



## Decision

**Matter of:** AeroSage, LLC

**File:** B-415893; B-415894

**Date:** April 17, 2018

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David M. Snyder, for the protester.  
David W. Altieri, Esq., Donald C. Mobly, Esq., Department of Veterans Affairs, and  
Jared M. Miller, Esq., Defense Logistics Agency, for the agencies.  
Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO,  
participated in the preparation of the decision.

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### DIGEST

1. Protest challenging the agency's decision not to award the company a contract based on the protester's response to a sources sought notice is dismissed because a sources sought notice is not a solicitation for the award of a contract.
2. Protest challenging a response time for submission of quotations of less than 1 hour is denied where emergency circumstances in connection with inclement weather warranted a short response time.

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### DECISION

AeroSage LLC, of Tampa, Florida,<sup>1</sup> protests the decision by the Department of Veterans Affairs (VA) not to award a contract based on a quotation submitted by the protester in response to a sources sought notice concerning diesel heating fuel (B-415893). The protester also challenges the response time for a request for quotations (RFQ) issued by the Defense Logistics Agency (DLA) for the VA's fuel requirements (B-415894).

We dismiss in part and deny in part the protests.

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<sup>1</sup> The protest was filed by AeroSage, LLC, but claims that AeroSage and another firm, SageCare Inc., are both interested parties affected by the issues raised in the protests. References in this decision to the protester are to AeroSage, but our discussion on the issues refers to the interests of both AeroSage and SageCare.

On January 4, the VA contracting officer was instructed to conduct a procurement for 50,000 gallons of diesel heating fuel for the VA Medical Center (VAMC) in East Orange, New Jersey. VA Contracting Officer's Statement (COS) at 1. The requirement was deemed an emergency by the VA based on the impending arrival of inclement weather. VA COS at 1; DLA COS at 2. DLA provided our Office a January 3 news article describing the anticipated weather conditions for the East Coast. Agency Report (AR) (B-415894), Exh. 3, "'Bomb Cyclone' Blasting East Coast Before Polar Vortex Uncorks Tremendous Cold Late This Week," Washington Post, Jan. 3, 2018. According to the article, the winter storm was anticipated to arrive in the mid-Atlantic area on January 3, and continue through the weekend. Id. at 1-2. The anticipated weather was described by the National Weather Service as a "rapidly intensifying East Coast storm" that could cause severe conditions including damaging wind, blinding snow, and temperatures "20 to 40 degrees below normal." Id. at 1, 3.

DLA states that "[t]he VA medical center was in dire need of the diesel fuel because the local electric and gas utility mandated that the VA medical center avoid use of natural gas to heat the building due to high demand for natural gas during the storm." DLA COS at 2. DLA further states that failure to obtain diesel heating fuel would have resulted in the local utility "charg[ing] the medical center a minimum of four times the normal natural gas rate if the VA medical center [] ran out of diesel fuel and resorted back to natural gas." Id.

The VA CO conducted market research to determine whether service-disabled veteran-owned (SDVOSB) small businesses could fulfill[] the requirement, and identified 26 such firms.<sup>2</sup> VA COS at 1. At 12:55 p.m.,<sup>3</sup> the contracting officer sent an email to the 26 SDVOSB firms titled "DEPT. VET. AFFAIRS – Seeking SDVOSB Sources for Emergency Diesel Fuel Delivery; East Orange, New Jersey." AR (B-415893), Exh. 2, Email from VA to SDVOSB Firms, Jan. 4, 2018, 12:55 p.m. The sources sought notice stated that the agency required "\$50,000 gallons" of dyed ultra low sulfur fuel for delivery on or before Saturday, January 6. Id. At 1:11 p.m., the VA contracting officer sent an email to the 26 SDVOSBs clarifying that a reference in the initial sources sought notice to "\$50,000 gallons" of diesel heating fuel was in error, and that the requirement was for "50,000 gallons" of fuel. AR (B-415893), Exh. 3, Email from VA to SDVOSB Firms, Jan. 4, 2018, 1:11 p.m.

