOSB 3% goal requirements." Protest at 2. We dismiss this ground for failure to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f). An agency's alleged failure to meet its set-aside goals does not dictate that any particular procurement should be set aside.

⁹ Although the regulation references the Defense Fuel Supply Center, DLA explains that this entity is a predecessor to DLA Energy. Agency Req. for Dismissal, May 2, 2018, at 4 n.4.

101-26.602-3. In particular, subsection 101-26.602-3(a)(1) states that estimated annual fuel requirements that are less than 10,000 gallons shall not be submitted to DLA unless the requiring activity does not have the authority or capability to procure locally. See Bluehorse, B-412494, B-412494.2, Feb. 26, 2016, 2016 CPD ¶ 64 at 5.

Other than to allege that the annual estimated quantities are “false,” the protesters do not set forth a clear statement of how exactly DLA, or the requiring activities, have violated this provision of the regulations. See generally, Protest at 2. Even assuming that the protesters are alleging that this requirement should not have been submitted to DLA, the protesters do not explain how DLA’s conduct of the procurement prejudices their ability to submit quotations or otherwise restricts competition. Accordingly, we dismiss this ground for failure to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

Remaining Protest Grounds

The remainder of the protest challenges various solicitation requirements as overly restrictive or unreasonable. In particular, the protesters object to the requirement to provide certificates of analysis,¹⁰ the requirement to provide copies of supplier and transportation agreements,¹¹ and the sufficiency of the time provided to vendors to submit quotations.¹² Protest at 3. The protesters request that these requirements be removed from the RFQ and that vendors be provided “additional reasonable time” to submit quotations. Id. at 4.

Subsequent to the filing of the protest, the agency granted the relief requested, which renders these protest grounds academic. Point Blank Enterprises, Inc. d/b/a Protective Products Enterprises, B-409940.3, Nov. 26, 2014, 2014 CPD ¶ 357 at 4. We do not consider academic protests because to do so would serve no useful public policy purpose. General Dynamics Mission Sys., Inc., B-414587, B-414587.2, May 11, 2017, 2017 CPD ¶ 142 at 1.

Specifically, on April 20, DLA issued amendment 0002 to the RFQ, which removed the requirements to submit certificates of analysis and supplier and transportation agreements. Amendment 0002 at 1. Additionally, through amendment 0002, DLA extended the deadline for submission of quotations from April 20 until April 25. Id.

¹⁰ The RFQ provided that “[o]fferors shall provide copies of certificates of analysis for all fuel types being solicited.” RFQ at 4.

¹¹ The RFQ provided that “[o]fferors shall provide copies of their supplier and transportation agreements with the offer for all fuel types being solicited.” RFQ at 4.

¹² As set forth above, the RFQ was issued on April 9 and the deadline for submission of quotations was initially April 20.

Both protesters submitted quotations. Agency Req. for Dismissal, May 2, 2018, at 4 n.5. Because the protesters' remaining grounds have been rendered academic, they are dismissed.

The protest is dismissed.

Thomas H. Armstrong
General Counsel