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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Murray-Benjamin Electric Company, LP

File: B-298481

Date: September 7, 2006

Brad Benjamin for the protester.

Gail Booth, Esq., and Edward C. Hintz, Esq., Defense Logistics Agency, and Michael J. Noble, Esq., General Services Administration, for the agencies.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that procurement violates agency's obligation to place orders under various contracts held by protester concerns matter of contract administration, which Government Accountability Office will not review.

2. Agency is not required to order supplies under non-mandatory Federal Supply Schedule (FSS) contract, and where it is in agency's best interests—including need to establish "best value" among potential offerors—agency may compete its requirements among commercial sources of supply instead of under non-mandatory FSS.

DECISION

Murray-Benjamin Electric Company, LP (MBE) protests the terms of request for proposals (RFP) No. SP0930-06-R-A401, issued by the Defense Supply Center Columbus, Defense Logistics Agency (DLA), for an indefinite quantity of fiber optic cables. MBE asserts that DLA is obligated to procure the items listed in this RFP under current contracts with MBE.

We deny the protest.

The RFP, issued on an unrestricted basis, sought offers on nine different fiber optic cables used in support of the Nuclear Power Plants, Weapon System Code 21N. The solicitation contemplated the award of a fixed-price, indefinite-quantity contract for

a 1-year base period, with up to 4 option years.¹ The RFP set a contract maximum of \$3 million and a minimum of \$45,000. Offers were to be evaluated for “best value” on the basis of price, past performance, proposed delivery, surge and sustainment, socioeconomic support, DLA mentoring business program, and the Javits-Wagner-O’Day program, with price approximately equal in weight to all other factors. Prior to the closing time for receipt of proposals, MBE submitted an offer and filed this protest with our Office.

MBE principally argues that, instead of competing the requirement, the agency should have purchased certain of the RFP’s line items under its Federal Supply Schedule (FSS) contract, Department of Defense E-Mall contract, or previously negotiated Indefinite Delivery Purchase Orders (IDPO), and the other items under other unidentified MBE contract vehicles. MBE notes that five of its IDPO contracts have been extended into 2007, and asserts that the agency is obligated under these contracts to procure the items from MBE.²

Under the Competition in Contracting Act of 1984, our jurisdiction to resolve bid protests extends to resolving disputes concerning the alleged violation of procurement laws and regulations in connection with the award of contracts by federal agencies. 31 U.S.C. § 3551-3552 (2000), amended by the Ronald W. Reagan National Defense Authorization Act of Fiscal Year 2005, Pub. L. No. 108-375, § 326, 118 Stat. 1811 (2004). In exercising this authority, we do not review matters of contract administration (with exceptions not relevant here), which are within the discretion of the contracting agency and are, under the Contract Disputes Act of 1978, for review by a cognizant board of contract appeals or the Court of Federal Claims. 4 C.F.R. § 21.5(a); Hawker Eternacell, Inc., B-283586, Nov. 23, 1999, 99-2 CPD ¶ 96 at 3. Resolving this aspect of MBE’s protest would entail interpreting MBE’s existing contracts and determining whether DLA’s actions constituted breaches of those contracts. This is a matter of contract administration, and therefore will not be considered.³

¹ These items are referenced by National Stock Number (NSN) as follows: 6015-01-467-9547 (9547), 6015-01-467-9549 (9549), 6015-01-467-9552 (9552), 6015-01-467-9550 (9550), 6015-01-528-2487 (2487), and 6015-01-528-2481 (2481), 6015-01-442-9423 (9423), 6015-01-442-9420 (9420), and 6015-01-531-4355 (4355).

² MBE also complains that the agency plans to change the variation in quantity provision in one of its IDPOs to reduce it from +/- 10 percent to +/- 0 percent, a change MBE asserts is “emblematic” of agency actions that have been detrimental to contractors. Protest at 2. To the extent MBE intends this to be a basis for protest; it concerns the administration of an unrelated contract and, as such, is not for review by our Office. Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2006).

³ In any event, DLA explains that use of MBE’s various contract vehicles would be inappropriate for this procurement. In this regard, only four of the NSNs (9547, 9549, (continued...)

In a related argument, MBE asserts that the agency should have placed orders under the protester's FSS contract instead of competing the requirement because, under the FSS, no further competition is required. In this regard, MBE notes that the agency has previously relied upon Federal Acquisition Regulation (FAR) § 8.404 in making FSS purchases, and that FAR § 8.002 makes the General Services Administration (GSA), which administers the FSS, a required source of supply. While MBE concedes that use of its FSS contract is not mandatory (Supplemental Protest at 1), it maintains that the agency nevertheless was required to order against its FSS contract based on these FAR provisions and Department of Defense (DoD) policy.

MBE's assertions are without merit. Under a mandatory FSS contract, an agency generally must order its requirements under that FSS if its minimum needs will be met by the products or services listed in the schedule. Adams Magnetic Prods., Inc., B-256041, May 3, 1994, 94-1 CPD ¶ 293 at 3. However, as conceded by MBE, its FSS contract is not mandatory; thus, an agency's use of that contract is voluntary.⁴ There is nothing else in the FAR, or elsewhere, that compelled the agency here to meet its requirements under MBE's FSS contract. FAR § 8.404 simply provides guidance on the use of the FSS—e.g., restricting competition to the FSS and eliminating the need for additional determinations of fair and reasonable pricing; it does not require agencies to use the FSS. Similarly, while the list of required sources found in FAR § 8.002 places non-mandatory FSS contracts above commercial sources in priority, it does not require an agency to order from the FSS. Further, although an agency's placement of an FSS order indicates that the agency has concluded that the order represents the best value (FAR § 8.404(d)), the regulation does not establish a presumption that all FSS contractors represent the best value, such that the agency would be required to purchase from an FSS contractor.⁵

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9552, and 9550) are listed on MBE's contracts, and MBE's FSS contract covering NSNs 9549, 9552, and 9550 is not mandatory. Further, the minimum order obligation under each active IDPO has been met, and the contract maximum under one IDPO has been met. With regard to the E-Mail, DLA has fulfilled its only obligation—to purchase not less than \$1 in exchange for the listing.