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<sup>2</sup> The Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 VA Act), 38 U.S.C. § 8127, requires the VA to set aside acquisitions for SDVOSBs whenever it is determined that there is a reasonable expectation that offers will be received from at least two SDVOSBs and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d); Veterans Administration Acquisition Regulation § 819.7005(a). The 2006 VA Act also requires that agencies procuring goods or services on behalf of VA--such as DLA here--comply with the VA Act Rule of Two "to the maximum extent feasible." 38 U.S.C. § 8127(j)(1).

<sup>3</sup> All times cited herein are Eastern Time.

AeroSage sent an email to the VA contracting officer on January 4 at 2:18 p.m., quoting a price for delivery of 50,000 gallons of diesel heating fuel for delivery by January 6. AR (B-415893), Exh. 3, Email from AeroSage to VA, Jan. 4, 2018, 2:18 p.m.; see also Protest at 6 (pagination from PDF file). At 2:23 p.m., the VA contracting officer sent an email to the 26 SDVOSB firms advising that “it is essential the Government receive[s] a response to the emergency request [] between 2:30pm and 3pm as a determination must be made how we will procure the required fuel. . . .” AR (B-415893), Exh. 2, Email from VA to SDVOSB Firms, Jan. 4, 2018, 2:23 p.m.

During the afternoon of January 4, the VA assessed whether the diesel heating fuel requirement could be placed under a long-term DLA contract for fuel for the East Orange VAMC that was awarded in December 2017. VA COS at 1. The VA concluded that the requirements could not be placed under the long-term contract, but that DLA could place the order as a one-time spot purchase.<sup>4</sup> Id. The VA coordinated the matter with DLA, and at 4:30 p.m., DLA agreed to solicit and award the contract. Id.

On January 5 at 7:18 a.m., the DLA contracting officer received the requirement to issue a solicitation for the East Orange VAMC’s diesel heating fuel requirements. DLA COS at 1. The DLA contracting officer conferred with her supervisor, and concluded that based on the responses to the VA’s sources sought notice, the contract should be set aside for SDVOSBs. Id. At 8:46 a.m., the DLA contracting officer sent the RFQ via email to four SDVOSB firms, including Aerosage.<sup>5</sup> AR (B-414894), Exh. 4, RFQ, at 1. The RFQ sought quotations to provide 50,000 gallons of diesel heating fuel to the East Orange VAMC on January 6. Id. The RFQ did not specify the basis for award. The RFQ required quotations to be submitted by no later than 9:30 a.m. on January 5--approximately 44 minutes after DLA issued the RFQ. Id.

The DLA contracting officer received quotations from three SDVOSB firms by the 9:30 a.m. closing time; AeroSage did not submit a quotation. DLA COS at 2. The DLA contracting officer concluded that Defense Energy Syndicate, LLC submitted the lowest-priced quotation and awarded that firm the contract at a price of \$2.73/gallon. AR (B-415894), Exh. 6, Award Notice, at 1. DLA notified the three firms that had submitted quotations of the award at 9:46 a.m. Id.

AeroSage states that it did not see the email transmitting the RFQ until 10:50 a.m. because the firm representative was “attending to other duties of a small business concern, [and] had trouble connecting to my e-mail.” Statement by Protester, Apr. 6,

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<sup>4</sup> DLA Energy acquires energy-related products and services for the Department of Defense and the civilian agencies. DLA Memorandum of Law at 2.

<sup>5</sup> The RFQ did not have a numerical identifying number; the email transmitting the RFQ was titled “RFQ - 50000 GALS DIESEL FUEL (DSS) DELIVERY 05 JANUARY 2018, EAST ORANGE, NJ.” AR (B-415894), Exh. 4, RFQ. The resulting award was purchase order No. SPE605-18-P-9067. DLA COS at 1.

