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Decision

Matter of: American Medical Equipment Company

File: B-407113; B-407113.2

Date: November 8, 2012

Gerald H. Werfel, Esq., Pompan, Murray & Werfel, PLC, and H. Todd Whay, Esq., The Whay Law Firm, for the protester.

Barton B. Evans, Esq., Department of Veterans Affairs, and Kevin R. Harber, Esq., Small Business Administration, for the agencies.

Brent Burris, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency determination not to set aside procurement for small businesses was proper where the record shows that the agency conducted broad market research and responses from small business firms demonstrated that it was not likely to receive proposals from at least two responsible small businesses capable of meeting the requirements of the solicitation.

DECISION

American Medical Equipment Company (AMEC), of Houston, Texas, protests the terms of request for proposals (RFP) No. VA256-12-R-0059, issued by the Department of Veterans Affairs (VA) for home oxygen services for beneficiaries in Veterans Integrated Service Network 16 (VISN 16). AMEC, a small business, contends that the VA failed to perform adequate market research to ascertain the interest and capability of small businesses to perform the solicitation requirements, and that the solicitation should have been set-aside, in its entirety, for small business concerns.

We deny the protest.

BACKGROUND

The RFP, issued on May 31, 2012 as a partial small business set-aside, provides for the award of two requirements contracts, each with a 1-year base period and four 1-year options. Agency Report (AR), Exhibit (Exh.) 6, RFP, at 5. The home oxygen

services required under the RFP are for VA beneficiaries within VISN 16--a geographic area that includes all of Louisiana, Arkansas, and Oklahoma as well as portions of Mississippi, Texas, Missouri, and Alabama. Id. at 13-16. Within VISN 16 there are 10 VA Medical Centers which serve approximately 6,000 home oxygen patients. Id. The home oxygen services include providing all necessary equipment and supplies as well as certified respiratory therapists to ensure proper administration of physician-prescribed oxygen. Id. at 16-37. One award--representing 8 of the 10 VA Medical Centers and the regions they serve--is to be made on an unrestricted basis. Id. The second award includes the remaining 2 Medical Centers and the regions they serve, and is set aside entirely for small businesses. Id. The VA estimates that the combined total value of the 2 procurements is approximately \$[deleted] million per year. Id.

Prior to issuing the solicitation, the Contracting Officer (CO) conducted market research to assess the interest and capability of small business concerns with respect to the VISN 16 home oxygen requirements. This research included consulting with technical and program experts, searching several government databases, reviewing the recent procurement history of four other VISNs, and issuing a Request for Information (RFI). AR, Exh. 2, CO Narrative of Facts, at 2.

More specifically, the CO contacted the VA program office, which advised the CO, among other things, that VISN 16 had experienced performance issues with the current and previous small business contractors, which provided home oxygen services for a portion of VISN 16. Id. at 2. The CO also contacted the contracting officers for VISN 1, VISN 11, VISN 19, and VISN 23, all of which had home oxygen requirements similar to that of VISN 16. The CO learned that the current contracts for these four VISNs were being performed by large businesses and had been solicited on an unrestricted basis. Id. at 4.

On January 5, 2012, the CO issued an RFI in FedBizOpps, indicating that the VA was "seeking potential sources capable of providing Home Oxygen services to beneficiaries within [VISN 16]." AR, Exh. 4, RFI, at 1. The RFI provided that VISN 16 served approximately 6,300 oxygen-using patients and listed the 10 VA Medical Centers in the network and the corresponding counties served by each facility. Id. The RFI advised interested respondents to include, among other information, the following: name and address of company, business size, identification of any socioeconomic categories the company qualified under, capabilities, an indication if the company could provide services for the entire VISN 16 or just a portion of the network, and any other pertinent information. Id. at 7. The RFI sought assessments of contractor capabilities under the North American Industry Classification System (NAICS) code 532291, which is designated for "Home Health Equipment Rental" and has a size standard of \$7 million in annual receipts. Id. at 1.

The VA received 14 responses to the RFI, 7 of which were from small businesses. AR, Exh. 5, RFI Responses; Exh. 20, Lincare's RFI Response. Two of the small

businesses indicated that they were interested in providing services for only a portion of VISN 16. AR, Exh. 2, CO Narrative of Facts, at 2. In reviewing the capability statements submitted by the small businesses, the CO determined that they did not demonstrate the capability to successfully provide home oxygen services to the entirety of VISN 16. Id. at 5. Specifically, the CO found that the interested small businesses did not demonstrate that they had experience (in terms of geographic scope, number of patients, and dollar value) comparable to the VISN 16 requirements. Id. The CO also noted that none of the small businesses that responded to the RFI indicated that they currently had the necessary personnel, supplies, equipment, or facilities to serve VISN 16, although some indicated that they would acquire them if awarded the contract. Id.

