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Decision

Matter of: Ipsos Public Affairs, LLC

File: B-421717

Date: September 5, 2023

David S. Black, Esq., and Richard J. Ariel, Esq., Holland & Knight, LLP, for the protester.
John W. Tangalos, Esq., and Rachel C. Fromm, Esq., Department of Veterans Affairs, for the agency.
April Y. Shields, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision to issue solicitation as a small business set-aside is denied where the agency performed market research and made a reasonable business judgment about the likelihood of small business competition.

DECISION

Ipsos Public Affairs, LLC, of Washington, D.C., protests the terms of request for proposals (RFP) No. 36C77622R0126, issued by the Department of Veterans Affairs (VA) for survey support services. Ipsos challenges the agency's decision to set aside the procurement for small businesses.

We deny the protest.

BACKGROUND

The RFP was issued on May 22, 2023, as a small business set-aside, under the corresponding size standard of North American Industry Classification System (NAICS) code 541910 (market research and public opinion polling). See Agency Report (AR), Tab 5, RFP.¹ The RFP seeks proposals to provide survey support services for the

¹ The agency has amended the RFP five times. All citations are to the Adobe PDF page numbers of the documents referenced in this decision, unless otherwise paginated.

Veterans Health Administration's survey of healthcare experiences of patients (SHEP) program. AR, Tab 6, RFP, attach. A, Performance Work Statement (PWS) at 2. The RFP requires a contractor that has received approval to administer certain surveys from the Centers for Medicare and Medicaid Services, specifying that the requirement was for provisional or full hospital consumer assessment of healthcare providers and systems (HCAHPS) approval. *Id.* The SHEP program uses these surveys as "the industry standard approach" to measure patient experiences of care and the agency's performance against private sector healthcare. *Id.* The RFP anticipates the award of a single indefinite-delivery, indefinite-quantity contract under which fixed-priced task orders will be issued, with an ordering period of five years and a maximum value of \$99 million. *Id.* at 8. Ipsos is a large business and has been the incumbent prime contractor since 2008. Protest at 3; Contracting Officer's Statement (COS) at 1.²

Prior to issuing the RFP, the agency conducted a series of acquisition planning efforts since at least February 2022 that included: issuing notices and requests for information (RFI), conducting searches in the Vendor Information Pages database and the Small Business Administration's small business database, reviewing the acquisition history and the HCAHPS approved vendor list, contacting small businesses, and receiving and reviewing responses. COS at 1-3; see AR, Tab 8, Market Research Report. The agency's market research resulted in responses from 13 vendors, including five small businesses. AR, Tab 8, Market Research Report at 8-9. The initial contracting officer analyzed the responses and solicited a review from the agency's program office; while the program office noted some concerns about, for example, whether the small businesses would be able to meet certain experience requirements, it did not identify any of the small businesses as incapable of performing the agency's requirement. *Id.* at 9-10, 14-16. The initial contracting officer found that three of the HCAHPS-approved small businesses were capable and that award could be made at a fair market price based on adequate competition, and thus concluded that issuing the RFP as a small business set-aside was proper.³ *Id.* at 22-23.

² The agency explains that, due to organizational changes, a new contracting officer was assigned prior to the issuance of the RFP. Memorandum of Law (MOL) at 4 n.7. Unless otherwise noted, references in our decision are to the second contracting officer, who submitted the contracting officer's statement in the agency report.

³ The initial contracting officer also first considered whether the requirement should be set aside for veteran-owned small businesses (VOSBs) or service-disabled veteran-owned small businesses (SDVOSBs) under the "VA Rule of Two." COS at 3, *citing* 38 U.S.C. § 8127(d). The VA Rule of Two requires a VA contracting officer to set aside acquisitions for VOSB or SDVOSBs where the contracting officer reasonably expects to receive at least two offers from VOSBs or SDVOSBs and that award can be made at a fair and reasonable price that offers the best value. *Community Surgical Supply of Toms River, Inc.*, B-416365.2, Jan. 28, 2019, 2019 CPD ¶ 72 at 2-3. The initial contracting officer concluded that the VA Rule of Two was not met here. AR, Tab 8, Market Research Report at 20.

