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Decision

Matter of: TeamGOV, Inc.

File: B-419865.2; B-419865.3

Date: November 10, 2021

Sean Trice, Esq., and Ralph C. Thomas III, Esq., Mesh Law, LLC, for the protester. Robert Notigan, Esq., and Alexis N. Webster, Esq., General Services Administration; and Mark Hagedorn, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies.

Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that an agency improperly removed requirements from Small Business Administration's (SBA) 8(a) program without seeking release from the SBA is denied where the record shows that the solicitation was for a "new" requirement.
2. Protest that an agency, in a solicitation for the establishment of a blanket purchase agreement (BPA), failed to meet the statutory and regulatory requirements applicable to bundling is denied where the requirements do not apply to BPAs.

DECISION

TeamGOV, Inc., a small business of Landover, Maryland, protests the terms of request for quotations (RFQ) No. 47PD0121Q0007, issued by the General Services Administration (GSA) for facilities engineering, operation and maintenance (O&M), and related services at four locations in Suitland, Maryland. The protester alleges that the agency improperly removed the requirements from the 8(a) program without seeking approval from the Small Business Administration (SBA) in accordance with applicable regulations.¹

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to enter into contracts with government agencies and to arrange for performance of those contracts through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) 19.800. This program is commonly referred to as the 8(a) Business Development program (or simply "8(a) program").

We deny the protest.

BACKGROUND

The RFQ was issued on April 7, 2021, on an unrestricted basis, for the establishment of a single fixed-price blanket purchase agreement (BPA) under GSA's Federal Supply Schedule (FSS), Multiple Award Schedule, Facilities-Facilities Maintenance and Repair, under the rules prescribed by section 8.405-3 of the FAR for a 1-year base period and nine 1-year option periods.² Agency Report (AR), exh. 2, RFQ at 1, 2, 4, 12.³ The BPA would be established using a best-value tradeoff, considering price and the following non-price evaluation factors, listed in descending order of importance: management plan, prior experience, and past performance. *Id.* at 12. The non-price factors, when combined, were more important than price. *Id.* The initial quotation due date of May 27, 2021, was extended to August 6. Contracting Officer's Statement (COS) at 1.

In general terms, the contractor is to provide facilities engineering, operation and maintenance, and related services⁴ at the following four locations within the Census Bureau campus in Suitland, Maryland: (1) Census Headquarters, North Building and Garage; (2) Census Headquarters, South Building and Garage; (3) Washington National Records Center; and (4) Suitland Child Care Center. PWS at 11; Memorandum of Law (MOL) at 1. The solicitation advises that the contractor must provide "management, supervision, labor, materials, equipment, and supplies," and "shall be responsible for the efficient, effective, economical, and satisfactory operation, scheduled and unscheduled maintenance, and repair of equipment and systems" within the property line of those locations. PWS at 1, 11. Currently two contractors perform various services that are encompassed by the PWS at the four locations under two separate 8(a) contracts that were awarded in 2020. GSA Resp. to SBA Comments at 5; AR, exh. 5, Tab 5, SBA Approval Letter; exh. 5, Tab 8, Sole-Source Justification and Approval (J&A); exh. 6, Tab 3, N&S Property Services, LLC Award at 2.

The PWS states that the BPA here will be a departure from GSA's traditional model previously used to procure basic operation, maintenance and repair services. PWS at 11, 18. The PWS explains that historically the agency solely procured the mechanical maintenance component of an entire facilities management program. *Id.*

² The solicitation also refers to this schedule as GSA FSS No. GSA schedule 03FAC. AR, exh. 1, Performance Work Statement (PWS) at 11.

³ The RFQ has been amended six times. All citations to the record are to the consecutive numbering of the pages in the Adobe PDF document.

⁴ The PWS's definition for "facilities engineering," provides that a facilities engineering contract includes the same basic services provided under a standard O&M contract but also requires the contractor to provide additional technical, managerial, and decision making expertise to assist GSA in the holistic management of assets over the long term. PWS at 15.

at 11, 18. These procurements used a national template statement of work and attempted enforcement of performance through robust inspections and aggressive monetary deductions. *Id.* at 18. Contractors were often relegated to a task performance role with all program and planning decisions retained by government employees. *Id.* The agency explained that this business model required substantial government technical expertise, was very expensive, and tended to diminish both the working relationship with the contractor, as well as the agency's objective to leverage private industry competencies and innovation. *Id.*

The PWS further explains that the RFQ seeks facilities engineering and O&M services incorporating "systems thinking" into all components of the contract.⁵ *Id.* The stated objective of the BPA is "to procure a holistic and integrated *complete facilities management program* that will meet the current and future needs of GSA and tenant agencies over the term of the BPA." *Id.* at 11 (emphasis added). The PWS reiterates that it is only identifying the agency's minimum requirements and expected outcomes. Vendors were expected to articulate and provide specific details in their quotations of how they will accomplish the requirements, meet objectives, integrate programs, and support GSA's mission and program philosophies. *Id.* at 11, 19; *see also* RFQ at 15-17.

