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Decision

Matter of: Academy Medical, LLC

File: B-418223; B-418223.2

Date: January 31, 2020

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Jason M. Fragoso, Esq., Department of Veterans Affairs, for the agency.
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DIGEST

Protest challenging agency's failure to set aside any portion of a solicitation is sustained where the agency decision was unreasonable and insufficiently documented.

DECISION

Academy Medical, LLC., a service-disabled veteran-owned small business (SDVOSB), of West Palm Beach, Florida, protests the terms of request for proposals (RFP) No. 36C10G19R0050, issued by the Department of Veterans Affairs (VA), for the distribution and supply management of medical, surgical, dental, and laboratory supplies to VA medical centers (VAMCs) and other governmental agencies (OGAs). The protester argues that the procurement should have been set aside for SDVOSBs or veteran-owned small businesses (VOSBs).

We sustain the protest.

BACKGROUND

On September 27, 2019, the VA issued the solicitation, on an unrestricted basis, under the procedures of the Federal Acquisition Regulation (FAR) parts 12 and 15. Agency's Memorandum of Law at 2; Agency Report (AR), Tab 4, Acquisition Plan and Market Research (APMR) at 18¹. The solicitation sought proposals to provide the distribution

¹ When referencing the agency's acquisition plan and market research, our Office cites to the associated Bates number.

and supply management of all required medical, surgical, dental, and laboratory supplies to VAMCs and OGAs in 20 Veteran's Integrated Service Networks (VISNs). Contracting Officer's Statement (COS) at 2-3. The solicitation anticipated award of one fixed-price, indefinite-delivery, indefinite-quantity contract per VISN.² AR, Tab 5, RFP at 4; COS at 3. The due date for proposals was October 28. COS at 3.

Prior to the issuance of the current RFP, the VA issued a solicitation--RFP No. 36C10G19R0022--for similar requirements. Id. at 4. Before issuing RFP-0022, the agency conducted market research by, among other things, issuing two requests for information (RFIs). AR, Tab 4, APMR at 36. Based on the results of its market research, the agency concluded that "[a]t least two SDVOSBs are reasonably expected to provide offers for VISNs 1, 2, 4, 8, 10, and 19." Id. at 43. The VA then determined that these VISNs would be set aside for SDVOSBs utilizing tiered evaluation procedures. Id.

Consistent with the foregoing determination, RFP-0022 advised that the contract line item numbers (CLINs) associated with VISNs 1, 2, 4, 8, 10, and 19 would be set aside using a tiered evaluation approach, and that the CLINs associated with the other VISNs would utilize full and open competition. Protest, exh. B, RFP-0022 at 47. Under the tiered evaluation, proposals are evaluated in the following order of priority: (1) SDVOSBs, (2) VOSBs, (3) all other small business concerns, and (4) other than small businesses. Id. If a sufficient number of awards cannot be made, proposals at the next lower tier will be evaluated until a sufficient number of awards can be made. Id.

Our Office received a number of protests objecting to the terms of RFP-0022. While these protests were pending, the contracting officer determined that substantial changes to the solicitation's terms were required and canceled the RFP. COS at 8. In reviewing the solicitation's terms, the VA reconsidered the appropriateness of setting aside the CLINs associated with VISNs 1, 2, 4, 8, 10, and 19. Id. Because the agency did not suspend the closing date for RFP-0022 pending resolution of the aforementioned protests, proposals were received prior to the cancellation. Id. The agency considered the content of these proposals, including the reasonableness of the pricing proposed by SDVOSBs and other small business concerns, as well as the capabilities of these firms, to update its market research. Id. at 8-9. The VA also reached out to the SDVOSB concerns that had responded to one of the RFIs, but had not submitted proposals, including Academy.³ Id. at 10.

² VISNs are comprised of groups of VAMCs and OGAs. COS at 3.

³ On September 19, the contracting officer called the Vice President of Operations for Academy to determine why Academy responded to one of the RFIs, yet declined to submit a proposal for the prior solicitation. Supp. AR, Tab 5, Declaration of Contracting Officer at 1. According to the agency, the contracting officer asked only why Academy did not submit an offer, to which Academy responded that it did not have the necessary teaming agreements in place. Id. at 2. Academy, however, asserts that the contracting

After updating its market research to take into account the results of the canceled solicitation, the agency determined that there was no reasonable expectation that two or more responsible SDVOSBs, VOSBs, or small business concerns would submit proposals at a fair and reasonable price for any VISN. AR, Tab 4, APMR at 79. The contracting officer thus determined that the competition for all VISNs would be conducted on an unrestricted, full and open basis. Id. at 80.