The CO further investigated the small businesses that responded to the RFI using the Federal Procurement Data System-Next Generation (FPDS-NG) and Dun & Bradstreet (D&B) reports. Id. at 4-5. With regard to the D&B reports, the CO considered the firm's Supplier Evaluation Risk (SER) scores. The SER score is an indicator that measures the likelihood that a company will seek legal relief from creditors or cease operations without paying creditors in full over the next 12 months. AR, Exh. 14, VA Information Letter 049-08-03, at 1. SER scores are based on a scale of 1 to 9, with 9 representing the highest-risk.¹ Id. Three of the businesses had SER scores of 7 or higher. Id. at 5.

With regard to the FPDS-NG information, the CO found that the small businesses that responded to the RFI did not have any contracts with the VA in the previous 5 years that were comparable in dollar value to the estimated \$[deleted] million per year for home oxygen services for the entire VISN-16. AR, Exh. 2, CO Narrative of Facts, at 5. For example, one of the small businesses had received less than \$8 million in total contract dollars from the VA over the previous 5 years combined, while the other small business respondents had received even less. Id.

Based on the above-described market research, the CO determined the VISN 16 requirements were not suitable for a small business set-aside. Id. The CO did, however, conclude that a portion of the solicitation's requirements could be set aside for small businesses. Specifically, the CO decided to set aside the home oxygen services requirements for two of the VA Medical Centers and the regions they served. Id. at 5-6. After making her determination, the CO sought approval of the procurement plan from the Department of Veterans Affairs Office of Small and Disadvantaged Business Utilization (OSDBU) Center. Id. at 6. In doing so, the CO

¹ The VA maintains that as a matter of policy, if a firm has a SER score of 7 or higher, a contracting officer must document additional due diligence to ensure that the firm is responsible prior to awarding the firm a contract with a value in excess of \$25,000. Id.

submitted her analysis of the small businesses that responded to the RFI along with documentation of her market research. Id. The VA OSDBU representative concurred with and approved the CO's acquisition plan. AR, Exh. 10, Approved VA Form 2268.

In April 2012, while further defining the requirements for the upcoming solicitation, the CO determined that NAICS code 621610, "Home Health Care Services" was a more appropriate categorization of the requirement than 532291, "Home Health Equipment Rental."² AR, Exh. 2, CO Narrative of Facts, at 6. In making this determination, the CO recognized that the pool of potential small businesses would expand as the size standard for 621610 was \$13.5 million in annual receipts versus \$7 million under 532291. AR, Exh. 8, Market Research Documentation and Determination, CO's Memorandum Clarifying NAICS on VA Form 2268, at 1. As such, the CO conducted additional market research using the government databases previously searched and the new NAICS code. Exh. 28, CO Supplemental Protest Narrative, at 2-3. In doing so, the CO noted that many of the same companies listed under NAICS 532291 were also listed under NAICS 621610, including several of the small businesses that had responded to the RFI. Id.

In conducting this additional research under the more expansive NAICS code, the CO did not identify any small businesses with the necessary capabilities to provide home-oxygen services for the VISN-wide contract. Id. As such, the CO decided to continue with the original acquisition strategy of setting aside approximately 20% of the requirement for small businesses, and soliciting the remainder on an unrestricted basis. Id. at 2.

² NAICS 621610 "comprises establishments primarily engaged in providing skilled nursing services in the home" including providing medications and medical equipment and supplies. AR, Exh. 28, CO Supplemental Protest Narrative, at 1. By comparison, NAICS 532291 "comprises establishments primarily engaged in renting home-type health and invalid equipment, such as wheel chairs, hospital beds, oxygen tanks, walkers, and crutches." Id. The CO determined that because the solicitation called for certified or registered respiratory therapists administering physician-prescribed oxygen and supplies and equipment that would not necessarily be rented, NAICS 621610 was the more appropriate code. Id. The CO's initial decision to use NAICS 532291 was based on previous solicitations as well as an SBA protest decision which had held that NAICS 532291 was more appropriate for home oxygen services than NAICS 339112, a manufacturing code for surgical and medical instruments. See AR, Exh. 8, Market Research Documentation and Determination, CO's Memorandum Clarifying NAICS on VA Form 2268, at 1; Exh. 8, Market Research Documentation and Determination, NAICS Appeals of Medical Comfort Systems, Inc., SBA No. NAICS-5106 (2010).

The CO contacted the VA Small Business Specialist in May 2012 to discuss the changed NAICS code and explained her additional research and determination that the procurement strategy should not change. Id. The Small Business Specialist concurred with this decision. Id. Prior to the closing time for receipt of proposals, AMEC filed this protest.