On June 10, 2021, the contracting officer notified the SBA that the agency intended to procure work previously performed under the 8(a) program using what GSA considered to be a new requirement. AR, exh. 8, Tab 2, GSA email to SBA. In this regard, the contracting officer provided information about the two existing 8(a) contracts currently performing some of this work, information about the "new" requirement, and the contracting officer's rationale for concluding that the requirement should be viewed as "new." *See generally* AR, exh. 8, Tab 4, SBA Notification, May 28, 2021. The contracting officer also provided a copy of GSA's Form 2689, Small Business Analysis Record, showing concurrence with the contracting officer by GSA's small business technical advisor, GSA's Associate Administrator of Small Business Utilization, and the SBA Procurement Center Representative. Thus, the form documented GSA's adoption of the contracting officer's recommendation to solicit the requirement for the Suitland Federal Center on an unrestricted basis under the FSS Schedule No. 03FAC in 2019. AR, exh. 8, Tab 3, Region 3 Global Submission O&M Unrestricted at 1.

⁵ The PWS provides a lengthy definition for "systems thinking." PWS at 17. In general terms, it is a set of specific tools and techniques of feedback and engineering theory to understand systems. *Id.* The goal of applying systems thinking to facility management is to see that every action or decision in operating, maintaining, and retrofitting a building will result in an impact (financial, environmental, human resource), and to evaluate the "full circle" implications. *Id.* The PWS explains that a standard O&M contract is prescriptive in nature, and does not implement a systems thinking approach because the contractor is not expected to evaluate the impact of actions, but only to provide services as directed by the owner. *Id.*

On June 17, SBA informed the contracting officer that “[b]ased on our updated regulations, 13 C.F.R. [§] 124.504(d), our office will review the paperwork with final approval coming from . . . the Associate Administrator of Business Development [(AA/BD)].” AR, exh. 8, Tab 2, GSA email to SBA at 3. SBA requested that the contracting officer provide additional information, including: (1) a compelling justification for why the requirement is new; (2) the procurement history; (3) the agency offer and SBA acceptance letter; (4) the result of any market research; (5) the agency’s written commitment to continue to support the 8(a) program; (6) a Justification and Approval document (J&A) for why the requirement is not appropriate for continuing in the 8(a) program; and (7) a statement of work for the new requirement. *Id.* On August 2, the contracting officer provided the information to the SBA and requested that SBA provide a response within the five-day period. *Id.* at 6. Hearing no response from SBA, the agency proceeded with the procurement as planned. COS at 5-6.

On August 4, two days before quotations were to be submitted, TeamGOV filed this protest with our Office.

DISCUSSION

TeamGOV raises numerous objections to the agency’s decision to solicit its requirements for the Suitland Federal Center on an unrestricted basis, rather than using an 8(a) set-aside contract. In filing and pursuing this protest, TeamGOV has made arguments that are in addition to, or variations of, those discussed below. While we do not address every issue raised, we have considered all of the protester’s arguments. To the extent they have not been withdrawn or abandoned, we find that none furnishes a basis on which to sustain the protest.

New Requirement

Under SBA regulations, where a requirement is procured using an 8(a) contract, follow-on acquisitions of the requirement must remain in the 8(a) program, unless SBA agrees to release the requirement for non-8(a) competition. See 13 C.F.R. § 124.504(d)(1). The mandate for a requirement to remain in the SBA’s 8(a) program does not apply where a follow-on contract is a “new” requirement. See 13 C.F.R. § 124.504(d); see e.g., *eAlliant, LLC*, B-407332.4, B-407332.7, Dec. 23, 2014, 2015 CPD ¶ 58 at 8-9. In this regard, the SBA’s regulations provide that the determination of whether a particular requirement or contract is a follow-on includes consideration of the following factors: (1) whether the scope has changed significantly, requiring meaningfully different types of work or different capabilities; (2) whether the magnitude or value of the requirement has changed by at least 25 percent for equivalent periods of performance; and (3) whether the end user of the requirement has changed. 13 C.F.R. § 124.3. As a general guide, if the procurement satisfies at least one of these three conditions, it may be considered a “new” requirement. *Id.*

