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Decision

Matter of: Veterans Electric, LLC

File: B-415883; B-415884

Date: April 12, 2018

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Brian R. Reed, Esq., Department of Veterans Affairs, for the agency.

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DIGEST

Protest that the agency was required, under a service-disabled veteran-owned small business procurement, to make an award to the protester rather than cancel solicitation and re-compete agency requirements is denied where the record shows that the protester was the only firm to submit a quotation and the quotation was not technically acceptable.

DECISION

Veterans Electric, LLC, a service-disabled veteran-owned small business (SDVOSB), located in Colgate, Wisconsin, protests the decision by the Department of Veterans Affairs (VA), to cancel request for quotations (RFQ) No. 36C252-18-Q-0112, a SDVOSB set-aside, and to re-compete its needs for a nurse call/code blue system at the VA Medical Center (VAMC) in Madison, Wisconsin under RFQ No. 36C252-18-Q-0382, which was a set aside for small businesses. The protester argues that the agency violated applicable law and regulation when it cancelled the underlying solicitation and reissued the solicitation as a set-aside for small business concerns.¹

We deny the protest.

¹ Because this decision contains a discussion of more than one RFQ, citations and references to each solicitation are identified by the last four digits of the RFQ number.

BACKGROUND

The acquisition is for the installation of a new nurse call/code blue system, brand name Ascom Telligence, to replace the existing nurse call/code blue system for the 7th Floor surgical unit at the Madison VAMC.² RFQ-0112, Statement of Work (SOW) at 1. These services involve the removal of all existing nurse call devices, cabling, and equipment, and the installation of a new nurse call system that seamlessly ties into the existing Ascom Telligence nurse call system currently in use on other floors in the Madison VAMC. SOW at 1. The VA approved a justification for the acquisition of the new system in accordance with Federal Acquisition Regulation (FAR) § 13.106-1, which governs the use of a single source for brand name purchases not exceeding the simplified acquisition threshold of \$150,000.00. Protest exh. 3, Justification for Single Source Awards, at 1-2. The agency estimated the value for the acquisition to be \$148,354.00.³

Prior to issuing RFQ-0112 as a SDVOSB set-aside, the agency conducted market research to identify potential sources under the North American Industry Classification System code 238210, Electrical Contractors and Other Wiring Installation Contractors. Contracting Officer's Statement at 1-2. In doing so, the agency issued a sources sought notice to determine the interest and capability of potential vendors, including small business, veteran-owned small business (VOSB), and SDVOSB concerns. AR exh. 2, Sources Sought Notice. The agency also utilized other market research techniques which included internet searches of government databases, such as the Vendor Information Pages database of businesses approved to participate in VA's veteran-owned small business program, see 38 C.F.R. § 74.1, and internet searches of government-maintained catalogs. Contracting Officer's Statement at 1-2.

Only two SDVOSB vendors, Veterans Electric, and Rone Communications, responded to the sources sought notice. After reviewing the responses, the agency concluded that there was a reasonable expectation of receiving quotations from the two vendors that expressed an interest. Id. at 2. Thereafter, the agency issued RFQ-0112 on November 16, 2017, as a total SDVOSB set-aside. The solicitation provided that the agency would issue a fixed-price order to the vendor submitting the lowest-priced, technically acceptable quotation. RFQ at 4.

² Ascom is the sole manufacturer of the Telligence nurse call/code blue system and owns the proprietary rights. MasterCom, a small business concern, is the authorized Ascom distributor in the Milwaukee and Madison Wisconsin areas. Agency Report (AR) exh. 9, Email from Ascom to VA (Feb. 15, 2018).

³ To determine the estimated market value of the acquisition, the contracting officer prepared an independent government cost estimate (IGCE). To that end, the contracting officer considered pricing from a prior procurement for similar equipment, as well as other information. Contracting Officer's Statement at 1-2.

Of relevance to this protest, the RFQ included specific contractor qualification requirements. In this regard, the RFQ provided as follows regarding a vendor's technical submittal:

The contractor shall submit certified documentation that they have been an authorized distributor and service organization for the Original Equipment Manufacturer (OEM) for a minimum of three (3) years. The Contractor shall be authorized by the OEM to pass thru the OEM's warranty of the installed equipment to VA. In addition, the OEM and Contractor shall accept complete responsibility for the design, installation, certification, operation, and physical support for the System. **This documentation, along with the System Contractor and OEM certifications must be provided in writing as part of the Contractor's Technical submittal.**

RFQ-0112, SOW at 2 (emphasis added).

The solicitation invited vendors to participate in a site visit, which was held on November 21, 2017. Only two firms, Veterans Electric, an SDVOSB, and MasterCom, a small business concern, attended the site visit. Contracting Officer's Statement at 2. Following the site visit, the VA issued amendment 1, to answer questions received and extended the closing date for submission of quotations to December 4, 2017. RFQ amend. 1 at 2.

