

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

Pyramid Services, Inc.

Appellant

Appealed from
Size Determination No. 3-2008-7

SBA No. SIZ-4879

Decided: January 14, 2008

APPEARANCES

Marc F. Efron, Crowell & Moring LLP, Washington, D.C., for Appellant.

Kathryn D. Norgaard, Chief of Contracting Office, Naval Facilities Engineering Command, Southwest, San Diego, California, for the Contracting Activity.

Cheryl Bernardi, President, for DCT Incorporated.

DECISION

PENDER, Administrative Judge:

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the Area Office size determination that interpreted 13 C.F.R. § 121.404 to require it to calculate Appellant's size status as of the RFP's "Step II" date (the date it submitted its technical and price proposal) is based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Facts

1. On November 3, 2006, the Department of the Navy, Naval Facilities Engineering Command Southwest, in San Diego, California (Navy), issued Solicitation No. N62473-06-R-

5501 (solicitation) for a combination firm-fixed price (FFP) and indefinite delivery-indefinite quantity (IDIQ) contract for base operations support services. The Navy Contracting Officer (CO) checked "Negotiated (RFP)" under Block 4 of the Standard Form (SF) 33 when issuing the solicitation.

2. The solicitation provides this negotiated procurement would be set-aside for small businesses (Section I, Clause 52.219-6 - Notice of Total Small Business Set-Aside (JUN 2003) (page 315)). The CO designated North American Industry Classification System (NAICS) code 561210, with a \$30 Million annual receipts size standard as being applicable to the work required by the solicitation (Section K, Clause 52.219-1 - Small Business Program Representations (May 2004) Alternate 1 (Apr 2002) (page 342)).

3. Section C of the solicitation contains the Description of the Work and Specifications, including Performance Standards. Section C consists of approximately 280 pages that describe in detail the work to be accomplished by the successful contractor. In addition Section C makes reference to various other documents that contain information relevant to the technical specifications, *e.g.*, annexes and Section J.

4. Paragraphs L.3 and L.4 of the solicitation require offerors to submit their proposals in two steps (pages 352 - 354).

a. Paragraph L.3 identifies the steps as: (I) the Statement of Qualifications (SOQ) and executed representations and certifications would be due on December 1, 2006; and (II) the Technical Proposal and Price Proposal would be due on February 9, 2007.

b. Paragraph L.4 details how offerors are to submit their proposals to the Navy. As with paragraph L.3, Step I is limited to a Statement of Qualifications and executed representations and certifications. Paragraph L.4 provides that Step II is to contain the Technical and Price Proposal and the offerors are to address the evaluation factors of Section M. In addition, paragraph L.4 provides instructions to the offerors on how to physically prepare their technical proposal.

5. Solicitation Section M contains the evaluation factors for award (originally pages 404 - 415, changed by pages 87 - 97 of Solicitation Amendment 0001). Paragraph M.2, "Award Without Discussion," provides that award may be made without discussions. (emphasis added)

6. Paragraph M.4, "Summary of the Source Selection Process," mentions that discussions may be held and that award will be recommended to the Source Selection Authority based upon best value.

7. Paragraph M.5, "Evaluation Factors," identifies the factors and subfactors and explains what will be evaluated at each step. Paragraph M.5 generally provides that the Step I evaluation will be an evaluation of a Statement of Qualifications and the Step II evaluation, which is entitled Evaluation of Technical and Price Proposals, will evaluate the technical factors and price. Before the description of the factors and subfactors applicable to Step I and Step II, paragraph M.4, subparagraph B., Relative Importance of the Evaluation Factors and Subfactors,

states:

1. Factors: For this acquisition, the Step I SOQ evaluation factors are Q1) Corporate Experience, Q2) Past Performance, Q3) Corporate Management Capabilities, and Q4) Safety. The SOQ evaluation factors are of equal importance. The Step II technical evaluation factor is T1) Technical and Management Approach, which is equal in importance to the aggregate of the Step I SOQ factors. All evaluation factors, when combined, are approximately equal to price. However, if an Offeror's proposal receives less than an "Acceptable" rating for any one factor, the Government may rate the Offeror's overall proposal "Marginal" or "Unacceptable". The importance of price will increase if Offerors in the competitive range are considered essentially equal in terms of technical capability, or if a price is so significantly high as to diminish the value of technical superiority to the Government. Using this trade-off process, as described in FAR 15.101-1, a Best Value Offeror will be selected.

