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Decision

Matter of: Aquila Fitness Consulting Systems, Ltd.

File: B-423173

Date: February 21, 2025

Alexander J. Brittin, Esq., Brittin Law Group, P.L.L.C., for the protester.
Jonathan E. O’Connell, Esq., Department of Justice, for the agency.
Janis R. Millete, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency’s decision to set aside a Federal Supply Schedule (FSS) procurement for women-owned small businesses is dismissed for failure to state a valid basis of protest because the protester has not alleged a violation of applicable law or regulation.

DECISION

Aquila Fitness Consulting Systems, Ltd. (Aquila), a small business of Miami, Florida, protests the terms of request for quotations (RFQ) No. M-24-A46-R-00017, issued by the Department of Justice, U.S. Marshals Service (USMS) for physical readiness and wellness program services at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia. The protester argues that the agency’s decision to set aside the solicitation, issued under the General Services Administration’s (GSA) Federal Supply Schedule (FSS), for women-owned small business (WOSB) concerns was unreasonable.

We dismiss the protest.

BACKGROUND

USMS issued the solicitation on Oct. 10, 2024, under the FSS provisions of Federal Acquisition Regulation (FAR) subpart 8.4, seeking quotations to provide physical

readiness services. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 1, 7.¹

Prior to solicitation issuance, the agency issued a sources sought notice that asked interested vendors to submit their business size and if applicable, "verified socioeconomic classifications," commercial and government entity code², potential government schedules, *i.e.*, GSA schedules, and a "comprehensive capabilities statement" to demonstrate how the requirements could be met.³ Agency Report (AR), Tab 2, Sources Sought Notice at 2; see AR, Tab 1, Combined Acquisition Plan/Market Research Form (Market Research) at 3-4. The agency listed North American Industry Classification System (NAICS) code 611699 on the sources sought notice, designated as "All Other Miscellaneous Schools and Instruction" and the notice indicated that the acquisition strategy would be "based (in part) on the responses" to the sources sought notice.⁴ AR, Tab 2, Sources Sought Notice at 1-2; COS/MOL at 3.

The sources sought notice described the required services as follows:

The USMS, Training Division (TD) requires contractor support in the development and on-site application/instruction of a physical readiness and wellness program. This is an on[]going need for the USMS and currently consist[s] of two (2) Injury Risk Reduction and Recovery Specialist[s] and one (1) Certified Athletic Trainer. These positions are onsite at the Federal Law Enforcement Training Center (FLETC) in Glynco, GA.

AR, Tab 2, Sources Sought Notice at 2.

Five of the six vendors that responded to the sources sought notice were small businesses with several that identified as socioeconomic concerns, *i.e.*, service-

¹ Unless otherwise noted, citations to the record reference the Adobe PDF document page numbers.

² Our Office has explained that commercial and government entity codes are assigned to discrete business entities for a variety of purposes and they dispositively establish the identity of a legal entity for contractual purposes. *DynCorp Int'l, LLC*, B-417611.7, *et al.*, Sept. 24, 2020, 2020 CPD ¶ 342 at 4 n.8.

³ USMS issued the sources sought notice on SAM.gov, which is the current governmentwide point of entry website, "the single point where Government business opportunities greater than \$ 25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public." FAR 2.101.

⁴ NAICS codes are used by the federal government to identify and classify specific categories of business by their economic activity. See FAR 19.102; see *EDOWSB Transformer Services, LLC*, B-416683, Oct. 15, 2018, 2018 CPD ¶ 357 at 2 n.3.

disabled veteran-owned, Historically Underutilized Business Zone, economically-disadvantaged women-owned, and SBA 8(a) small business development. AR, Tab 1, Market Research at 4. Moreover, several firms disclosed that they held GSA FSS contracts that may meet agency requirements. COS/MOL at 3-4. Based on these responses, the agency used GSA's "Market Research as a Service" (MRAS)⁵ to post a draft performance work statement (PWS) to FSS contract holders. The agency also revised the NAICS code to 812990 for "Personal Trainer and Aerobic/Cardio Class Leader/Instructor" services, because the contracting officer determined that this NAICS code "was more specific" to the agency's needs. COS/MOL at 4 n.4; AR, Tab 1, Market Research at 4-5. The MRAS notice asked interested vendors to respond to questions asking whether they could meet all performance objectives in the draft PWS and if the vendor had similar experience providing "on-site full service Health and Wellness programs to include: strength coaching, stretching exercises, injury prevention. . . ." COS/MOL at 4-5.

After receipt of the MRAS market research report, the contracting officer considered the five vendor responses. AR, Tab 1, Market Research at 5-6. Relevant here, of the five responses, two concerns identified as women-owned small businesses, two as economically-disadvantaged women-owned small businesses, and one as a women-owned business. AR, Tab 4, MRAS Market Research at 2. The contracting officer determined that, while it had initially planned to set aside the procurement for service-disabled veteran-owned business concerns, it was reasonable to expect at least two quotations from WOSBs at a reasonable price, under the 812990 NAICS code. AR, Tab 1, Market Research at 5-6; see AR, Tab 4, MRAS Market Research. Therefore, the contracting officer determined, with the concurrence of the agency's small business specialist, that while the small business requirements under FAR part 19 were not mandatory under a FAR subpart 8.4 FSS procurement, it would use its discretionary authority to set aside the procurement for WOSBs. *Id.* at 6; see AR, Tab 7, Small Business Review Form.

