



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

April 3, 2014

Via Email

Katherine Riback, Esq.
Office of the General Counsel
U.S. Government Accountability Office
Washington, DC 20548
RibackK@gao.gov

RE: Response in B-409528

Dear Ms. Riback:

In February 2014, several entities filed protests with the U.S. Government Accountability Office (GAO) concerning RFP No. GSQ02-14-R-SA0001. This solicitation, which was issued by the General Services Administration on January 31, 2014, will result in multiple awards of indefinite delivery, indefinite quantity (IDIQ) contracts to provide Federal customers with office supply items. According to the protests, the solicitation violates the Small Business Act because GSA failed to have its Senior Procurement Executive identify the negative impact the acquisition strategy will have on small businesses. Specifically, the protesters allege that GSA failed to give any consideration to the economic consequences of the hundreds of companies that are failing and have failed to receive one of these awards. According to the protests, GSA provided and analyzed data only on companies awarded contracts.

Your office has requested that the U.S. Small Business Administration (SBA) respond to the issue presented in the protest. For the following reasons, we believe the protests should be sustained.

FACTS

The solicitation at issue, Office Supplies Third Generation (OS3), is part of GSA's effort to "carry out the Office of Management and Budget (OMB) and GSA mandate to maximize use of strategic sourcing while building a new, more sustainable business model." GSA Legal Memo at 1. GSA states that this solicitation is a "follow-on to the existing Office Supplies Second Generation (OS2) Blanket Purchase Agreements (BPAs) that were placed under GSA's Multiple Award Schedule (MAS) 75 for Office Supplies". Id. Those 15 BPAs are set to expire in May 2014. GSA explains that the "new model" will leverage industry purchasing, increase internal efficiencies and increase small business opportunities. Id. citing to Agency Report (AR), Agency Exh. 1, RFP at 4. The estimated spend on OS3 is \$1.25 billion. Statement of Contracting Officer Nelson Duncan; AR, Agency Exh. 1, Appendix A, Statement of Work at 2.

GSA states that in comparison to OS2, OS3 increases the number of contracts for these office supplies and also the number of contracts to be awarded to small businesses. Under OS2, 13 of the 15 awards were to small businesses. GSA Legal Memo at 4. With OS3, there is a Contract Line Item Number (CLIN) structure where “strong socioeconomic preference” is provided to small business in 3 of the 4 CLINs. Id. As a result, GSA expects that 23 of the anticipated 24 awards will be made to small businesses and that one of those awards will be to a small business consortium that will consist of a minimum of 25 small businesses. Id. In addition, GSA notes that customers can still purchase office supplies from the more than 400 contracts currently available under GSA’s MAS 75 Office Supplies Schedule. Id.

GSA issued the solicitation on January 31, 2014. On that same day, SBA’s procurement center representative (PCR) non-concurred with the acquisition for the following reasons:

GSA's proposed small business evaluation preference results in a de facto small business set-aside but without the requirements normally included in an acquisition set aside for small business, e.g., Limitations on Subcontracting, compliance with the Non-manufacturer Rule, and application of the Buy American Act.

In accordance with the SBA Final Rule on Task and Delivery Order Contracts, published October 2, 2013, contracting agencies may set aside task orders under Multiple Award Contracts awarded through full and open competition. The discrete task orders awarded in such situations, become subject to the requirements of set-asides, including Limitations on Subcontracting and the Non-Manufacturer Rule. GSA’s evaluation preference as structured essentially limits awards to small businesses and socio-economic subcategories while skirting these requirements.

This PCR action is taken after consultation with SBA HQ staff, which will assess the effect of such acquisition strategies as they relate to the Small Business Act and any impact on the small business community.

Attachment 1.

ANALYSIS

On September 27, 2010, President Obama signed into law the Small Business Jobs Act of 2010 (Jobs Act), Pub. L. 111-240, which was designed to protect the interests of small businesses and boost their opportunities in the Federal marketplace. For example, §1331 of the Jobs Act amended the Small Business Act and set forth limitations on contract consolidation. This is important because, for a number of years, only the Department of Defense (DOD) had limitations imposed with respect to contract consolidation (see 10 U.S.C. § 2382). Now, with the Jobs Act, all agencies have limitations on contract consolidation and the responsibility for monitoring this was placed with the SBA.

