



Decision

Matter of: Excelsior Ambulance Service, Inc.

File: B-422779

Date: September 20, 2024

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DIGEST

Protest challenging an agency's decision to not set aside a procurement for service-disabled veteran-owned small businesses (SDVOSB) is denied where the agency concluded from its market research that it did not have a reasonable expectation of receiving proposals from two or more SDVOSBs capable of performing the required services.

DECISION

Excelsior Ambulance Service, Inc., a service-disabled veteran-owned small business (SDVOSB) of Ludowici, Georgia, challenges the terms of request for proposals (RFP) No. 36C24724R0057, issued by the Department of Veterans Affairs (VA) for the provision of ambulance and stretcher van services to the Carl Vinson VA Medical Center (CVVAMC) in Dublin, Georgia. Excelsior asserts that the VA should have issued the RFP as a SDVOSB set-aside rather than as a small business set-aside.

We deny the protest.

BACKGROUND

The VA issued the RFP on July 18, 2024, as a small business set-aside pursuant to the procedures of Federal Acquisition Regulation (FAR) parts 12 and 15. Agency Report (AR), Exh. 2, RFP at 1, 82; Memorandum of Law (MOL) at 1-2. The RFP sought proposals for emergent and non-emergent ambulance and stretcher van services to

CVVAMC and its associated healthcare facilities.¹ AR, Exh. 2, RFP at 5. The RFP contemplated the award of a single indefinite-delivery, indefinite-quantity fixed-price contract. *Id.* at 80. Offerors were informed that North American Industry Classification System (NAICS) code 621910 (ambulance services) applied to each item of the procurement. *Id.* at 1.

Prior to issuing the RFP, the agency conducted market research. On February 1, 2024, the VA posted a sources sought notice on the SAM.gov website to determine the availability of potential offerors.² AR, Exh. 3a, Market Research at 2. The notice invited interested firms to provide their qualifications to demonstrate their ability to perform the work. AR, Exh. 3b, Sources Sought Notice at 2. The notice requested firms to submit a statement of capability to perform the work specified in the notice, a description of the firm's business size and socio-economic status, and the firm's price estimate. *Id.* at 2-3.

In addition to the sources sought notice, the VA conducted searches for capable contractors through the Veterans Small Business Certification (VetCert) database and reviewed the procurement history for ambulance services within VISN 7. AR, Exh. 3a, Market Research at 1-2. The agency searched the VetCert database for SDVOSB/VOSB (veteran-owned small business) firms registered under NAICS code 621910. *Id.* at 2. The search identified 148 SDVOSB/VOSB firms that could potentially meet the standards of performing non-emergent ambulance services to CVVAMC. *Id.* For the past performance review, the contracting officer reviewed the procurement history for ambulance services at VA facilities within VISN 7. *Id.* Of the four identified small business contractors performing ambulance services in VISN 7, only one contractor (the protester) was a certified SDVOSB.³ *Id.*

¹ CVVAMC is located in Veterans Integrated Services Network 7 (VISN 7). MOL at 2 n. 1. VISN 7 has medical facilities and clinics in Georgia, South Carolina, and Alabama. *Id.*

² SAM.gov is the current governmentwide point of entry (GPE) which serves as the single point where government business opportunities greater than \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public. FAR 2.101; *Excelsior Ambulance Serv., Inc.*, B-421948, Sept. 27, 2023, 2023 CPD ¶ 220 at 2 n.1.

³ After the VA completed its market research, one of the four non-SDVOSB small business concerns identified as having previously performed ambulance services in VISN 7 recertified as a SDVOSB. MOL at 3 n.5. This development, however, has no bearing on our analysis of the contracting officer's contemporaneous set-aside decision. First, we have previously found that information that first becomes available after issuance of a solicitation does not demonstrate that the contracting officer's prior determination not to set aside the procurement was unreasonable, and there is nothing in the procurement regulations that requires the contracting officer to amend or cancel a solicitation when the official subsequently learns of interested, responsible SDVOSB concerns, assuming that the contracting officer had conducted a reasonable

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The agency received two responses to the sources sought notice. *Id.* The responses were from Excelsior and a non-SDVOSB small business. *Id.* The contracting officer concluded, based on the sources sought notice and other market research, that at least two small businesses could potentially fulfill the government's requirements, with only one being an SDVOSB. *Id.* at 3. The contracting officer then considered the market research to decide whether the requirement should be set aside for VOSB or SDVOSBs under the "VA Rule of Two." *Id.* The VA Rule of Two requires the agency to set aside acquisitions for VOSB or SDVOSB concerns where the agency's market research leads it to conclude that there is a reasonable expectation that two or more such concerns are likely to submit offers, and that award can be made at a fair and reasonable price.⁴ 38 U.S.C. § 8127(d). The contracting officer concluded that the VA Rule of Two was not met because the agency's market research did not reasonably support an expectation that at least two SDVOSB or VOSB concerns were likely to submit offers, and, as noted above, instead issued the RFP as a small business set-aside. AR, Tab 3a, Market Research at 3. Prior to the due date for receipt of proposals, August 8, Excelsior filed this protest.⁵

DISCUSSION

Excelsior challenges the VA's decision not to conduct this procurement as an SDVOSB set-aside. Protest at 1. The protester alleges that the VA's market research is insufficient, arbitrary and capricious, and in violation of law and regulation. Comments at 1. The protester contends that in its "anecdotal (but extensive) experience," numerous SDVOSB and VOSB contractors regularly compete for and perform patient

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investigation regarding the possibility of two or more responsible SDVOSB concerns competing on the procurement. *Crosstown Courier Serv., Inc.*, B-410936, Mar. 12, 2015, 2015 CPD ¶ 107 at 6. Second, as the agency notes, and as discussed herein, nothing in the record indicates this additional firm's interest or current capability to perform the agency's current requirements; indeed, the firm neither submitted information in response to the sources sought notice nor a proposal. MOL at 3, 3 n.3.