Pursuant to FAR 8.405-2(c)(3)(iii)(B), USMS issued the solicitation as a WOSB set-aside directly to four vendors. COS/MOL at 7. The agency explains that it provided the solicitation to these four vendors "consistent with the market research to reasonabl[y] ensure at least three . . . quotes are received from contractors who can fulfill this requirement." AR, Tab 1, Market Research at 6. Two firms, [DELETED] and [DELETED], submitted quotations in response. COS/MOL at 7. On Nov. 14, 2024, Aquila timely filed the current protest challenging the solicitation.⁶

⁵ MRAS provides GSA schedule marketplace data that includes responses from interested vendors to assist agencies with its acquisition strategy. See <https://www.gsa.gov/about-us/organization/federal-acquisition-service/customer-and-stakeholder-engagement/market-research-as-a-service> (last visited January 30, 2025).

⁶ In its initial protest, Aquila argued that the agency's actions demonstrated "potential favoritism or undue influence by the incumbent contractor" and preferential treatment in favor of an alleged incumbent contractor, Unico. We dismissed these arguments on the
(continued...)

DISCUSSION

Aquila protests the agency's decision to set aside the procurement for WOSB concerns, challenging the agency's market research as inadequate under FAR part 19 procedures. Protest at 2-4; Comments at 2, 6. In this regard, Aquila alleges that the agency's market research was insufficient because it failed to determine whether the WOSB vendors were capable of performing the "FLETC requirements" in violation of FAR section 19.1505(a)(1). Comments at 2, 4-9. The protester also argues that the agency did not determine that the vendors could perform at a fair and reasonable price contrary to FAR section 19.1505(c)(2). *Id.* at 2, 4-10.

USMS maintains that it conducted adequate market research and reasonably set aside the procurement to WOSB concerns. COS/MOL at 8. In this regard, USMS contends that its decision to set aside is within its discretion and is a matter of business judgment. *Id.* For the reasons discussed below, we conclude that Aquila fails to state a valid basis of protest and dismiss the protest on that basis.

As noted, the agency conducted this procurement as an FSS acquisition under FAR subpart 8.4. The FAR provides that although the preference programs of FAR part 19, small business programs, are not applicable to FSS procurements (except under circumstances not relevant here), an agency may, in its discretion, set aside orders for any of the small business concerns identified in FAR part 19. FAR 8.405-5(a)(1); See *American Relocation Connections, LLC*, B-416035, May 18, 2018, 2018 CPD ¶ 174 at 6; see also *Financial & Realty Services, LLC*, B-422858, Nov. 25, 2024, 2024 CPD ¶ 289 at 5. Accordingly, our Office has previously concluded that FAR section 8.405-5 does not require an agency to use the procedures under FAR part 19 when choosing to set aside a procurement for a particular type of small business concerns. *Financial & Realty Services, LLC, supra*; see also *Swank Healthcare*, B-407367, Dec. 12, 2012, 2013 CPD ¶ 7 at 3 n.3 (dismissing protester's complaint that the agency failed to comply with FAR Part 19 requirements when setting aside an FSS contract for failure to state a valid basis for protest because the requirements of FAR Part 19 generally do not apply to FSS contracts).

In this regard, FAR section 8.405-5(a) states that an agency may set aside an order for any of the small business concerns identified in FAR section 19.000(a)(3). FAR 8.405-5(a)(1)(i). The FAR further provides that when setting aside orders, the agency should "[f]ollow the ordering procedures for Federal Supply Schedules at 8.405-1, 8.405-2, and

basis that they failed to state a valid basis for protest. See Protest at 3; Electronic Protest Docketing System No. 8. Aquila provided no evidence nor detailed statement of facts to support its allegations, and therefore the allegations are based on mere speculation and do not provide an adequate basis for protest. See 4 C.F.R. §§ 21.1(c)(4) and 21.5(f); *Oceanometrics, Inc.*, B-278647.2, June 9, 1998, 98-1 CPD ¶ 159 at 6; see *Environmental Affairs Management, Inc.*, B-277270, Sep. 23, 1990, 97-2 CPD ¶ 93.

8.405-3,” and that the small business program eligibility requirements identified in FAR part 19 apply. *Id.* at 8.405-5(a)(2)(i)-(ii).

In *Financial & Realty Services*, we concluded that while this section of the FAR identifies the types of set-asides for small business concerns and directs agencies to use the small business program eligibility requirements, it “provides no other directions about using procedures from FAR part 19.” *Financial & Realty Services, LLC, supra*. Rather, FAR section 8.405-5(a) “explicitly directs the agency to follow the ordering procedures for FSS procurements under FAR subpart 8.4.” *Id.* In turn, FAR section 8.405-2 provides that an agency shall issue a solicitation to all schedule contractors that offer the required services under the appropriate multiple-award schedules, or “[p]rovide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements.” FAR 8.405-2(c)(3)(ii), (iii).

Here, based on its market research, the agency issued this solicitation to four FSS vendors that stated they could fulfill the agency’s requirements. The protester does not argue that the agency failed to follow the ordering procedures set forth in FAR section 8.405-2 or any other FAR subpart 8.4 procedures.⁷ Rather, Aquila asserts that USMS’s market research was insufficient under FAR part 19. However, as discussed above, agencies have discretion to set aside procurements under the FSS and FAR part 19 procedures generally do not apply to an FSS procurement conducted under FAR subpart 8.4. Accordingly, we find Aquila’s challenges fail to state adequate legal grounds of protest and dismiss it on that basis. See 4 C.F.R. § 21.5(f).

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

⁷ As noted above, the agency explains that pursuant to FAR subsection 8.405-2(c)(3)(iii)(B), it issued the procurement to four vendors to reasonably ensure that at least three quotations were received from contractors that could fulfill this requirement. While the protester notes that the agency issued the solicitation pursuant to this regulation, and received two quotations in response, the protester does not otherwise allege that the agency failed to comply with any of the procedural requirements of FAR section 8.405-2. Comments at 5-6.