Only a few years after passage of the Jobs Act, Congress amended the provisions addressing contract consolidation and specifically repealed 10 U.S.C. §2382. This new law made SBA the sole agency responsible for ensuring compliance with the limitations on contract

consolidation. See Pub. L. No. 112-239, Div A, Title XVI, Subtitle D, Part VI, § 1671(a), (b), (c)(2).

The Small Business Act defines contract consolidation as follows:

(1) the term 'consolidation of contract requirements', with respect to contract requirements of a Federal agency, means a use of a solicitation to obtain offers for a single contract or a multiple award contract--
(A) to satisfy 2 or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under 2 or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited; or
(B) to satisfy requirements of the Federal agency for construction projects to be performed at 2 or more discrete sites; and
(3) the term 'senior procurement executive' means an official designated under section 16(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(c)) [41 USCS § 1702(c)] as the senior procurement executive for a Federal agency.

15 U.S.C. § 657q(a). Further, the requirements concerning contract consolidation apply to procurements with a total value of more than \$2 million. Id. § 657q(c).

The Act does not preclude an agency from consolidating contracts although it limits when and how an agency may proceed with this type of contract. The purpose and intent of the statute is to ensure that before consolidating contracts, agencies conduct sufficient market research, assess and analyze the impact such a contract could have on small businesses, and ensure there are sufficient opportunities for small businesses. Therefore, the Small Business Act requires that, for any consolidated contract, the Senior Procurement Executive or Chief Acquisition Officer of the agency:

- (A) conducts market research;
- (B) identifies any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements;
- (C) makes a written determination that the consolidation of contract requirements is necessary and justified;
- (D) identifies any negative impact by the acquisition strategy on contracting with small business concerns; and
- (E) ensures that steps will be taken to include small business concerns in the acquisition strategy.

15 U.S.C. § 657q(c)(1). In addition, the SPE or CAO must make a determination that the consolidation is necessary and justified and may do so only if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches identified by the agency. Id. § 657q(c)(2).

On May 16, 2012, SBA published its proposed rule implementing these Jobs Act provisions (77 Fed. Reg. 29130). On October 2, 2013, SBA issued its final rule implementing these provisions (78 Fed. Reg. 61114). The final rule had an effective date of December 31, 2013. GSA issued the solicitation for OS3 on January 31, 2014, after the effective date for SBA's regulations.

In its agency response to the protests, GSA argues that OS3 is a "follow on" contracting vehicle to GSA's FSSI OS2 and therefore is not a consolidation of contract requirements subject to the provisions of the Small Business Act. In addition, GSA argues that it is "contrary to law" to provide an economic analysis on the consequences of small businesses on a consolidated contract. We disagree with both of these assertions.

First, the plain language of the statute states that consolidation of contracts occurs when an agency combines 2 or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under 2 or more separate contracts (performed by either small or large businesses) lower in cost than the total cost of the contract for which the offers are solicited. In this case, GSA (an agency) is combining several requirements (for office supplies) of GSA and numerous other agencies that have been provided to or performed for GSA and numerous other agencies under more than two separate contracts each undeniably lower in cost than the total cost of the contract of \$1.25 billion. GSA's own consolidation analysis acknowledges that agencies throughout the Government have their own contracts or BPAs for office supplies, or purchase these items using the purchase card. AR, Exh. 2 at 8. GSA intends for all of these agencies to utilize OS3. OS3 is the epitome of contract consolidation.

SBA's position that follow-on contracts can be considered consolidated contracts is consistent with a DOD memorandum issued on contract consolidation some time ago. According to this memo, follow-on contracts are subject to contract consolidation review:

Prior to contracting for a new requirement or a follow-on to an existing requirement, particularly for professional and technical services, the contracting officer shall conduct an analysis to determine if consolidation provides significant benefits. Prior to the exercise of an option, the contracting officer shall conduct such an analysis if the analysis was not conducted at the time of initial award. For each circumstance, if the analysis indicates consolidation will not provide significant benefits, the contracting officer shall break out tasks for competition. The awards shall be consistent with the order of precedence in the Defense Federal Acquisition Regulation Supplement (DFARS).