The VA received only one quotation by the December 4, 2017 extended due date. This quotation was from Veterans Electric, with a total offered price of \$243,000. Contracting Officer's Statement at 2. After reviewing Veterans Electric's quotation, the agency could not determine if the vendor's proposed price was fair and reasonable as it was approximately 55% higher than the IGCE. Id. at 3. In light of this, the contracting officer decided to cancel the SDVOSB set-aside and to open the procurement to other categories of small business concerns. Id.

The contracting officer first considered whether there was a reasonable expectation that quotations would be received from two or more VOSBs and that award could be made at a fair and reasonable price. The contracting officer concluded that this was not likely because the agency had not identified any VOSB concerns, other than Veterans Electric and Rone Communications, at the time of the agency's original market research. The agency's market research did, however, reveal that there were at least two small business concerns that would be likely to submit quotations, Veterans Electric and MasterCom. Id. Accordingly, on December 28, 2017, the agency reissued a solicitation for its requirements under RFQ 0382, as a small business set-aside, rather than as an SDVOSB or VOSB set-aside, with quotations due by January 5, 2018. RFQ-0382.

That same day, December 28, 2017, the contracting officer notified Veterans Electric that the agency had decided to resolicit its requirements for the Madison VAMC as a small business set-aside. Protest exh. 6, Email from Contracting Officer (Dec. 28, 2017). On December 29, 2017, Veterans Electric contacted the agency to request an explanation for the agency's decision to cancel the SDVOSB solicitation and to resolicit the requirement as a small business set-aside rather than as another SDVOSB set-aside. Id., Email from Veterans Electric (Dec. 29, 2017). The agency responded that since the contracting officer could not determine the reasonableness of the vendor's proposed pricing, the agency changed its acquisition strategy and issued RFQ-0382 as a small business set-aside. Id., Email from Contracting Officer (Jan. 3, 2018).

This protest followed.⁴

DISCUSSION

Veterans Electric objects to the agency's decision to cancel RFQ-0112, and the decision to issue RFQ-0382 as a small business set-aside rather than as another SDVOSB or VOSB set-aside. The protester argues that both agency decisions violated applicable procurement statutes and regulations; specifically, the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the VA Act), 38 U.S.C. § 8127, and the VA's implementing regulations (VAAR) § 819.7005(a). Protest at 2-3. In particular, the protester alleges that under the VA Act and VA implementing regulations, the agency should have made an award to Veterans Electric since the vendor had submitted an acceptable quotation at a fair and reasonable price in response to the SDVOSB set-aside. Not having done so, the protester contends that the decisions to cancel the SDVOSB set-aside and then reissue the RFQ as a small business set-aside were unreasonable. Finally, Veterans Electric contends that MasterCom's participation in the small business set-aside, RFQ-0382 would be tainted by impermissible organizational conflicts of interest (OCIs).

The VA argues that Veterans Electric did not, and does not, meet the qualification requirement that the successful vendor must be an authorized distributor for the OEM. Agency Supp. Memorandum of Law, at 4-6. The agency reports that the contracting officer who started the acquisition and evaluated Veterans Electric's quotation left his position after the protests were filed (but prior to submission of the agency report) and a new contracting officer was assigned to complete the acquisition. Id. at 3; Contracting Officer's Supp. Statement of Facts at 1. In reviewing the procurement record and the issues raised in these protests, the new contracting officer reports that he contacted Ascom, the OEM, to ascertain "which companies are authorized distributors" in the

⁴ Although Veterans Electric raises a number of arguments, for purposes of our decision, we only discuss some of the protester's allegations. Nevertheless, we have reviewed the protester's various arguments in detail and find that none establish that the agency unreasonably canceled the SDVOSB set-aside and resolicited the requirement as a small business set-aside.

Madison and/or Milwaukee Wisconsin market, and was told that Veterans Electric was “not an authorized distributor of the equipment.” Contracting Officer’s Supp. Statement of Facts at 1. The contracting officer also reports that he reviewed Veterans Electric’s quotation and found that the protester had not submitted the required certification indicating that Veterans Electric is an authorized distributor and service organization for the OEM. Thus, the VA contends that Veterans Electric was, and remains, ineligible for award due to its failure to meet this technical requirement under RFQ-0112 and RFQ 0382. Id. at 2.