2018, at 1. The protester sent an email to the DLA contracting officer at 10:57 a.m. and requested an opportunity to submit a quotation. Id. The DLA contracting officer advised that the award had already been made. DLA COS at 3. This protest followed.

## DISCUSSION

AeroSage raises three primary arguments: (1) the VA unreasonably failed to accept its quotation in response to the sources sought notice and award AeroSage a contract for the diesel heating fuel requirements, (2) the RFQ issued by DLA did not provide vendors with a reasonable amount of time to respond, and (3) the actions of the VA and DLA demonstrate a bad-faith intent to avoid awarding a contract to the protester. For the reasons discussed below find no basis to sustain the protests.<sup>6</sup>

First, AeroSage argues that DLA should not have issued the RFQ for the VA's fuel requirements because the VA had already issued such a solicitation; relatedly, the protester argues that the VA unreasonably failed to accept its quotation and award the protester a contract. We conclude that this argument fails to state a valid basis of protest.

Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

As discussed above, the emails from the VA contracting officer to the 26 SDVOSB firms was a sources sought notice. Our Office has explained that a sources sought notice is a request for information by the agency and not a solicitation that anticipates the award

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<sup>6</sup> AeroSage also raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find that none provides a basis to sustain the protest. For example, the protester argues that the awardee's quotation was not submitted before the RFQ's deadline, and therefore could not be accepted. Under our Bid Protest Regulations, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract. 4 C.F.R. § 21.0(a). A protester is an interested party to challenge the agency's evaluation of proposals or quotations where there is a reasonable possibility that the protester's proposal would be in line for award if its protest were sustained. See Enterprise Info. Servs., Inc., B-405152 et al., Sept. 2, 2011, 2011 CPD ¶ 174 at 7 n.8. Here, because the protester did not submit a timely quotation, and because we conclude that the protester's challenge to the time for submission of quotations does not provide a basis to sustain the protest, the protester would not be in line for award ahead of the other two vendors who submitted quotations.

of a contract. See Sigmatech, Inc., B-296401, Aug. 10, 2005, 2005 CPD ¶ 156 at 4. Here, the sources sought notice did not request quotations, nor did it request that vendors provide prices. The initial 12:55 p.m. email from the VA contracting officer was titled, “DEPT. VET. AFFAIRS – Seeking SDVOSB Sources for Emergency Diesel Fuel Delivery; East Orange, New Jersey.” AR (B-415893), Exh. 2, Email from VA to SDVOSB Firms, Jan. 4, 2018, 12:55 p.m. A subsequent email from the VA contracting officer explained that responses were needed between 2:30 p.m. and 3 p.m. because “a determination must be made how we will procure the required fuel to satisfy the East Orange VA Medical Center’s emergen[cy] need.” AR (B-415893), Exh. 2, Email from VA to SDVOSB Firms, Jan. 4, 2018, 2:23 p.m. Because the sources sought notice did not solicit quotations or anticipate the award of a contract, we conclude that the protester’s arguments that the VA unreasonably refused to accept its quotation, and that DLA improperly issued an RFQ, fail to state a valid basis of protest and are therefore dismissed.

Next, AeroSage argues that the DLA solicitation did not provide vendors a reasonable amount of time to respond.<sup>7</sup> The protester contends that, had it been able to submit a quotation, it would have quoted a price lower than the awardee’s. We conclude that this argument does not provide a basis to sustain the protest.