⁴ In contrast to this VA-specific Rule of Two, which establishes mandatory set-aside requirements for VOSB or SDVOSB concerns for acquisitions conducted by the VA, the more general "Rule of Two" contemplates that federal agencies set aside certain acquisitions for small business concerns where the agency's market research leads it to conclude that there is a reasonable expectation that two or more such concerns are likely to submit offers, and that award can be made at a fair and reasonable price. FAR 19.502-2. As discussed herein, the agency set this procurement aside for small business concerns pursuant to FAR section 19.502-2.

⁵ The agency subsequently only received two proposals in response to the solicitation, from the protester and the small business concern that also responded to the sources sought notice. MOL at 3 n.3.

transportation contracts within the geographic area specified in the RFP. Protest at 2. The protester additionally points to the results of the agency's VetCert database in support of its position. Comments at 1. Thus, Excelsior argues that the agency cannot reasonably justify its decision to not issue the RFP as a SDVOSB set-aside.

The VA responds that the set-aside decision was reasonable, proper, and consistent with applicable procurement law and regulation. MOL at 5. The agency asserts that, based on its market research, which included the issuance of a sources sought notice and review of previously awarded contracts, the contracting officer reasonably concluded that it would not receive offers from two or more capable SDVOSBs. *Id.*

As addressed above, the VA is required by statute to set aside all acquisitions for SDVOSB or VOSB concerns where the agency's market research leads it to conclude that there is a reasonable expectation that two or more such concerns are likely to submit offers, and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d). The determination of whether there is a reasonable expectation of receiving offers from two or more SDVOSBs that are capable of performing the required work is a matter of informed business judgment within the contracting officer's discretion that we will not disturb absent a showing that it was unreasonable. *Tech62, Inc.*, B-420883, B-420883.2, Oct. 3, 2022, 2022 CPD ¶ 253 at 4-5.

While the requirements of 38 U.S.C. § 8127(d) do not dictate the use of any particular methodology in assessing the availability of potential SDVOSB concerns, our Office has explained that the assessment must be based on sufficient evidence to establish its reasonableness. *HurtVet Subcontracting, LLC*, B-419139, Dec. 2, 2020, 2020 CPD ¶ 392 at 2-3. Measures such as prior procurement history, market surveys that include responses to sources sought announcements, and recommendations of appropriate small business specialists may all provide a reasonable basis for a decision to set aside, or not set aside, a requirement for SDVOSBs. *AeroSage LLC*, B-414314, B-414314.2, May 5, 2017, 2017 CPD ¶ 137 at 6.

Here, our review of the record confirms that the contracting officer exercised reasonable business judgment in deciding to not set aside this RFP for SDVOSBs. The agency used a variety of market research methods that, as discussed above, are consistent with applicable procurement law and regulation, including: conducting a VetCert search of SDVOSB vendors capable of performing the RFP; issuing a sources sought notice; and reviewing past performance for the same service performed within VISN 7 facilities. AR, Exh. 3a, Market Research at 1. Based on this market research, the agency identified at least five small businesses that could potentially submit offers and would be capable of performing the requirements. *Id.* at 3. Specifically, the agency considered the two responses that it received to the sources sought notice, one submitted by the protester, an SDVOSB, and the other submitted by a small business concern, as well as three additional small business concerns identified when reviewing previous awards in VISN 7. *Id.* at 2-3. In our view, the record provides adequate support for the reasonableness of the conclusion that SDVOSB competition reasonably could not be expected.

Nonetheless, the protester challenges the sufficiency of the VA's market research on two grounds. First, the protester argues that the VetCert search should have, *per se*, been sufficient to require the agency to have set aside the procurement for SDVOSBs. Comments at 1. Second, Excelsior contends that the sources sought notice is not a reliable indicator of SDVOSB interest because most small businesses focus on "actual procurements" rather than notices. *Id.* at 2. If the agency had set aside the RFP for SDVOSBs, Excelsior asserts, the agency would have received at least two proposals from the 148 contractors it identified in its VetCert search. *Id.* at 2. We find no merit to the protester's arguments.

First, we have previously rejected similar arguments that a contracting officer is obligated to set aside a procurement for SDVOSBs based solely on the results of searches of applicable databases of SDVOSB and VOSB concerns. As we explained, the VA's investigation must address not only the existence of SDVOSBs that might submit proposals, but also their capability to perform the contract. *HurtVet Subcontracting, LLC, supra* at 3. The protester advances no evidence to show that any of the firms identified in the search have the capability to meet the agency's requirements here. Additionally, the protester's unsupported allegations are further undermined by the agency's unrebutted market research finding that Excelsior was the only identified SDVOSB that provides ambulance services and is registered to do so in the state of Georgia. AR, Tab 3a, Market Research Report, at 3. Excelsior has offered no evidence to show that any of the firms identified in the VetCert search have the capability to meet the agency's requirements, particularly when none of them responded to the sources sought notice or the solicitation. MOL at 3 n.3. Additionally, we find no merit to the protester's argument that the agency unreasonably relied on a sources sought notice because it was unduly burdensome on SDVOSB concerns. Furthermore, we note that the protester's speculation that SDVOSBs would be more likely to respond to the solicitation, as opposed to the sources sought notice, was not what transpired here, where the agency ultimately only received proposals from the two firms that responded to the sources sought notice.

Our Office finds that the contracting officer reasonably exercised business judgment to not set aside the RFP for SDVOSBs. 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