⁴ In comments requested by our Office, GSA confirms that, absent a statute or regulation explicitly providing that use of a particular FSS contract is mandatory, an agency's use of that contract is voluntary. GSA Comments at 1.

⁵ As explained by GSA, while agencies are encouraged to use the FSS, where an agency concludes that it is in its best interests to meet its needs through an open-market procurement, it is free to do so. GSA Comments at 1. MBE asserts that DLA did not make a "best interests" determination, but we are aware of no legal requirement—and MBE cites none—that an agency do so. In any case, such a

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Our conclusion is not changed by MBE's assertion that DLA has previously placed FSS orders for weapon systems and nuclear application programs and that other agency's have competed their needs through FSS contracts. Each federal procurement stands on its own; the fact that DLA and other agencies may have made FSS contract purchases in the past does not require DLA to do so here. Sabreliner Corp., B-275163 et al., Dec. 31, 1996, 96-2 CPD ¶ 244 at 2 n.2. MBE's reliance on a letter from DoD's Director of Defense Procurement and Acquisition Policy on use of the FSS is similarly misplaced. The letter represents an internal matter of executive policy for the guidance and benefit of government personnel, and does not have the force and effect of law. Thus, the fact that the procurement may not conform to it does not represent a valid basis for protest. American Contract Servs., Inc., B-225182, Feb. 24, 1987, 87-1 CPD ¶ 203 at 4. In any event, while the letter provided guidance on the use of the FSS, it did not require its use.

MBE asserts that the solicitation should have included an evaluation preference for HUBZone offerors under FAR § 19.1307. Noting that the preference is not limited to manufacturers, MBE maintains that it would be entitled to the preference as a small, woman-owned, HUBZone business.

MBE's assertion is without merit. A HUBZone preference is only required to be included in a procurement conducted on the basis of full and open competition. FAR §§ 19.1307, 19.1308. Here, the agency determined that the required fiber optic cable is available only from a limited number of manufacturers, and thus restricted the competition under the authority of 10 U.S.C. § 2304(c)(1). AR, Tab 4, Justification For Other Than Full and Open Competition. In any case, MBE was not prejudiced by the absence of the preference. In this regard, under the terms of the standard preference clause (FAR § 52.219-4), in order to receive the price preference a nonmanufacturer HUBZone small business, such as MBE, must agree to furnish only end items manufactured or produced by HUBZone small business manufacturing concerns. FAR § 52.219-4(f). The record shows that none of the approved manufacturers of the solicited cable is a HUBZone small business; MBE thus would not be able to meet this requirement, and thus would not qualify for the HUBZone price preference.

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determination is implicit from the record. DLA explains that this acquisition is for critical application items used on a critical weapons system--nuclear power plants, weapons system code 21N--and will result in moving inventory control into the hands of the contractor. Agency Report (AR) ¶¶ 28-29. For these reasons, DLA determined that it is necessary to make a determination of best value among competing proposals.

MBE challenges the RFP's contract limitations clause, which provides for a contract minimum of only \$45,000. MBE asserts that the minimum is unreasonable and places undue hardship on offerors.

The essence of MBE's protest is that the agency has imposed too much risk on offerors. Solicitation provisions are not improper merely because they may impose risk on the contractor. It is within an agency's administrative discretion to offer for competition a proposed contract that imposes maximum risks upon the contractor and minimum burdens on the agency, and an offeror should account for this in formulating its proposal. TN-KY Contractors, B-291997.2, May 5, 2003, 2003 CPD ¶ 91 at 3; Instrument Control Serv., Inc.; Science & Mgmt. Res., Inc., B-289660, B-289660.2, Apr. 15, 2002, 2002 CPD ¶ 66 at 7. Therefore, MBE's objection to the imposition of risk on the contractor does not provide a valid basis of protest.⁶

The protest is denied.

Gary L. Kepplinger
General Counsel

⁶ To the extent MBE believes the stated minimum represents insufficient consideration, its position is without merit. The agency explains that the military's demand for fiber optic cable has become more difficult to forecast due to contingency operations in different parts of the world, and maintains that the stated minimum ensures that the agency does not exceed what it is fairly certain to order. Where, as here, the government cannot predetermine, above a specified minimum, the precise quantity of supplies that will be required during the contract period, and where it is inadvisable for the government to commit itself for more than a minimum quantity, it may use an indefinite-quantity contract. FAR § 16.504(b); Aalco Forwarding, Inc. et al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 6. To ensure that the contract is binding, the minimum quantity must be more than a nominal amount, but should not exceed the amount the agency is fairly certain to order. FAR § 6.504(a)(2). The determination of whether a stated minimum quantity is "nominal" must consider the nature of the acquisition as a whole. Sea-Land Serv., Inc., B-278404.2, Feb. 9, 1998, 98-1 CPD ¶ 47 at 12. In view of the uncertainty in the amount of cable to be ordered, we believe the agency has reasonably established that the minimum represents more than a nominal amount.