According to TeamGOV, the RFQ does not represent a “new” requirement. Protest at 7; Comments and Supp. Protest at 2-6. Rather, it is “basically an operations and

maintenance procurement of the Suitland Census Building Complex North/South” providing substantially the same services that have been provided to GSA since at least 2011 that “has [been] dressed . . . up a bit with ‘bells and whistles.” Comments and Supp. Protest at 5. In this regard, the protester asserts that a review of the RFQ’s scope of work shows that the agency simply bundled and added “duties of overall management, coordination, and a ‘facilities engineering model,”” such that it increased the cost of performance to the point that no 8(a) contractor could “handle the additional features.” *Id.* at 2. TeamGOV further argues that the procurement cannot be deemed a “new” requirement because GSA did not comply with the applicable regulations established for the proper coordination with the SBA, thus denying SBA the ability to carry out its duties under its regulations. *Id.* at 3-5, 7-9 (*citing* 13 C.F.R. § 124.504(d)).

GSA responds that the requirements here are, in fact, “new” requirements because they involve more responsibilities than the basic O&M services included in the current contracts for the four locations. COS at 3. In this regard, the agency explains that the current contracts were awarded on a sole-source basis and intended as “bridge” or interim contracts to provide basic services while the agency implemented its new strategy of incorporating the “systems thinking” model to O&M contracts. The agency explains that the new strategy is significantly different from the “wrench and screwdriver” model used in the past. COS at 3; Contracting Officer’s (CO) Resp. to SBA Comments at 1.

Specifically, the agency explains that the intricacies and expertise required to provide services under a facilities engineering model at the four locations are more complex than the services being performed under the current contracts because the current contracts only involve basic maintenance services, and not an evaluation of the impact of their actions. CO Resp. to SBA Comments at 3. According to GSA, the proposed contracts require a more sophisticated level of oversight and management, requiring significantly different capabilities, such as asset planning and project evaluation. COS at 5. The agency explains that firms responding to the RFQ will be required to submit a detailed management plan, which will be assessed for the firm’s capability to partner with, and not simply work for, the government. CO Resp. to SBA Comments at 2.

GSA also states that the independent government estimate for the requirement is [DELETED]% higher than the value of the two current contracts for the equivalent period of performance (10 years). *Id.* at 4. The agency represents that the increased cost is driven by the significant changes in what the contractor is required to provide from a managerial standpoint to use the facilities engineering model of performing this work. *Id.* Finally, the agency explains that it provided SBA with written notice that GSA viewed this effort to be a “new” requirement, and the SBA did not contest or address the contracting officer’s conclusion. Supp. COS at 4-5.

At our Office’s invitation, SBA provided its views on the protest. We accord great weight to SBA’s interpretation of its regulations, unless the interpretation is unreasonable. *M&C Venture Grp., LLC*, B-419870, July 28, 2021, 2021 CPD ¶ 262 at 3; *NANA Servs., LLC*, B-297177.3; B-297177.4, Jan. 3, 2006, 2006 CPD ¶ 4 at 10. Considering the

totality of the information provided by the contracting officer, the SBA agreed with GSA's conclusion that the requirement qualified as "new" under SBA regulations. Specifically, the SBA found that the RFQ describes an effort that will require the contractor to leverage technical, managerial, and decision-making expertise not presently required under the current O&M contracts.⁶ SBA Supp. Comments at 3. The SBA also accepted the contracting officer's representations that the [DELETED]% increase in contract magnitude is directly linked to these new contract requirements. *Id.*

Relevant here, SBA's regulation provides the following:

(d) Release for non-8(a) or limited 8(a) competition. (1) Except as set forth in paragraph (d)(4) of this section, where a procurement is awarded as an 8(a) contract, its follow-on requirement must remain in the 8(a) BD [Business Development] program unless SBA agrees to release it for non-8(a) competition. *Where a procurement will contain work currently performed under one or more 8(a) contracts, and the procuring agency determines that the procurement should not be considered a follow-on requirement to the 8(a) contract(s), the procuring agency must notify SBA that it intends to procure such specified work outside the 8(a) BD program through a requirement that it considers to be new.* Additionally, a procuring agency must notify SBA where it seeks to reprocur a follow-on requirement through a pre-existing limited contracting vehicle which is not available to all 8(a) BD Program Participants and the previous/current 8(a) award was not so limited. If a procuring agency would like to fulfill a follow-on requirement outside of the 8(a) BD program, it must make a written request to and receive the concurrence of the AA/BD to do so.