In addition to reevaluating the set-aside determination, the contracting officer concluded that the Service Contract Labor Standards (SCLS) did not apply to the solicitation, and that FAR clause 52.222-41 and all associated FAR provisions and clauses, which had been included in RFP-0022, would not be included in the new solicitation. Supp. COS at 2-3. According to the agency, the SCLS was not included in the new solicitation because the SCLS applies only if the “principal purpose” of the contract is the furnishing of services. Id. at 4. The contracting officer concluded that the SCLS was inapplicable because “less than 10% of the total cost” of this solicitation involves distribution services. Id. at 5.

The contracting officer’s conclusion that the SCLS should not be included in the instant solicitation was in direct contrast to the position he had taken when asked to remove the SCLS from the earlier solicitation. In this regard, the record reflects that prior to the submission of proposals in response to RFP-0022, at least three prospective offerors, including Academy, submitted questions objecting to the inclusion of the SCLS on the basis the solicitation was primarily for the acquisition of supplies, not services, and asking the agency to remove the SCLS and related clauses. Comments on Supp. AR, exh. A, Q&A from RFP-0022 at 2-5. Additionally, in response to questions, the agency informed prospective offers that one prospective offeror not only asked the contracting officer to reconsider the application of the SCLS, but expressly stated that the inclusion of the SCLS “puts an unreasonable burden on large distributors.” Id. at 5. The contracting officer stated in his response to these questions that “the vast majority of this requirement is distribution and supply management services,” and refused to amend the solicitation to remove the SCLS. Id. at 2-5.

The agency issued the current solicitation, which does not contain the SCLS, as unrestricted. Academy then filed its pre-award protest with our Office on October 25.

officer also asked whether Academy intended to submit an offer on the new solicitation, to which Academy responded affirmatively. Comments, exh. B, Declaration of Vice President (VP) at 1. The contracting officer asserts that he never asked whether Academy intended to submit a proposal under the new solicitation (RFP-0050). Supp. AR, Tab 5, Declaration of Contracting Officer at 1. Following this phone conversation, the VP emailed the contracting officer on September 20, stating that Academy was “pulling together [its] thoughts” and would answer the VA the following week. Protest, exh. D at 1. On September 25, the VP sent another email, stating that Academy would like to arrange a meeting. Id. The VA responded two days later and declined the meeting, stating that a new solicitation had been issued. Id.

DISCUSSION

The protester challenges the agency's failure to set aside any VISN for SDVOSBs or VOSBs. The protester contends that, to the extent the agency relied on the proposals received in response to RFP-0022 to justify its decision to issue the current solicitation as unrestricted, such reliance was unreasonable. The protester further asserts that the agency did not take into account the impact that removal of the SCLS requirement would have on the ability of SDVOSBs, VOSBs, and other small business concerns to compete. For the reasons discussed below, we conclude that the agency's market research was insufficient to support the agency's conclusion that it would not receive viable proposals from at least two SDVOSBs or VOSBs; we therefore sustain the protest.

Academy's allegations concern the requirements under the Veterans Benefits, Health Care, and Information Technology Act of 2006 (VA Act), 38 U.S.C. §§ 8127-8128. Specifically, the VA Act requires the VA to set aside acquisitions for VOSBs or SDVOSBs whenever there is a reasonable expectation that the VA will receive offers from at least two VOSBs or SDVOSBs capable of performing the required work, and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d); Veteran Shredding, LLC, B-417399, June 4, 2019, 2019 CPD ¶ 210 at 3; Crosstown Courier Serv., Inc., B-410936, Mar. 12, 2015, 2015 CPD ¶ 107 at 4. We refer to this requirement as the VA's Rule of Two.