2. Subfactors: Within Factor Q3, the following relative importance scheme applies: Subfactors are essentially equal. Within Factor T1, the following rating scheme applies: Subfactors are listed in the descending order of importance.

8. On November 16, 2006, the CO issued Amendment 0001, which corrected the size standard to \$32.5M in annual receipts, and moved the instructions on the two-step submission of offerors' proposals from Section L.3 to Section L.5. This amendment also changed Section M in its entirety. In response to a question concerning the two-step process, the CO provided further explanation as follows:

Step I will be used to advise firms of their viability in receiving an award. The Government will send out letters to those offerors who are not the most qualified. These letters are scheduled to go out by 8 January 2007. Should a contractor receive this letter it will inform them that they can still submit a proposal should they wish but that the Government does not advise them to expend their time or effort based on the evaluation of Step I.

Amendment 0001, Question 9, at 5.

9. On February 9, 2007, the CO, by Amendment 0007, informed offerors that the Step I letters would be sent out that day, and extended the Step II deadline. On March 9, 2007, the CO, by Amendment 0009, extended the Step II deadline to March 19, 2007.

10. On November 7, 2007, the CO awarded the contract to Pyramid Services, Inc. (Appellant) and notified unsuccessful offerors of the award.

11. On November 9, 2007, DCT Incorporated (DCT), an unsuccessful offeror, protested Appellant's size status to the CO.

12. On November 9, 2007, the CO referred the size protest to the Small Business

Administration's (SBA) Office of Government Contracting, Area III, in Atlanta, Georgia (Area Office), for a size determination.

B. The Size Determination

On November 29, 2007, the Area Office issued Size Determination No. 3-2008-7 (size determination) concluding Appellant was other than small. Based on Appellant's Federal Income Tax Returns, the Area Office determined Appellant's size status as of March 19, 2007, calculating Appellant's annual receipts for its fiscal years ending December 31, 2004, 2005, and 2006.

In the size determination, the Area Office reviewed 13 C.F.R. § 121.404(a), which applies to solicitations generally and 13 C.F.R. § 121.404(f), which applies to two-step sealed bidding. The Area Office next reviewed FAR 14.5 and determined that a two-step sealed bidding procurement requires the submission of a technical proposal with Step I. The Area Office found FAR 14.5 inapplicable to the instant procurement since the technical proposal was required with Step II. In addition, the Area Office determined that FAR 14.5 was irrelevant in any case since the procurement did not involve the submission of sealed bids. Therefore, the Area Office explained it determined Appellant's size as of March 19, 2007, because that was the date on which Appellant submitted its Step II offer that included price.

C. The Appeal

Appellant received the size determination on November 29, 2007, and filed its size appeal on December 11, 2007.

Appellant contends the Area Office erred by basing the size determination on the wrong date. Appellant asserts that, instead of March 19, 2007, the Area Office should have determined Appellant's size as of December 1, 2006, because that was the date Appellant submitted its small business certification to the CO as part of its Step I submission for this procurement. Appellant analogizes to the FAR Subpart 14.5 provisions on Two-Step Sealed Bidding, wherein an offeror's price information is not presented until Step II. Appellant notes this appeal presents a question of first impression to OHA.

Appellant also characterizes DCT's size protest as a complaint about the Navy's solicitation requirement that the size certification be submitted in Step I and, as such, should have been presented to the General Accountability Office (GAO) rather than to the SBA.

In support of its appeal, Appellant attaches Exhibit H, a two-page question-and-answer document concerning the Air Force's "4P A-E 08 program," and accessed from the website of the Air Force Center for Engineering and the Environment (AFCEE), Brooks City-Base, TX. This document is not in the Record that was before the Area Office.