The agency also sought internal agency concurrence by submitting a small business program form that summarized the decision to set aside the procurement for small business. AR, Tab 9, VA Form 2268 Full Concurrence. Both the contracting activity's small business liaison and a representative from the VA's office of small and disadvantaged business utilization concurred with the set-aside decision. *Id.*

On August 9, 2022, the agency issued a pre-solicitation notice indicating its intent to solicit the requirements as a small business set-aside. COS at 1, *citing* Protest, exh. B, Pre-Solicitation Notice. After the agency decided to incorporate a Federal Risk and Authorization Management Program (FedRAMP) compliance requirement⁴ into the RFP, the agency also conducted supplemental market research, which included obtaining additional responses from the small businesses. COS at 4, *citing* AR, Tab 10, Supp. Market Research Info. Folder. The additional information received was consistent with the agency's initial set-aside determination, and the small businesses affirmed that they could meet the FedRAMP compliance requirement. COS at 4. The contracting officer reviewed the procurement record and concurred with the previous findings and conclusion to set aside the procurement for small businesses. AR, Tab 10, Supp. Market Research Info. Folder, Updated HCAHPS List and Contracting Officer Memorandum.

As noted above, the agency issued the RFP on May 22, 2023. Prior to the June 23 due date for receipt of proposals, Ipsos filed this protest.

DISCUSSION

Based on the protester's experience as the incumbent contractor and its understanding of the "financial capacity, organizational and infrastructure resources, and technical capabilities required to perform the SHEP Program," Ipsos argues that "it is not possible" for the agency to have reasonably identified at least two small businesses capable of performing this requirement. Protest at 7. In addition, Ipsos contends that "prior procurement history weighs in favor of full and open competition" based on its contract that was awarded in 2017, and that the agency's set-aside decision was inadequately documented. *Id.* at 9, 12-13. As such, Ipsos argues that the VA could not reasonably justify issuing this RFP as a small business set-aside.

The agency responds that the set-aside decision was reasonable, proper, consistent with applicable procurement law and regulation, and adequately documented. The agency asserts that the contracting officer reasonably concluded that offers will be received from at least two small businesses capable of performing the work at a fair market price. MOL at 1, 4. The contracting officer explains that "[a] variety of effective, informative market research methods were used to arrive at the small business set-

⁴ FedRAMP is a government-wide program providing a standardized approach to security assessment, authorization, and continuous monitoring for cloud products and services. *SRA Int'l, Inc.*, B-409939, Sept. 2, 2014, 2014 CPD ¶ 264 at 2 n.1.

aside determination made for this procurement, as is readily demonstrated by the contemporaneous procurement record.” COS at 4.

Under Federal Acquisition Regulation section 19.502-2(b), a procurement with an anticipated dollar value of more than \$150,000, such as the one here, must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at fair market prices. Our Office will review the record to determine whether the agency made reasonable efforts to locate small business competitors. *Mountain West Helicopters, LLC; Trans Aero, Ltd.*, B-408150, B-408150.2, July 1, 2013, 2013 CPD ¶ 152 at 3.

No particular method of assessing the availability of capable small businesses is required; rather, the assessment must be based on sufficient facts so as to establish its reasonableness. *Mountain West Helicopters, LLC; Trans Aero, Ltd.*, *supra*. The decision whether to set aside a procurement may be based on an analysis of factors such as the prior procurement history, the recommendations of appropriate small business specialists, and market surveys that include responses to sources sought announcements. *Commonwealth Home Health Care, Inc.*, B-400163, July 24, 2008, 2008 CPD ¶ 140 at 3. In making set-aside decisions, agencies need not make actual determinations of responsibility or decisions tantamount to determinations of responsibility; rather, they need only make an informed business judgment that there is a reasonable expectation of receiving acceptably priced offers from small business concerns that are capable of performing the contract. *Ceradyne, Inc.*, B-402281, Feb. 17, 2010, 2010 CPD ¶ 70 at 4.

Because a decision whether to set aside a procurement is a matter of business judgment within the contracting officer’s discretion, our review generally is limited to ascertaining whether that official abused his or her discretion. *Information Ventures, Inc.*, B-400604, Dec. 22, 2008, 2008 CPD ¶ 232 at 3; *ViroMed Labs.*, B-298931, Dec. 20, 2006, 2007 CPD ¶ 4 at 3-4. We will not question a small business set-aside determination where the record shows that the evidence before the contracting officer was adequate to support the reasonableness of the conclusion that small business competition reasonably could be expected. *Commonwealth Home Health Care, Inc.*, *supra* at 3.

Here, our review of the record confirms that the contracting officer exercised reasonable business judgment in deciding to set aside this RFP for small businesses after finding that three of the HCAHPS-approved small businesses were capable and that award could be made at a fair market price based on adequate competition. See AR, Tab 8, Market Research Report; AR, Tab 10, Supp. Market Research Info. Folder. The agency used a variety of market research methods, as discussed above, that are consistent with applicable procurement law and regulation, including: issuing a series of notices and RFIs, conducting searches in various small business databases, reviewing the acquisition history and the HCAHPS approved vendor list, contacting small businesses, and receiving and reviewing responses. COS at 1-3; AR, Tab 8, Market Research

Report. As also noted above, both the contracting activity's small business liaison and a representative from the VA's office of small and disadvantaged business utilization concurred with the set-aside decision. AR, Tab 9, VA Form 2268 Full Concurrence.

