



Decision

Matter of: Mission Analytics, LLC

File: B-423165

Date: January 28, 2025

Michael F. Winters, for the protester
Daniel J. McFeely, Esq., Department of Veterans Affairs, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the scope of the agency’s proposed corrective action, taken in response to an agency-level protest, is denied where the agency reasonably decided to take corrective action to address perceived flaws in the solicitation and to ensure a fair and impartial competition.

DECISION

Mission Analytics, LLC, a service-disabled veteran-owned small business (SDVOSB) of Falls Church, Virginia, protests the scope of the agency’s proposed corrective action, announced in response to Mission Analytics’ agency-level protest challenging the award of a contract to Aviate Enterprises, Inc., an SDVOSB of McClellan, California, under request for quotations (RFQ) No. 36C26224Q1803, issued by the Department of Veterans Affairs (VA), for video display monitors. The protester contends the agency’s proposed corrective action is unreasonable.

We deny the protest.

BACKGROUND

The agency issued the solicitation on September 5, as an SDVOSB set-aside, pursuant to the procedures of Federal Acquisition Regulation (FAR) parts 12 (Acquisition of Commercial Products and Commercial Services) and 13 (Simplified Acquisition Procedures) for commercial grade monitors. Req. for Dismissal, exh. 2, RFQ at 6.¹

¹ All citations to the record are to the Adobe PDF document page numbers.

Specifically, the solicitation contemplated the award of a contract, on a fixed-price basis, for 86-inch monitors and mounting brackets, that were brand name or equal to NEC Display Solutions commercial monitor (model No. M861), which would be installed at the Greater Los Angeles, California VA medical center. *Id.* at 3. In addition to the brand name or equal designation, the RFQ also identified eight salient characteristics of the requested product. *Id.*

The agency received quotations by the September 12 due date. Req. for Dismissal, exh. 1, Contracting Officer's Statement (COS) at 2. The agency made award to Aviate Enterprises, Inc., on September 19, and provided public notice of the agency's award decision on September 20. *Id.*

On September 24, the protester filed an agency-level protest with the VA. Req. for Dismissal, exh. 3, First Agency-level Protest at 3-5. Mission Analytics argued the agency provided insufficient notification regarding the application of a waiver to the small business nonmanufacturer rule (NMR).² *Id.* On September 26, the agency provided its response to the protest, explaining, in relevant part:

As a result of the protest, the Contracting Officer has reviewed the procurement and has determined that there were errors in the procurement. The Contracting Officer has also determined that the solicitation does not accurately reflect VA's requirements for this procurement. The Contracting Officer has determined that corrective action is necessary to correct these deficiencies. To this end, VA will terminate the contract award to Aviate Enterprises, Inc. for the subject procurement. VA will also review its requirements for this procurement and will proceed in a manner appropriate to the results of that review. Because this corrective action results in the termination of the contract

² Regarding the small business NMR, ordinarily, when a procurement that has an assigned manufacturing or supply North American Industry Classification System (NAICS) code is set aside for small business, a small business vendor must be the manufacturer or producer of the end item being procured to be eligible to provide manufactured products or other supply items under the procurement. 13 C.F.R. § 121.406(a)(1). If the offeror does not manufacture the item being purchased, the "nonmanufacturer rule" provides that the offer of a nonmanufacturer small business concern can be considered if the small business offeror, among other things, represents that it will supply the product of a domestic small business manufacturer or processor, or that a waiver of this requirement is granted by the Small Business Administration (SBA). 13 C.F.R. § 121.406(b). Section 19.507(h) of the FAR provides that FAR clause 52.219-33, Nonmanufacturer Rule, should be included when the item being acquired has been assigned a manufacturing or supply NAICS code and any portion of the requirement is to be (1) set aside for small business and is expected to exceed the simplified acquisition threshold or (2) set aside or awarded on a sole-source basis. The FAR also states that the contracting officer shall not include FAR clause 52.219-33, Nonmanufacturer Rule, where the SBA has waived the NMR. FAR 19.507(h)(2).

award decision that forms the basis for your protest, the protest is rendered moot, and this protest is considered closed.

Id. at 2.

Mission Analytics filed a second agency-level protest with the VA on October 7. Req. for Dismissal, exh. 4, Second Agency-level Protest at 4-6. In this protest, Mission Analytics argued the VA's "state[d] intent to cancel the solicitation rather than award to lowest eligible offer" was unreasonable and asked the agency to "[r]eopen [the] solicitation and award to Mission Analytics." *Id.* at 6.

On October 29, the VA's senior procurement executive responded to Mission Analytics' protest, providing that the agency's "decision to terminate the contract award and proceed with a review of the requirements for this procurement was reasonable." *Id.* at 2. She explained that the contracting officer erroneously believed an NMR class waiver applied to the NAICS code applicable to the procurement, and thus conducted market research "based on this incorrect premise, which affected the VA Rule of Two analysis and set-aside decision for this procurement."³ *Id.* The senior procurement executive went on to explain:

[B]ecause the RFQ identified the product of a large business as an acceptable item for offerors to quote for this procurement, the solicitation does not accurately reflect VA's requirements for this procurement. Absent an NMR waiver, VA cannot accept the product of a large business for procurements, like this one, where the NMR applies. [. . .] Further, SDVOSB concerns who relied upon the solicitation's representation that they could offer to provide the brand-name product specified in the solicitation were placed at a competitive disadvantage[,] as SDVOSBs who offered to provide the brand-name product that the solicitation requested could not be eligible for contract award.