On December 12, 2007, in response to a request from OHA, the CO filed and served a response to several questions, including the date initial offers were due on this procurement. The CO answered that question "1 Dec 2006". That same day, DCT filed and served a letter taking

exception to the CO's answer to that question, asserting the correct date, pursuant to 13 C.F.R. § 121.404, was February 9, 2007.

On December 20, 2007, the Navy filed its response to the appeal. The Navy agrees with Appellant that the Area Office erred in basing the size determination on the December 1, 2006 date, analogizing to the Two-Step Sealed Bidding procedure under FAR Subpart 14.5. The Navy agrees with Appellant that this appeal presents a question of first impression for OHA. The Navy also notes it established this two-step negotiated procedure (with representations and certifications presented at Step I) in order to increase the participation of small businesses in its contracting programs.

On December 26, 2007, DCT responded to the appeal. DCT asserts the procurement was advertised as a Request for Proposals (RFP), not an Invitation for Bids (IFB) and, therefore, FAR Subpart 14.5 is inapplicable and the date as of which Appellant's size is to be determined is the date it submitted its price proposal.

IV. Discussion

A. Timeliness

Appellant filed the instant appeal within 15 days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. *See Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review. Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken.

C. Analysis

1. Introduction

The issue in this appeal is whether the Area Office determined Appellant's size status as of the correct date. The Area Office found the regulation that governed its size determination was 13 C.F.R. § 121.404(a), which provides:

SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price.

Appellant and the Navy disagree with the Area Office. They argue the regulation that should govern when the Area Office determines Appellant's size is 13 C.F.R. § 121.404(f), which provides:

For purposes of two-step sealed bidding under subpart 14.5 of the FAR, 48 CFR, a concern must qualify as small as of the date that it certifies that it is small as part of its step one proposal.

For the reasons I will discuss below, I find the Area Office is correct as a matter of law.

2. The Solicitation is a Negotiated Procurement Under FAR 15

The solicitation is an RFP (a negotiated procurement) because:

1. The solicitation's cover sheet identifies itself as a negotiated RFP (Fact 1);
2. The solicitation includes a Section M, Evaluation Factors for Award (Facts 5, 6 and 7) (as required by FAR 15.204-1) containing evaluation factors and significant subfactors as anticipated by FAR 15.304; and
3. Section M provides that award is to be made on the basis of Best Value pursuant to FAR 15.101 (Facts 6 and 7).

FAR 15's title is Contracting by Negotiation. FAR 15.000 provides that the scope of Part 15 is as follows:

This part prescribes policies and procedures governing competitive and noncompetitive negotiated acquisitions. A contract awarded using other than sealed bidding procedures is a negotiated contract (see 14.101).

Since FAR 15 provides for Evaluations Factors for Award containing factors and subfactors and Section M provides that award is to be based upon Best Value, it is axiomatic that the solicitation is a negotiated procurement. I hold the Area Office had to apply 13 C.F.R. § 121.404(a) and had to use the date when Appellant provided its technical and price proposal to the Navy to determine Appellant's size because that is when it submitted an offer including price.

3. The Solicitation is Not a Two-Step Sealed Bid Procurement Pursuant to FAR 14.5

Appellant's contention that the solicitation is analogous to a Two-Step Sealed Bid and that the Area Office should have applied 13 C.F.R. § 121.404(f) when determining Appellant's size ignores specific provisions in FAR 14.101 and 14.5. FAR 14.101, in relevant part, provides:

Elements of sealed bidding.

Sealed bidding is a method of contracting that employs competitive bids, public opening of bids, and awards. The following steps are involved:

- ...
- (c) Submission of bids. Bidders must submit sealed bids to be opened at the time and place stated in the solicitation for the public opening of bids.
- (d) Evaluation of bids. Bids shall be evaluated without discussions.
- (e) Contract award. After bids are publicly opened, an award will be made with reasonable promptness to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, considering only price and the price-related factors included in the invitation.

The instant solicitation does not call itself an Invitation for Bids (IFB) in Block 4 of the SF 33, yet it could have done so. Nor does the solicitation provide:

- a. The public opening of bids;
- b. There will be no discussions; and
- c. Award will be made only upon the basis of price.

