



Decision

Matter of: Walker Development & Trading Group, Inc.

File: B-414365

Date: May 18, 2017

Terrance Walker, for the protester.

David G. Fagan, Esq., Department of Veterans Affairs, for the agency.

Kenneth Kilgour, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision to set aside the procurement for service-disabled veteran-owned small business concerns is denied where the agency had a reasonable expectation that offers would be received from at least two such firms and that award would be made at a fair market price.

DECISION

Walker Development & Trading Group, Inc., of Reno, Nevada, protests the terms of request for quotations (RFQ) No. VA262-17-Q-0438, issued by the Department of Veterans Affairs (VA) for three types of medical devices. The protester contends that the agency's market research provides insufficient support for the VA's decision to set this requirement aside for service-disabled veteran-owned small business (SDVOSB) concerns.

We deny the protest.

BACKGROUND

The RFQ, set-aside for SDVOSB concerns and issued in accordance with Federal Acquisition Regulations (FAR) parts 12, 13, and 19 and VA acquisition regulations, sought quotations for mobile cardiac outpatient telemetry (MCOT), holter monitoring, and cardiokey devices for patient care.¹ Agency Report (AR), Tab 2,

¹ The RFQ incorporated by reference FAR clause 52.219-27, Notice of Service Disabled Veteran-Owned Small Business Set Aside. RFQ at 4.

RFQ, at 2, 4. The period of performance would be from February 22, 2017 to February 21, 2018. Id. Award would be made to the firm offering the lowest-priced, technically acceptable quotation. Id. at 4. The RFQ stated that offers would be considered technically acceptable if the quoted products and services were brand name or equal. Id. The agency assigned North American Industry Classification System (NAICS) code 334510, Electromedical and Electrotherapeutic Apparatus Manufacturing to the RFQ; the RFQ advised firms that the Small Business Administration (SBA) had issued a nonmanufacturing rule class waiver for that NAICS code. Id. at 1, 2. The deadline for quotation submission was February 14, 2017. Id. at 4.

On February 13, Walker filed this protest challenging the adequacy of the agency's market research. Walker asserts that the agency unreasonably concluded that it would receive two or more quotations from SDVOSB concerns and that award would be made at a fair market price.² The agency argues that the VA's set-aside decision had a reasonable basis.

DISCUSSION

Generally, the decision whether to set aside a procurement for SDVOSB concerns is a business judgment within the contracting officer's discretion, which we will not disturb absent a showing that it was unreasonable. Aero Sage LLC, B-414314, B-414314.2, May 5, 2017, 2017 CPD ¶ ___ at 6; Starlight Corp., Inc., B-410471.2, Dec. 30, 2014, 2014 CPD ¶ 383 at 5. 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. Starlight Corp., Inc., *supra*; Mountain West Helicopters, LLC; Trans Aero, Ltd., B-408150, B-408150.2, July 1, 2013, 2013 CPD ¶ 152 at 3. We will not question an agency's 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. Starlight Corp., Inc., *supra*.

Further, 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. InfoReliance Corp., B-413298, Sept. 19, 2016, 2016 CPD ¶ 263 at 4. Here, as explained below, Walker

² Walker initially argued that the agency improperly issued the RFQ on a brand name only basis and conducted unreasonable market research when the agency failed to review "equal" products. However, as the agency notes, the RFQ specifically states that the acquisition is for brand name or equal. RFQ at 3, 4.

does not show that the VA unreasonably determined that it would receive offers from two or more SDVOSB firms at fair and reasonable prices.

The agency's market research included a review of the prior acquisition history and searches of the VA Western States Consortium blanket purchase agreement website, the National Acquisition Center contract catalog, and the General Services Administration's website. AR, Tab 3, Market Research Report, at 1-3. In addition, the agency posted a sources sought notice, conducted a search on Vetbiz.gov, and emailed ninety-one vendors found on Vetbiz.gov with information about the procurement. Id. at 2.

Some of the firms identified in those searches were found to be unable to provide the required equipment. Id. at 2. The VA, however, received responses from two interested SDVOSB concerns that provided capability statements and price estimates, which the agency deemed to be fair and reasonable. Id. During this protest, the agency provided the protester with the names of the two firms identified in the agency's market research. Walker has not provided a reasonable basis on which to question the agency's assertion that competition between these two SDVOSB firms will not result in award being made at a reasonable price.

Walker asserts that the agency's market research failed to consider whether an SDVOSB concern would meet the limitation on subcontracting rule and whether an SDVOSB nonmanufacturer would be providing the product of an SDVOSB concern. Protest at 4. Here, the agency incorporated by reference FAR clause 52.219-27, Notice of Service Disabled Veteran-Owned Small Business Set Aside, and assigned NAICS code 334510, Electromedical and Electrotherapeutic Apparatus Manufacturing, to the RFQ. FAR clause 52.219-27, Notice of Service Disabled Veteran-Owned Small Business Set Aside, states that SDVOSB concerns providing products as manufacturers agree that at least 50 percent of the costs of manufacturing will be performed by the concern or other SDVOSB concerns.

Ordinarily, in order to qualify as a small business concern to provide manufactured products or other supply items, an offeror must either be the manufacturer or producer of the end item being procured, or if it does not manufacture the item being purchased, the offeror must comply with what is known as the nonmanufacturer rule. 13 C.F.R. § 121.406(a). The nonmanufacturer rule provides that the offer of a nonmanufacturer small business concern can be considered, provided, among other things, that the small business concern 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 SBA. 15 U.S.C. § 637(a)(17); see also 13 C.F.R. § 121.406.

Where the nonmanufacturing rule applies to a procurement and the agency's market research fails to consider whether the firms identified in the market research can comply with the rule, the market research is unreasonable. Triad Isotopes, Inc.,

B-411360, July 16, 2015, 2015 CPD ¶ 220 at 7. The SBA is permitted to waive the nonmanufacturer rule where the SBA has determined that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications or where no small business manufacturer or processor is available to participate in the procurement. 15 U.S.C. § 657s(a)(4). When SBA issues a waiver of the nonmanufacturer rule, a firm can supply the product of any size business without regard to the place of manufacture. 13 C.F.R. § 121.406(b)(7).

Here, as noted above, the agency notified offerors that the SBA had issued a class waiver of the nonmanufacturer rule for the assigned NAICS code. Consequently, we see no merit to the protester's contention that the agency's market research failed to consider whether the firms identified had the capability to perform and could comply with the rule.³

Walker also argues that the agency failed to adequately assess whether the two identified firms could comply with the terms of the solicitation. See Comments on AR at 5-6. As noted above, the agency's market research considered the capability of the vendors to meet the requirements. The agency was not required to make a determination of responsibility in the course of conducting market research. InfoReliance Corp., *supra*.

The protest is denied.

Susan A. Poling
General Counsel

³ To the extent that Walker is arguing that the agency should have assigned a NAICS code for services and not one for manufacturing, we note that is a matter for review by the SBA and is not a matter for consideration by our Office. 4 C.F.R. § 21.5(b)(1). Further, with respect to any of Walker's remaining challenges to the solicitation, Walker is not an interested party to raise these concerns, given that Walker is not an eligible SDVOSB and therefore is not a prospective offeror. 4 C.F.R. §§ 21.0(a), 21.1(a); see also Encompass Group LLC, B-406346, Mar. 23, 2012, 2012 CPD ¶ 121 at 4-5.