DISCUSSION

AMEC challenges the VA's decision to set aside only a portion of the VISN 16 requirements for home oxygen services. AMEC raises numerous arguments challenging the adequacy of the agency's market research, which underlies the VA's determination that there was not a reasonable expectation of receiving offers from two or more small business concerns capable of performing the requirement.³ We have considered the protester's arguments and find that none provide a basis to object to the VA's decision not to set-aside the RFP, in its entirety, for small businesses.⁴

The Federal Acquisition Regulation (FAR) requires that acquisitions with an anticipated dollar value of more than \$150,000 be set aside for small business concerns if the agency determines there is a reasonable expectation that offers will be received from two or more responsible small business concerns, and that award will be made at a fair market price. FAR § 19.502-2(b). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion, and we will not sustain a protest challenging the determination absent a

³ At this Office's request, the Small Business Administration (SBA) submitted comments in which it concurs with the protester that the CO's decision not to set aside the procurement was unreasonable. SBA Comments, Oct. 4, 2012. SBA's arguments are largely the same as those raised by the protester and for same reasons discussed in this decision, we do not find the SBA's arguments persuasive.

⁴ The agency argues that AMEC is not an interested party because even if the entire VISN-16 procurement were set aside for small businesses, the protester would not be in line for the award (AMEC was among several small business that submitted proposals for both the unrestricted and restricted portions of the VISN 16 requirements). AR, at 21; Thermal Combustion Innovators, Inc., B-279602, July 1, 1998, 98-2 CPD ¶. 3 at 2 (holding that protester did not have standing to challenge agency's decision not to set aside procurement where award was to be made to lowest-priced, technically acceptable offeror and another small business was rated acceptable and had a lower price than protester). The record, however, does not reflect that any of the small business offerors would necessarily be eligible for award if the entire procurement was set aside [deleted]. As such, the reasoning in Thermal Combustion is not applicable in this case.

showing that it was unreasonable. North Shore Medical Labs, Inc., B-310747, Feb. 6, 2008, 2009 CPD ¶ 70 at 4. However, an agency must undertake reasonable efforts to ascertain whether it is likely that it will receive offers from at least two small businesses capable of performing the work. Id. Our Office will review a protest of an agency determination not to set aside a procurement to determine whether the contracting officer has undertaken reasonable efforts to ascertain the availability of capable small businesses. Id.

In determining the availability of responsible small business concerns for set-aside purposes, the contracting agency's investigation goes not only to the existence of the businesses, but also to their capability to perform the contract. Information Ventures, Inc., B-279924, Aug. 7, 1998, 98-2 CPD ¶ 37 at 3. The fact that multiple small business responses are received in the course of market research is not necessarily determinative. See The Protective Group, Inc., B-310018, Nov. 13, 2007, 2007 CPD ¶ 208 at 3.

The protester argues that the RFI was inadequate for the purpose of assessing small business capabilities and failed to provide notice that the CO was using the RFI to assess the ability of small businesses to meet the VISN-wide requirement. Protester's Comments at 4. This contention is without merit. The RFI stated that the VA sought home oxygen services for VISN 16, described in detail the geographic scope of the requirement, and identified the approximate number of patients. AR, Exh. 4, RFI. The RFI also directed interested businesses to respond with their business size and their capability to meet the VISN 16 home oxygen requirements. AR, Exh. 4, RFI, at 7. This included a request for information indicating whether the respondent was capable of serving the entire VISN 16 or only a portion. Id. Given these facts, we have no basis to conclude that it was unreasonable for the CO to rely on the RFI responses to assess whether the small businesses that responded were capable of providing services to the entirety VISN 16.

AMEC also asserts that the CO did not conduct adequate market research after changing the NAICS code from 532291 to 621601, thereby increasing the size standard from \$7 million to \$13.5 million. Supplemental Protest at 3-4. According to the protester, the CO should have reissued the RFI to include the more expansive NAICS code, and thus acted unreasonably by not providing additional small businesses with the opportunity to submit capability statements. Id. We disagree.

The record reflects that after deciding to change the NAICS code, the CO again searched government databases to assess the capability of additional businesses which qualified as small under NAICS 621601 but not under NAICS 532291. See AR, Exh. 8, Market Research Documentation and Determination, Addendum to Market Research Report for VISN Home Oxygen Services, at 3; Exh. 33, SBA Dynamic Small Business Search (oxygen); Exh. 34, SBA Dynamic Small Business Search (home oxygen). Based on her review of this information as well as her prior market research, the CO concluded that there was not a reasonable expectation that

offers would be received from two or more small businesses capable of providing home oxygen services to all of VISN 16. AR, Exh. 8, Market Research Documentation and Determination, Addendum to Market Research Report for VISN Home Oxygen Services, at 3. Moreover, after deciding to change the NAICS code, the CO advised a VA small business specialist of the change and explained her determination that the procurement approach should remain the same. AR, Exh. 28, CO Supplemental Protest Narrative, at 2-3. The small business specialist concurred with this decision. Id.; see also MVM, Inc.; Cook International, Inc.; Special Investigations, Inc.; and Varicon, Inc., B-237620, March 13, 1990, 90-1 CPD ¶ 270 at 3 (“[W]e give great weight to the fact that the contracting officer's determination was made with the concurrence of the small business program manager.”). Accordingly, we have no basis to conclude that the CO acted unreasonably in deciding not to reissue the RFI.