Based upon the foregoing and most particularly since award is not to be based only on price, I must hold the solicitation cannot be any kind of an IFB and that 13 C.F.R. § 121.404(f) cannot apply. However, an examination of FAR 14.5 further demonstrates why this procurement cannot be a two-step sealed bid.

The predicate for two-step sealed bidding is explained in FAR 14.501, which states:

Two-step sealed bidding is a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available. An objective is to permit the development of a sufficiently descriptive and not unduly restrictive statement of the Government's requirements, including an adequate technical data package, so that subsequent acquisitions may be made by conventional sealed bidding. This method is especially useful in acquisitions requiring technical proposals, particularly those for complex items. It is conducted in two steps:

- (a) Step one consists of the request for, submission, evaluation, and (if necessary) discussion of a technical proposal. No pricing is involved. The objective is to determine the acceptability of the supplies or services offered. As used in this context, the word *technical* has a broad connotation and includes, among other things, the engineering approach, special manufacturing processes, and special testing techniques. It is the proper step for clarification of questions relating to technical requirements. Conformity to the technical requirements is resolved in this step, but not responsibility as defined in 9.1.
- (b) Step two involves the submission of sealed priced bids by those who submitted acceptable technical proposals in step one. Bids submitted in step two are evaluated and the awards made in accordance with subparts 14.3 and 14.4.

The solicitation contains 280 pages of technical specifications and many other pages of relevant appendices and references (Fact 3). In the context of FAR 14.501, I find these specifications adequately describe the work to be performed. Accordingly, this solicitation is not the kind of procurement anticipated by FAR 14.501.

FAR 14.501 also provides that Step I requires the submission of a technical proposal. The solicitation requires the technical proposal be submitted with Step II which, absent the qualification step of this solicitation, would be consistent only with what occurs with an RFP.

FAR Subparts 14.3 and 14.4 deal with bid submissions and opening procedures. These sections are designed to protect the integrity of the sealed bidding process, *e.g.*, ensure bids are responsive, received at the correct place, modified or withdrawn according to established rules, opened at a set time, physically protected, publicly opened (if not classified), properly recorded, and properly rejected. However, neither FAR 14.3 nor FAR 14.4 is relevant to the solicitation, for there is no sealed bid to publicly open, discussions may occur, and award will not be made only upon the basis of price.

Based upon the foregoing I conclude that this solicitation bears no relationship to Two-Step Sealed Bidding as anticipated by FAR 14.5 and thus I hold the Area Office could not utilize 13 C.F.R. § 121.404(f) to establish the date when Appellant's size status should be determined.

4. The Area Office Did Not Commit Error

I have considered other arguments made by Appellant and they have no merit. For example, Appellant cites *Size Appeal of Sundance Construction Management, Inc.*, SBA No. SIZ-2870 (1988) and *Size Appeal of Alaska Cargo Transport, Inc.*, SBA No. SIZ-3437 (1991), for the proposition that size must be determined when an offeror submits its certifications. Appellant's reliance on these decisions is misplaced. Both of these decisions are clearly predicated on a requirement that any initial offer including certifications must also include a price. The inclusion of a price is the *sine qua non* for the regulations that govern these decisions as it is the basis for applying 13 C.F.R. § 121.404(a) to initial offers that include a price today. Absent a price in an offer, SBA will not determine a concern's size until the date when a price is offered. Therefore, since the Navy did not even require offerors to price their proposals until they submitted their Step II offers, the Area Office had no option but to determine Appellant's size as of the date it submitted its price.

V. Conclusion

I have considered Appellant's Petition, the applicable law and the Record. The applicable law supports the Area Office's determination of Appellant's size as of the March 19, 2007, Step II submission date. The Record supports the Area Office's determination that Appellant exceeds the applicable \$32.5 Million size standard. Therefore, the Area Office did not base its size determination upon a clear error of fact or law when it determined Appellant was other than a small concern for this procurement.

Consequently, the size determination is AFFIRMED. Appellant's appeal is DENIED.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(b).

THOMAS B. PENDER
Administrative Judge