13 C.F.R. § 124.504(d) (emphasis added).

Regarding whether a requirement is new or a follow-on, the regulation explains:

The determination of whether a particular requirement or contract is a follow-on includes consideration of whether the scope has changed significantly, requiring meaningful different types of work or different capabilities; whether the magnitude or value of the requirement has

⁶ The SBA specifically found that the RFQ required the following new capabilities: incorporating GSA's programs and strategic objectives into its management plan; working jointly with other facilities-related initiatives, to include design and construction by GSA and other contractors; and partnering with GSA to implement a complete and cost-conscious facilities management program. SBA Supp. Comments at 3. We note that these capabilities are those described in the PWS as the "strategic general categories" under which the contractor is to provide support to GSA's strategic management and capital improvement programs associated with physical assets and components. PWS at 12-13.

changed by at least 25 percent for equivalent periods of performance; and whether the end user of the requirement has changed. As a general guide, if the procurement satisfies at least one of these three conditions, it may be considered a new requirement. However, meeting any one of these conditions is not dispositive that a requirement is new. In particular, the 25 percent rule cannot be applied rigidly in all cases. Conversely, if the requirement satisfies none of these conditions, it is considered a follow-on procurement.

13 C.F.R. § 124.3.

Our review of the solicitation shows that while the RFQ does contain work currently performed under one or more 8(a) contracts, the record supports the conclusion of the GSA and SBA that the solicitation is a “new” requirement, *i.e.*, not a follow-on requirement, as contemplated by the regulations. First, the PWS clearly reflects that the agency is requiring different capabilities from the contractor as a result of its inclusion of the facilities engineering model, than what was previously sought in prior contracts. These capabilities, primarily captured in the “strategic categories” of services in the PWS, require the contractor to support the agency’s strategic management and capital improvement programs associated with physical assets and components. These services also require the contractor to participate and partner with the government in the initiative of obtaining high performance and sustainable operations. PWS at 12-13.

We also note that the “tactical categories” of services also require the contractor to exhibit tactical stewardship of contracted assets by maintaining awareness of projects and activities. *Id.* at 12. Further, the most important non-price evaluation factor is the management plan, under which the agency will assess the contractor’s overall approach and commitment to managing the BPA and accomplishing the objectives of this requirement. RFQ at 13. Unlike previous solicitations, the RFQ encourages firms to provide innovative solutions that provide a positive benefit or advantage to the government. *Id.* at 11, 13. The change in scope, requiring meaningfully different types of work, combined with the change in the value of the requirement for equivalent periods of performance, clearly show that the RFQ is a “new” and not a follow-on requirement.

Furthermore, the record shows that the agency notified the SBA of its conclusion that the RFQ was a new requirement and that the agency intended to establish a BPA under the FSS, *i.e.*, outside of the 8(a) program. Although GSA provided this notification to SBA after the RFQ was issued, SBA’s June 11 email to the contracting officer indicated that a “final approval” decision would be made by SBA’s Associate Administrator of Business Development. Even so, there is nothing in the regulations that require an agency receive approval prior to proceeding with a procurement that it has concluded is a “new” requirement. Instead, SBA’s regulations anticipate a possible appeal to the head of a procuring agency when SBA does not agree that a particular procurement is a

new requirement.⁷ 13 C.F.R. § 124.505(a)(3). Not only did SBA not appeal the GSA's decision, during the course of this protest SBA confirmed that it does not intend to initiate an appeal in connection with this procurement. SBA Resp. to GAO's Req.

Finally, because we agree with the conclusions of GSA and SBA that the RFQ is a "new" requirement (*i.e.*, not a follow-on requirement or contract), we need not address the protester's argument that the agency improperly removed requirements from the 8(a) program. In this regard, the SBA confirmed that to the extent GSA's requirements are deemed "new" relative to the incumbent services fulfilled through the 8(a) program, there is no follow-on or renewable acquisition that requires release from the program.⁸ *Id.*

Bundling

TeamGOV also argues that the RFQ is a bundled contract, and GSA failed to comply with statutory and regulatory requirements applicable to bundling. Comments and Supp. Protest at 14-17. According to TeamGOV, GSA violated various requirements under section 7.107 of the FAR, and the provisions of the Small Business Act, 15 U.S.C. §§ 631-657. *Id.* at 14-15.