As to whether the VA had a "reasonable" expectation, our Office has concluded that such a determination is a matter of informed business judgment within the contracting officer's discretion. Crosstown Courier Serv., Inc., B-407404, Nov. 30, 2012, 2012 CPD ¶ 333 at 3. That said, a contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two SDVOSBs or VOSBs capable of performing the work; our Office will review a protest to determine whether a contracting officer has made such efforts. See Safety Storage, Inc., B-280851, Oct. 29, 1998, 98-2 CPD ¶ 102 at 3. In this regard, we have found unreasonable the decision to issue a solicitation on an unrestricted basis where that decision is based on outdated or incomplete information. McSwain & Assocs., Inc. et al., B-271071 et al., May 20, 1996, 96-1 CPD ¶ 255 at 2.

Academy contends that the contracting officer unreasonably relied on outdated information--to wit, the proposals received in response to RFP-0022--to justify issuing the current solicitation as unrestricted. We agree with the protester that, in the circumstances here, such reliance was unreasonable.

In deciding whether to set aside a procurement, an agency may reasonably rely on the results of a canceled procurement where the requirements of the two solicitations are the same. Veteran Shredding, supra, at 5. Here, however, the requirements of the two solicitations are not the same. Most notably, the canceled solicitation contained the SCLS requirement, and the current solicitation contains no such requirement.

The record indicates that removing the requirement to comply with the SCLS likely had a material effect on the competitive field. In this regard, the protester asserted in its initial protest that complying with the SCLS requirements was so burdensome as to have deterred competition, explaining as follows:

Not only did these confusing RFP provisions obligate the offerors, to figure out which wage determinations applied, with no support from the VA, but they also obligated offerors to map all their non-exempt personnel into appropriate [Service Contract Act] labor categories for pricing purposes to ensure that they were compliant with the Act. That was a monumental task to be completed in 30 days, which was all the time that the VA allowed under the solicitation. In addition, the [Service Contract Act] had never been a part of the VA's prior primer [sic] vendor procurements. Thus, the imposition of this new requirement imposed significant performance risk on offerors who, as noted above, were given only thirty (30) days to prepare and submit their proposals.

Protest at 3 n.1.

Further, as noted above, prospective offerors submitted three questions objecting to the inclusion of the SCLS in RFP-0022, with one of these questions explicitly addressing the burden imposed by the SCLS requirement. In addition, Academy contends that two of the incumbent large business contractors notified the VA that they were unwilling to compete unless the VA removed the Service Contract Act requirements. Supp. Protest at 3. Finally, the contracting officer himself explained that he decided not to include the SCLS in the new solicitation because, among other things, "[r]equiring [prime vendors] to strictly adhere to wage determinations for specific labor categories in this instance would be unfair . . . [as prime vendors] have no feasible method of segregating out employees who can only work on orders associated with Government contracts." Supp. AR, Tab 4, Contracting Officer's Memorandum for Record at 2.

Additionally, the contracting officer's assertion that "at no point . . . did a SDVOSB/VOSB indicate that the inclusion of the [SCLS] was a potential reason for a company not to propose," Supp. COS at 7, is not supported by the record. As mentioned above, Academy expressly asked the contracting officer to remove the SCLS requirement. Comments on Supp. AR at 7. Furthermore, it was impossible to discern from the redacted version of the market research report addendum provided to our Office by the VA what feedback was provided by other SDVOSBs as to their basis for not submitting proposals.

Finally, while the contracting officer argues that he did in fact consider the competitive impact of removing the SCLS requirement and found its removal to be immaterial, the contracting officer's explanation addresses only whether the removal of the SCLS could be expected to have an impact on offerors' prices (as opposed to their decision to compete). Supp. COS at 7. The contracting officer's assertion that if an SDVOSB or

VOSB firm had indicated that inclusion of the SCLS in the earlier RFP had dissuaded it from submitting a proposal, he would have considered this information in his set-aside determination, id., indeed implies that he did not consider the potential impact of the SCLS on the willingness of SDVOSBs and VOSBs to compete.

Based on this record, we cannot conclude that the VA reasonably evaluated the effect that the removal of the SCLS requirement would have on the willingness of SDVOSBs and VOSBs to compete under the instant solicitation. Accordingly, we sustain the protest.

RECOMMENDATION

We recommend that the VA reconsider its market research, specifically address the competitive impact of the SCLS' removal with respect to SDVOSBS, VOSBs, and other small business concerns, and make a new set-aside decision. We also recommend that the agency reimburse the protester for the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Academy's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the VA within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Thomas H. Armstrong
General Counsel