Id. at 3. On November 8, Mission Analytics filed the instant protest with our Office.

³ The VA rule of two requires the agency to set aside acquisitions for veteran-owned small businesses 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. 38 U.S.C. § 8127(d).

DISCUSSION

Mission Analytics argues the VA lacks a reasonable basis for its proposed corrective action.⁴ In this regard, the protester avers that the VA's stated rationale for terminating the award and reviewing its requirement is inconsistent with law and regulation and "appears to be pretextual and made to avoid awarding a contract on a competitive basis or to avoid resolving [the] protest."⁵ Protest at 4. The VA, in response, argues its proposed corrective action reasonably addresses perceived flaws in the solicitation.

Contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. *360 IT Integrated Solutions; VariQ Corp.*, B-414650.19 *et al.*, Oct. 15, 2018, 2018 CPD ¶ 359 at 6. The details of implementing the corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. *MSC Industrial Direct Co., Inc.*, B-411533.2, B-411533.4, Oct. 9, 2015, 2015 CPD ¶ 316 at 5. Thus, agencies are afforded the discretion to determine how to appropriately remedy their reasonable concerns, absent a showing that this discretion is being abused in some way. *360 IT Integrated Solutions, supra*.

Based on our review of the record, we find reasonable the agency's proposed corrective action, which includes reviewing its requirement, conducting additional market research, and revising the solicitation. Indeed, the parties are in apparent agreement that the solicitation is defective, though perhaps differing as to how.

In the main, the agency's rationale for its corrective action is two-fold. First, because the contracting officer incorrectly believed a NMR waiver applied to the procurement, "market research needs to be re-accomplished to determine if SDVOSB concerns could comply with the NMR[,] and if the Solicitation requirement that currently restricts participation in the procurement to SDVOSB concerns is valid[.]" Memorandum of Law (MOL) at 22. Second, the agency explains "because the Solicitation states that VA will accept offers of the brand-name monitor, but at the same time the NMR requires that VA must reject offers of the brand-name monitor, the Solicitation needs to be revised to clarify the restrictions on size of manufacturer and country of origin for offered monitors to ensure fairness to the vendors, to provide the Government an adequate number of

⁴ The protester challenges the VA's "cancellation" of the underlying solicitation. See *e.g.*, Protest at 1. However, nothing in the record provides that the agency has committed to cancelling the RFQ. Instead, the VA states it intends to "review its requirements for this procurement and will proceed in a manner appropriate to the results of that review." Req. for Dismissal, exh. 3, First Agency-level Protest at 2.

⁵ The protester raises other collateral allegations, and although our decision does not specifically address every argument presented, we have considered each argument and find that none provides a basis on which to sustain the protest.

quotes from which to choose, and to meet his duty to promote competition.” *Id.*; see also Supp. COS at 2-3.

While the protester concedes the VA’s “requirement changed somewhat” as a result of the application of the NMR (Comments at 5), Mission Analytics disagrees with the VA’s intended plan to conduct additional market research and revise the solicitation. Comments at 5-7. For example, concerning market research, the protester contends the agency’s research is sufficient because the VA received more than one quotation. *Id.* at 5. Moreover, the protester avers the RFQ need not be revised to clarify the restrictions on size of manufacturer and country of origin for offered monitors because the solicitation already includes a clause explaining this point. Comments at 5-6 (citing the RFQ’s inclusion of the VA’s Acquisition Regulation (VAAR) clause 852.219-76 (Notice of Limitations on Subcontracting--Certificate of Compliance for Supplies and Products)); see RFQ at 20.

Yet, separate and apart from the concerns identified by the VA, the protester contends there are other defects in the RFQ, such as with the listed salient characteristics. Supp. Comments at 3-4. As one example, Mission Analytics notes the solicitation provides, as a salient characteristic, that an offered product must “have the Energy Star Rating of 8 or higher.” RFQ at 3. However, the protester asserts the agency’s inclusion of this criteria as a salient characteristic is contrary to law. Supp. Comments at 4 (explaining that an EnergyStar rating is a government certification, not a salient characteristic, and arguing a mandatory EnergyStar rating is inconsistent with 41 U.S.C. § 3307, which concerns a preference for commercial services). The protester identifies other perceived flaws, such as potential ambiguity with the RFQ’s requirement concerning LAN and USB connections. Supp. Comments at 4. More to the point, the protester argues it is impossible for an offered product to actually meet the solicitation’s salient characteristics because, according to Mission Analytics, “there is NO product that meets both EnergyStar and the NMR.” *Id.* at 5.

With this as a backdrop, we conclude the protester fails to establish that the agency’s intended corrective action--conducting additional market research, reviewing its requirements, and revising the RFQ--is somehow unreasonable. Indeed, the protester’s own arguments claim that the agency’s solicitation, on its face, has numerous deficiencies that need to be corrected. Accordingly, the protester has not demonstrated how the agency’s intended conduct, which includes reviewing its requirement and revising the solicitation, falls outside the bounds of the broad discretion afforded to agencies when taking corrective action. *360 IT Integrated Solutions, supra* at 6.

The protest is denied.

Edda Emmanuelli Perez
General Counsel