Memorandum For Secretaries Of The Military Departments, Directors Of Defense Agencies,
Subject: Consolidation of Contract Requirements, dated October 28, 1996, available at
<http://www.acq.osd.mil/dpap/Docs/contract.pdf>.¹

Further, contract consolidation (and bundling) is an issue that has been discussed by Congress many times over the last decade. In one report, Congress associated GSA's schedule contracts with contract consolidation, as follows:

Contract bundling

During the last several years, Congress has focused on streamlining procurement processes to improve the Federal government's capacity to acquire goods. These procurement reforms included provisions to facilitate the increased use of certain types of contracts. The Federal Acquisition Streamlining Act of 1994 codified the authority of agencies to enter into task-or delivery-order contracts with multiple firms for the same or similar products and services known as multiple award contracts. Information technology acquisition reforms of the Clinger-Cohen Act of 1996 provided for the use of multi-agency contracts and government-wide acquisition contracts.

In Fiscal Year 2002, more than 40 agencies spent approximately \$20 billion on the General Services Administration's (GSA) schedule contracts, a more than 200 percent increase since 1997. With new regulations adopting rules for 'co-operative' purchasing use of information technology schedules by state and local governments, the GSA expects total sales to double over the next several years.

The Committee believes stronger action is needed to address the problem of contract consolidation. In pursuing operational efficiencies, Federal agencies are making decisions, including contract consolidation, that block small business access to the Federal marketplace and the opportunity to compete.

S. Rep. No. 108-124 at 36 (2003). Large multiple award contracts that combine 2 or more requirements for goods or services to pursue efficiencies, and which may be utilized by any or all Federal agencies, are consolidated contracts.

Second, with respect to the consolidation analysis performed by GSA, SBA did not concur with the acquisition and therefore did not concur with the analysis. In addition, SBA has

¹The DOD statutory provision, 10 U.S.C. § 2382(c)(1), had virtually the same definition of contract consolidation compared to the definition now in the Small Business Act:

(1) The terms 'consolidation of contract requirements' and 'consolidation', with respect to contract requirements of a military department, Defense Agency, or Department of Defense Field Activity, mean a use of a solicitation to obtain offers for a single contract or a multiple award contract to satisfy two or more requirements of that department, agency, or activity for goods or services that have previously been provided to, or performed for, that department, agency, or activity under two or more separate contracts smaller in cost than the total cost of the contract for which the offers are solicited.

the authority, not GSA, to interpret the Small Business Act.² SBA has not informed agencies that economic impact determinations are not required.

In fact, it would appear from the history on contract consolidation that some type of data analysis is required. We note that the former contract consolidation statutory provision for DOD did not require a negative impact determination.³ However, Congress did require the following from DOD:

(1) The Secretary of Defense shall revise the data collection systems of the Department of Defense to ensure that such systems are capable of identifying each procurement that involves a consolidation of contract requirements within the department with a total value in excess of \$5,000,000.

(2) The Secretary shall ensure that appropriate officials of the Department of Defense periodically review the information collected pursuant to paragraph (1) in cooperation with the Small Business Administration—

(A) to determine the extent of the consolidation of contract requirements in the Department of Defense; and

(B) to assess the impact of the consolidation of contract requirements on the availability of opportunities for small business concerns to participate in Department of Defense procurements, both as prime contractors and as subcontractors.

(3) In this subsection:

(A) The term ‘consolidation of contract requirements’ has the meaning given that term in section 2382(c)(1) of title 10, United States Code, as added by subsection (a).

(B) The term ‘small business concern’ means a business concern that is determined by the Administrator of the Small Business Administration to be a small-business concern by application of the standards prescribed under section 3(a) of the Small Business Act (15 U.S.C. 632(a)).”

10 U.S.C. § 2382 note; Pub. L. 108–136, Div. A, title VIII, § 801(b), Nov. 24, 2003, 117 Stat. 1540, (emphasis added). Further, the committee report for the Small Business Act’s consolidation provisions explained that:

S. 2989 is aimed at expanding the access of small businesses to federal contracts, in part by regulating contract bundling and contract consolidation (the practice of combining two or more contracts into a large single agreement). Under the bill, federal agencies would have to justify the use of consolidated contracts by

² In fact, GSA acknowledged to GAO already that SBA is the agency that interprets these provisions. (“DOD and GSA have been awaiting SBA’s final rules on consolidated contracts to update or create corresponding guidance”). Small Business Contracting – Updated Guidance And Reporting Needed For Consolidated Contracts, GAO-14-36 (Nov. 2013), available at <http://www.gao.gov/assets/660/659254.pdf>.

³ DOD was required to do the following: conduct market research; identify any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements; and determine that the consolidation is necessary and justified. 10 U.S.C. § 2382(b)(1).

evaluating whether such contracts are necessary and analyzing the effect on small businesses.