With respect to its review of prior procurement history, the agency rejects the protester's allegation to the extent Ipsos focuses only on its contract from 2017. The contracting officer reasonably explains that, as the record shows, the agency's market research considered the prior award and concluded that this procurement "does not reflect the same market conditions that were present in 2016" on which that procurement was conducted. COS at 4. For example, as the contracting officer notes, the agency's market research found that "there are several additional HCAHPS approved small businesses that were not available at the time of the previous procurement, and that these businesses are interested in submitting proposals for this effort." *Id.*, citing AR, Tab 8, Market Research Report. We also agree with the contracting officer's assertion that "each acquisition stands on its own and must be supported by current and relevant market research that considers changes in industry." COS at 4; see also MOL at 5 n.8.

Nonetheless, in its comments responding to the agency's report, Ipsos points to a number of things that it claims the agency was required to consider in making the set-aside decision, without establishing any requirement that the agency do so. In this regard, the legal standard for our review of such a decision requires business judgment about a reasonable likelihood of small business competition, and thus recognizes that a contracting officer may set aside a solicitation even where a skeptical competitor can identify contrasting information that could arguably justify rejecting the set-aside, and holding a full and open competition instead. *Community Surgical Supply of Toms River, Inc.*, *supra* at 5-6.

As a general matter, while Ipsos complains that the contracting officer was "unreasonably dismissive" of concerns from the program office about the capability of the small businesses discussed in the market research report, the agency asserts that Ipsos mischaracterizes those concerns. For example, as the contracting officer explains, while the program office noted some concerns about whether the small businesses would be able to meet certain experience requirements, those were not required at the market research stage and, even so, the responses from the program office "favored a finding of capability." COS at 4. In this regard, the agency's characterization is consistent with the record that "the program office, while expressing some concerns, did not find any of the responsive HCAHPS approved small businesses incapable of performing this effort." MOL at 8 n.13; see also COS at 3 (explaining that the program office's concerns "did not provide, in the Contracting Officer's opinion, a basis for finding that the HCAHPS small businesses who responded to the agency's RFI/sources sought notices were not capable of performing this effort"); see generally AR, Tab 8, Market Research Report.

As an example, Ipsos posits that one of the small businesses, [REDACTED], "has a fatal lack of prior experience performing government contracts" and "entirely lacks any experience performing 'contracts with the size and scope of the SHEP program

requirements.” Comments at 8. Ipsos cites to similar concerns noted from the program office in the market research report. *Id.*, citing AR, Tab 8, Market Research Report at 15.

The record shows that the contracting officer found [REDACTED] capable after considering both the limited concerns noted by the program office and, among other things, that: [REDACTED] has been a fully approved HCAHPS vendor since 2012, [REDACTED] “experience as a whole shows sufficient capability at this stage,” [REDACTED] has “healthcare survey experience without subcontracting,” and “[i]t would not be fair to find a vendor not capable based on a lack of past experience with SHEP or not doing an identical project.” AR, Tab 8, Market Research Report at 16. As the contracting officer points out in response to the protest, “[a]gencies are not required to request, nor must prospective small business offerors provide, a complete technically acceptable approach in response to the agency’s market research.” COS at 5. We agree with the agency that the protester is, in essence, advocating for a level of investigation that is neither “practical” nor required in order for the agency to make a reasonable set-aside decision. MOL at 12-13.

Finally, as another example, Ipsos contends that the agency failed to consider that one of the small businesses, [REDACTED], “was in the midst of a devastating corporate bankruptcy at the time the [contracting officer] made his determination.”⁵ Comments at 3. In our view, Ipsos raises a question of responsibility and, as noted above and as the agency argues, in making set-aside decisions, agencies need not make actual determinations of responsibility or decisions tantamount to determinations of responsibility. *Ceradyne, Inc.*, *supra* at 4; *see also* MOL at 13.

In conclusion, we find that the contracting officer reasonably exercised business judgment to set aside this procurement for small businesses. Although the protester disagrees with the contracting officer’s judgment, its disagreement in this regard does not show that the agency abused its discretion.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁵ In support of its claims about [REDACTED] capability, Ipsos also notes that it “at one time had entered into a teaming agreement with [REDACTED] to explore submission of a proposal in response to the solicitation,” but has since “terminated the teaming agreement with [REDACTED] and is no longer associated with [REDACTED] in regard to this procurement.” Comments at 3 n.2.