Veterans Electric counters that we should reject the agency’s arguments as “waived, untimely and a naked attempt at post hoc justification” for its decision to cancel and re-compete the requirements rather than make award to the protester under the SDVOSB set-aside. Protester’s Supp. Comments at 7. The protester also disagrees with the agency’s interpretation of the RFQ’s certification requirements, arguing that the VA’s position would render the SDVOSB set-aside a “necessary farce on its way to awarding MasterCom the contract under a re-solicitation.” Id. at 8. In its view, a more reasonable interpretation of this provision is one in which Veterans Electric could meet the requirement “by engaging MasterCom as a subcontractor” under the solicitation as originally set-aside. Id.

We do not find that Veterans Electric was prejudiced by the VA’s decision to cancel the RFQ. Competitive prejudice is a required element of every viable protest, and where none is shown, we will not sustain a protest. WKF Friedman Enters., B-411208, June 16, 2015, 2015 CPD ¶ 183 at 3. In this regard, our Office will not sustain a protest, even if deficiencies in the procurement are found, where the protester fails to demonstrate that, but for the agency’s actions, it would have had a substantial chance of receiving the award. IAP World Servs., Inc.; Jones Lang LaSalle Americas., Inc., B-411659 et al., Sept. 23, 2015, 2015 CPD ¶ 302 at 13.

As noted above, the RFP required firms to provide certifications establishing that they have been an authorized OEM distributor and service organization for a minimum of three years, and be authorized by the OEM to pass through the OEM’s warranty of the installed equipment. Veterans Electric has not shown--or even argued--that the firm submitted the required certifications with its quotation under the cancelled solicitation. While Veterans Electric might have had the opportunity to subcontract with MasterCom in order to meet the RFQ’s qualification requirements, its quotation did not evidence any such agreement. Accordingly, notwithstanding the protester’s contention that it could meet this stated requirement by utilizing MasterCom as a subcontractor, the record does not support its claim. Clearly stated solicitation requirements are considered material to the needs of the government, and a quotation that fails to conform to such material terms is technically unacceptable and may not form the basis for award. Carahsoft Tech. Corp., B-401169, B-401169.2, June 29, 2009, 2009 CPD ¶ 134 at 5; CAMS Inc., B-292546, Oct. 14, 2003, 2003 CPD ¶ 191 at 3. We therefore have no basis to question the agency’s determination that Veterans Electric’s quotation was

unacceptable for these reasons.⁵ Accordingly, even if Veterans Electric's protest was sustained and the RFQ reinstated, Veterans Electric would not be eligible for award.

In a negotiated procurement, such as this one, contracting agencies have broad discretion in determining when it is appropriate to cancel a solicitation and need only a reasonable basis to support a decision to cancel. SupplyCore Inc., B-411015.8, May 27, 2016, 2016 CPD ¶ 153 at 3. In light of the fact that Veterans Electric was the only firm to respond to the now cancelled solicitation, and the fact that Veterans Electric was in no way prejudiced by the cancellation, we have no basis to object to the VA's decision to cancel and resolicit the procurement.⁶

Finally, to the extent the protester argues in the alternative that the reissued solicitation should have been set aside for SDVOSB or VOSB concerns on the basis that there are at least two SDVOSB and VOSB concerns that are capable of performing the agency's requirements, the arguments are without merit. In this regard, the VA Act provides that VA acquisitions must be set aside for veteran-owned concerns if the VA determines that there is a reasonable expectation that offers will be received by at least two veteran-owned small business concerns and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d). As noted above, the agency issued a sources sought notice for the requirements at issue and only two SDVOSB firms responded.

⁵ To the extent Veterans Electric claims that this solicitation requirement was ambiguous, Protester's Supp. Comments at 8, a solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. See KAES Enters., LLC, B-411225 et al., June 18, 2015, 2015 CPD ¶ 186 at 5. The protester, however, does not advance any reasonable alternative interpretation of the solicitation's OEM certification requirements which its quotation otherwise satisfied. Accordingly, this line of argument is without a valid basis.

⁶ To the extent Veterans Electric argues that MasterCom, a vendor likely to compete under the small business set-aside, has unmitigable OCIs which should preclude MasterCom from award, we dismiss these allegations as premature. Setting aside the fact that Veterans Electric is not eligible for award given that it fails to meet the solicitation's OEM certification requirements, and that the OCI arguments advanced by the protester do not appear to support a basis to conclude that MasterCom suffers from any OCI, the allegations are premature at this juncture where the agency has not made a determination regarding MasterCom's eligibility for award. Government Business Servs. Grp., B 287052 et al., Mar. 27, 2001, 2001 CPD ¶ 58 at 12.

Subsequently, only one SDVOSB submitted a quotation, Veterans Electric, and as discussed above, its quotation was technically unacceptable. Under these circumstances, we have no basis to question the agency decision not to issue the solicitation as a set-aside for veteran-owned business concerns.

The protest is denied.

Thomas H. Armstrong
General Counsel