AMEC also faults the CO for failing to consider the capability statements of three of the small businesses that responded to the RFI--Lincare, Inc., A-Z DME, and AeroFlow. Protester's Comments at 9-10. With regard to Lincare, the record demonstrates that the CO had conflicting information as to whether Lincare was in fact a small business; thus, it was reasonable for the CO to question Lincare's status as such. See AR, Exh. 8, Market Research Documentation and Determination, D&B report for Lincare, at 2; Exh. 20, Lincare's RFI Response. With regard to A-Z DME, although not mentioned in the CO's Market Research Report dated February 16, 2012, other contemporaneous documents reflect that the CO considered A-Z DME's RFI response as well as the company's FPDS-NG data when she made her set-aside determination. See AR, Exh. 8, Market Research Documentation and Determination, CO's Determination and Findings, Set-Aside Procedures, at 1; AR, Exh. 8, Market Research Documentation and Determination, FPDS-NG report for A-Z DME.

With regard to AeroFlow, AMEC correctly notes that the contemporaneous record does not indicate that the CO assessed this firm's RFI response prior to issuing the solicitation. The CO, however, explains that she did in fact consider AeroFlow's response, D&B report, and FPDS-NG information during her initial market research, but that her review of this information was inadvertently excluded from the market research documentation. Exh. 19, CO's Supplemental Narrative, at 2. The CO states that AeroFlow's RFI response and FPDS-NG data failed to demonstrate that the company could meet the home oxygen requirements for all of VISN-16. Id. We have reviewed these documents and find the CO's assessment to be reasonable. For example, AeroFlow's RFI response demonstrated that it did not currently provide home oxygen services in any of the states serviced by VISN-16. See AR, Exh. 5, RFI Responses, AeroFlow Response. To the extent the protester argues that we should disregard the CO's representations because they are not reflected in the contemporaneous record, we disagree. While we give greater weight to contemporaneous materials, as compared to statements made in response to a protest, we will consider such statements where, as in this case, the agency's

representations are credible and consistent with the contemporaneous record. Further, even if we were to assume that AeroFlow was a small business capable of meeting the requirement at issue, this would not establish that there are two small businesses capable of doing so.⁵

Finally, the protester argues that it was inappropriate for the CO to consider the SER scores from the D&B reports and that the CO improperly found three of the six small businesses that responded to the RFI to be not responsible for financial reasons. According to AMEC, the CO's responsibility determinations were inappropriate since such determinations are to be made by the SBA, not the VA. Protester's Comments at 7-9. The protester's arguments in this regard are belied by the factual record, which makes plain that the CO did not make a responsibility determination regarding any of the small businesses that responded to the RFI. See AR, Exh. 8, Market Research Documentation and Determination, Market Research Report, Feb. 16, 2012. Rather, the record demonstrates that the SER scores were simply one factor of many considered by the CO to inform the exercise of her business judgment regarding the potential for receiving at least two offerors from small business concerns that could reasonably satisfy the agency's requirements. See id.; EMMES Corporation, B-402245, B-402245.2, Feb. 17, 2010, 2010 CPD ¶ 53 at 4 (holding that considerations relevant to determining capability "may be similar to responsibility standards"). Thus, we have no basis to find unreasonable the CO's exercise of her business judgment in deciding to issue

⁵ Similarly, the protester argues that the CO's assertions regarding past performance issues with small businesses that performed a portion of the VISN 16 home oxygen requirement are undocumented and unsubstantiated. Protester's Comments at 10-12. The CO's market research report dated February 16, 2012 states that the CO considered the "history of prior procurements for these services in this area." AR, Exh. 8, Market Research Documentation and Determination, Market Research Report, Feb. 16, 2012, at 5. The VA also explains that the information on past performance problems was provided verbally to the CO by the program office for VISN 16. Exh. 19, CO's Supplemental Narrative, at 1. While contemporaneous documentation of these discussions is preferable, the lack of such documentation does not render the CO's reliance on this information--or her ultimate decision--unreasonable. Contrary to protester's assertion, the past performance of prior small businesses was just one factor of many that the CO considered when making the decision not to set aside the entire procurement.

the RFP as a partial set-aside for small business concerns, rather than issuing the solicitation as a total set-aside.

The protest is denied.

Lynn H. Gibson
General Counsel