Contracting officers are required to establish solicitation response times that will afford potential offerors a reasonable opportunity to respond. Federal Acquisition Regulation (FAR) § 5.203(b). What constitutes a reasonable opportunity to respond will depend on “the circumstances of the individual acquisition, such as the complexity, commerciality, availability, and urgency.” Id. Where a protester contends that the agency allowed insufficient time for preparation of proposals, we require a showing that the time allowed was inconsistent with statutory requirements or otherwise unreasonable, or that it precluded full and open competition. See Coyal Int’l Grp., B-408982.2, Jan. 24, 2014, 2014 CPD ¶ 40 at 2. We will not disturb a contracting officer’s decision in this regard unless it is shown to be unreasonable or the result of a deliberate attempt to exclude the protester from the competition. Bannum, Inc., B-411340, July 8, 2015, 2015 CPD ¶ 213 at 3.

Here, we conclude that the 44-minute response time for submission of quotations was not unreasonable under the circumstances. As discussed above, the record shows that the VA had an emergency need for diesel heating fuel at the East Orange VAMC, based on the need to use other than natural gas fuel. On January 4, the VA issued a sources sought notice to determine whether there were SDVOSB firms capable of performing

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<sup>7</sup> Although this protest challenges the terms of the RFQ, it was filed after the time for receipt of quotations. We nonetheless conclude that the protest is timely because the protester’s challenge to the 44-minute response time effectively encompasses an argument that there was not enough time to file a protest prior to the time for receipt of quotations. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1); Immediate Sys. Resources, Inc., B-292856, Dec. 9, 2003, 2003 CPD ¶ 227 at 4.

the work, consistent with the agency's obligations under the 2006 VA Act. By the close of business that day, the VA concluded that it would meet its requirements through a spot purchase made by DLA. The next morning, DLA concluded that it would allow only a 44-minute response time because, in the agency's judgment, "we would need time to work with [the] winning vendor and allow the vendor sufficient time to coordinate the delivery information with the VA medical center and then relay that information to its delivery team," and also "so that in the event that any issues arose in coordinating or performing the delivery (e.g., equipment breakdown, impassable roads, etc.), we would have sufficient time to effect any last minute changes." DLA COS at 2.

Although AeroSage argues that it was not able to respond because it did not see the email in time, we think that the correspondence with the VA concerning the sources sought notice put the protester on notice that the VA had not concluded as of the close of business on January 4 how it would conduct the procurement for an emergency delivery on January 6. See AR (B-415893), Exh. 2, Email from VA to SDVOSB Firms, Jan. 4, 2018, 2:23 p.m. Thus, the protester had a reason to expect further correspondence regarding the VA's requirements; in fact, DLA specifically emailed the protester with the RFQ. Additionally, the record shows that the RFQ required only that vendors respond via email with a price quotation, as opposed to a detailed quotation or proposal, and that three quotations were received. For these reasons, we find no basis to conclude that the RFQ's response time violated FAR § 5.203(b).<sup>8</sup>

Finally, AeroSage argues that the actions of the VA and DLA reflect bias and bad faith and an intent to harm the protester. In this regard, the protester contends that the VA's and DLA's actions are "another of the numerous documented examples since late 2014 of VA and DLA retaliation against our companies for seeking accountability for systemic violations of acquisition law, the Veterans Benefit Act, as well as misrepresenting material facts, small business goal and [Federal Procurement Data System] reporting to Congress." Protest at 2.

Government officials are presumed to act in good faith and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Marinette Marine Corp., B-400697 et al., Jan. 12, 2009, 2009 CPD ¶ 16 at 29. Our review of the protester's other allegations find that none provides a basis to sustain the protest. Aside from arguing that the effect of the agency's otherwise reasonable actions was prejudicial to AeroSage's interests, the protester provides no evidence that the

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<sup>8</sup> We recognize that a 44-minute response time is very brief. Our decision here does not establish that a 44-minute response time is necessarily reasonable in other circumstances. Rather, our decision here is limited to the circumstances set forth in the record and discussed in this decision.

agencies' actions were motivated by bad faith or bias against the protester. Indeed, as set forth above, DLA specifically emailed the RFQ to the protester. For this reason, we deny the protest.

The protests are dismissed in part and denied in part.

Thomas H. Armstrong  
General Counsel