GSA responds that because the RFQ seeks new requirements--departing from the outdated and fragmented facilities services delivery model--the procurement does not meet the definition of consolidation or bundling under the FAR or Small Business Act. Thus, GSA concluded it was not required to perform a consolidation or bundling analysis under section 7.107 of the FAR. Supp. COS at 4; Supp. MOL at 2-3 (*citing* FAR 2.101, 15 U.S.C. §§ 657q(a), 632(o)).

Under the Small Business Act, a bundled contract is "a contract that is entered into to meet requirements that are consolidated in a bundling of contract requirements." 15 U.S.C. § 632(o)(1). The term "bundling of contract requirements" is defined as "consolidating [two] 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."

⁷ Under the regulations, SBA may appeal to the head of the procuring agency a contracting officer's decision that a particular procurement is a new requirement; new requirements are not subject to the release requirements set forth in 13 C.F.R. § 124.504(d). 13 C.F.R. § 124.505(a)(3). SBA must notify the contracting officer of the SBA Administrator's intent to appeal a decision to remove a requirement from the 8(a) program within 5 working days of SBA's receipt of the decision. 13 C.F.R. § 124.505(b)(1).

⁸ In light of our resolution of the issue, we do not reach the issue of the applicability of the withdrawal requirements in the FAR and the SBA's regulations to procurements conducted under FAR subpart 8.4.

15 U.S.C. § 632(o)(2); *see also* FAR 2.101; 13 C.F.R. § 125.1. Similarly, the FAR defines “bundling” as “a subset of consolidation that combines two or more requirements for supplies or services, previously provided or performed under separate smaller contracts . . . into a solicitation for a single contract, a multiple-award contract, or task or delivery order that is likely to be unsuitable for award to a small business concern. . . .” FAR 2.101. While an agency is not prohibited from conducting an acquisition that consolidates or bundles requirements, the agency must make a written determination that consolidation or bundling is necessary and justified. 15 U.S.C. § 644(e); 13 C.F.R. § 125.2(d); FAR 7.107.

Section 2.101 of the FAR states that the definition of a contract “includes orders issued against Multiple Award Contracts and orders competed under agreements where the execution of the order is the contract (e.g., a Blanket Purchase Agreement (BPA), a Basic Agreement (BA), or a Basic Ordering Agreement (BOA)).” FAR 2.101. Section 125.1 of SBA’s regulations provides that “contract” has the same definition “as set forth in FAR § 2.101.” 13 C.F.R. § 125.1. Accordingly, orders issued under BPAs are contracts, but BPAs are not. *Coast to Coast Comput. Prods., Inc.*, B-417500; B-417500.2, July 29, 2019, 2019 CPD ¶ 276 at 6 (finding that the agency was not required to comply with consolidation analysis requirements of the Small Business Jobs Act of 2010 when establishing a BPA, because a BPA is not a contract under the SBA’s definition of a contract).

As discussed in *Coast to Coast Comput. Prods., Inc.*, the preamble to the final rule, amending the FAR to institute a government-wide policy on consolidation and bundling, includes a discussion of BPAs. That discussion clarifies that the statutory definition of “bundling of contract requirements” at 15 U.S.C. § 632(o), and of “consolidation of contract requirements” at 15 U.S.C. § 657q (as well as the SBA’s implementation of regulations at 13 C.F.R. § 125.1(c)), refer only to “contracts” when addressing bundling and consolidation, and that BPAs are not contracts. *See Coast to Coast Comput. Prods., Inc.*, *supra* at 5-6; Federal Acquisition Regulation, Consolidation and Bundling, 81 Fed. Reg. 67,763, 67,765 (Sept. 30, 2016) (“BPAs are not contracts and therefore neither the statute nor the implementing regulations apply the consolidation and bundling analysis to them.....”). In sum, the bundling analysis required under the applicable statute or implementing regulations do not apply to BPAs. *Coast to Coast Comput. Prods., Inc.*, *supra* at 6.

Even if, for the sake of argument, the agency was required to perform a bundling analysis, because we agree with the agency that the RFQ is a new requirement, we do not view the RFQ as “consolidating [two] 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” as contemplated by the Small Business Act or implementing regulations. Therefore, we find no violation of statute or regulations

pertaining to bundling. *Edmond Sci. Co.*, B-410179, B-410179.2, Nov. 12, 2014, 2014 CPD ¶ 336 at 12.

The protest is denied.

Edda Emmanuelli Perez
General Counsel