S. Rep. No. 111 S. Rpt. 343, at 11 (2010) (emphasis added).

It would appear that when Congress created the new contract consolidation provisions in the Small Business Act, it clearly wanted negative impact on small businesses to be considered and addressed – in a thoughtful and meaningful way - by the agency. And, based on the history of the DOD provision, Congress wanted some type of data analysis. It would seem that this analysis would then be used to determine the steps that need to be taken to include small business concerns in the acquisition strategy. See 15 U.S.C. § 657q(c)(1)(D) & 9(E) (“(D) identifies any negative impact by the acquisition strategy on contracting with small business concerns; and (E) ensures that steps will be taken to include small business concerns in the acquisition strategy.”).

In this case, GSA performed no negative impact assessment other than the following:

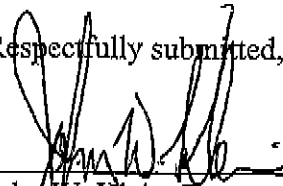
Another matter of interest is the impact of potential reduction in sales for small businesses not chosen as an OS3 CLIN provider. GSA has considered this potential negative impact on small businesses but has determined the benefits to be gained through OS3 CLINs will outweigh this negative impact.

AR, Exh. 2 at 7. The above two sentences hardly seem like the thoughtful analysis Congress would have wanted on this important issue. GSA is merely acknowledging that small businesses will be harmed by OS3, but never states how many and to what degree (or, for example, the potential impact on the Federal government's small business supplier base). While SBA acknowledges that in some instances existing data sources may hinder an agency's ability to explicitly assess the negative impact of the acquisition on small businesses, in this case, as GSA notes, this is a follow on acquisition. GSA should have some data on OS2's impact on small businesses that can be used for this analysis. This data, however, is not found in their consolidation analysis.

CONCLUSION

SBA understands the potential cost savings and administrative efficiencies that may result from strategic sourcing in general. However, agencies must still adhere to statutory requirements concerning contract consolidation (and bundling, if applicable) when issuing solicitations in support of this initiative. In this case, with OS3, GSA was required to prepare a consolidation analysis that assessed the negative impact the acquisition will have (if any) on small businesses. GSA failed to do so.

Respectfully submitted,



John W. Klein, Esq.
Associate General Counsel
for Procurement Law
Laura Eyester, Esq.
U.S. Small Business Administration
409 Third Street, SW, Fifth Floor
Washington, DC 20416

cc (by email):

Agency Counsel
Kristen M. Nowadly
Assistant Regional Counsel
U.S. General Services Administration
kristen.nowadly@gsa.gov

Protesters:

Phil Jessen, pjessen@imagesupp.com
admin@nationalofficeoutlet.com
Janice Dean, janice@farratech.com
Ken Paul, ken.paul@bahfed.com
J Meyer, jmeyer@americantoneronline.com
evan@adhesives.com
John Miller, john.miller@dbfederal.com
Kevin Paul, kevin.paul@kpaulcorp.com
Naseer Bade, naseer.bade@federalmerchants.com
alanc@itdprintsolutions.com
kurt@tantaquidgeon.com
Michael@dolphinblue.com
toddbcase@copierdoctors.com
greg@papershredders.com
sales@eaprisa.com
mrben@mindspring.com
marcine@grayenterprise.com
Alpha Sum Business Machines, Lisa@AlphaSum.com

From: [REDACTED]
Sent: Friday, January 31, 2014, 2:54 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: GSA Form 2689 for OSA
Importance: High

AICDN,

I non-concur with GSA's acquisition strategy for the OS9 Purchasing Channel due to policy concerns regarding the following:

GSA's proposed small business evaluation preference results in a de facto small business set-aside but without the requirements normally included in an acquisition set aside for small business, e.g., Limitations on Subcontracting, compliance with the Non-manufacturer Rule, and application of the Buy American Act.

In accordance with the SBA Final Rule on Task and Delivery Order Contracts, published October 2, 2013, contracting agencies may set aside task orders under Multiple Award Contracts awarded through full and open competition. The discrete task orders awarded in such situations, become subject to the requirements of set-asides, including Limitations on Subcontracting and the Non-Manufacturer Rule. GSA's evaluation preference as structured essentially limits awards to small businesses and socio-economic subcategories while skirting these requirements.

This PCR action is taken after consultation with SBA HQ staff, which will assess the effect of such acquisition strategies as they relate to the Small Business Act and any impact on the small business community.

[REDACTED]