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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Crosstown Courier Service, Inc.

File: B-410936

Date: March 12, 2015

Christopher J. Noyes, for the protester.

Natica C. Neely, Esq., Department of Veterans Affairs, for the agency.

Evan D. Wesser, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision not to set aside a procurement for service-disabled veteran-owned small business (SDVOSB) concerns is denied where the agency reasonably concluded from its market research that it did not have an expectation of receiving proposals from two or more SDVOSB concerns capable of performing the required services.

DECISION

Crosstown Courier Service, Inc., of Chicopee, Massachusetts, protests the terms of request for proposals (RFP) No. VA263-14-R-3610, a small business set-aside, issued by the Department of Veterans Affairs (VA) for courier services for the Minneapolis VA Health Care System (MVAHCS). Crosstown, a service-disabled veteran-owned (SDVOSB) concern, argues that the VA should have set the procurement aside for SDVOSB concerns.

We deny the protest.

BACKGROUND

The RFP seeks proposals for all necessary labor, equipment, and transportation services for pick-up and delivery each weekday between the MVAHCS and 10 VA Community Based Outpatient Clinics (CBOC) located throughout Minnesota and

western Wisconsin. RFP at 11, 19-28.¹ The courier will be required to transport laboratory specimens, mail, X-rays, CD materials, and pharmacy coolers from the CBOCs to the MVAHCS, and to deliver empty specimen containers and coolers from the MVAHCS to the CBOCs. Id. at 11. The RFP includes three evaluation factors: (1) technical; (2) past performance; and (3) price. Id. at 54.² Award is to be made on a best-value basis. Id.

Prior to setting aside the procurement for small businesses, the contracting officer (CO) conducted market research to determine whether there was a reasonable expectation of receiving proposals from two or more SDVOSB concerns capable of performing the required services at reasonable prices. The CO determined that it was appropriate to limit the market research to Minnesota-based SDVOSB concerns, in light of the daily delivery and pickup requirements from Minneapolis to locations throughout Minnesota and western Wisconsin. In this regard, the RFP required offerors to demonstrate their capability of managing all operations at a local level to ensure proper quality assurance. RFP at 12. Additionally, the RFP directed that all vehicles to be used in the performance of the resulting contract had to be owned by the contractor or its subcontractor. Id.³ For these reasons, the CO concluded that a vendor located within 50-100 miles of the MVAHCS would “keep costs to the government reasonable.” AR, Tab 4, Market Research Report (May 16, 2014), at 1.⁴

¹ References to page numbers in this decision are to the VA’s Bates numbering in the Agency Report (AR).

² The RFP does not specify the relative weight of the evaluation factors. See RFP at 54. We have held, however, that where a solicitation does not disclose the relative weight of evaluation factors or subfactors in a Federal Acquisition Regulation (FAR) part 15 procurement, or an acquisition that utilizes FAR part 15 negotiated procedures, they should be considered approximately equal in importance or weight. Bio-Rad Labs., Inc., B-297553, Feb. 15, 2006, 2007 CPD ¶ 58 at 6.

³ The contractor-ownership requirement was imposed to mitigate the risk of late or failed deliveries arising from maintenance or other issues stemming from the use of employee-owned vehicles. CO’s Statement at 1. The CO represented that contractor-ownership of vehicles was found to be a “limiting factor” for SDVOSB concerns during the market research for the incumbent, small business set-aside contract. Id. at 2.

⁴ The VA’s Market Research Report (AR, Tab 4) states that the market research was limited only to those vendors located within 100 miles of the MVAHCS. As discussed herein, however, the contemporaneous exhibits to the Market Research Report show that the CO’s market research included vendors located throughout Minnesota. See AR, Tab 5, Minnesota Market Research.

The CO conducted research in a number of government databases. First, she searched the General Service Administration's (GSA) e-Library for local couriers in Minnesota under Federal Supply Schedule 48, Transportation, Delivery and Relocation Services, Special Item Number 451 3, Local Courier Delivery Services – (Small Business Set-aside). That search identified no local vendors. AR, Tab 4, Market Research Report, at 1; Tab 5, Minnesota Market Research, at 1-6. Next, the CO searched for firms with the RFP's applicable North American Industry Classification System (NAICS) code, No. 492110 (courier services), using the VA's Veterans Information Pages (VIP).⁵ That search identified only one Minnesota-based SDVOSB concern. AR, Tab 4, Market Research Report, at 1; Tab 5, Minnesota Market Research, at 7. Next, the CO searched using the keyword "courier" in the Small Business Administration's Dynamic Small Business Search (DSBS) database. That search identified six active, Minnesota-based small business concerns, including the same SDVOSB concern identified in the VIP. AR, Tab 4, Market Research Report, at 1; Tab 5, Minnesota Market Research, at 9-10. Finally, the CO searched using the RFP's applicable NAICS code for Minnesota-based vendors in the System for Award Management. That search identified eleven total vendors, six of which were small businesses, including the SDVOSB concern located utilizing the VIP and DSBS database. AR, Tab 4, Market Research Report, at 2; Tab 5, Minnesota Market Research, at 11-13.

Because only one SDVOSB concern was identified as being based in Minnesota, where the majority of the delivery sites are located, the CO determined that there was no reasonable expectation that two or more SDVOSBs would respond to the RFP. Based on the number of small businesses in Minnesota with the appropriate NAICS code, she instead set the procurement aside for small business concerns. Prior to the closing time for receipt of proposals, Crosstown timely filed this protest.

DISCUSSION

Crosstown challenges the adequacy of the VA's market research and ultimate determination not to set aside the RFP for SDVOSB concerns. The protester's primary complaint is that the agency unreasonably limited its market research to Minnesota, instead of considering SDVOSB couriers nationwide. See Protest (Dec. 17, 2014) at 2-3. Crosstown further argues that the VA's decision to restrict its market research to Minnesota, despite not limiting the competition to Minnesota-based concerns, was unreasonable and an improper attempt to avoid setting aside the RFP exclusively for SDVOSB concerns. See Comments (Jan. 20, 2015) at 1. We find no basis to sustain the protest.

⁵ The VA has designated the VIP as the database of businesses approved to participate in VA's veteran-owned small business program, and www.VetBiz.gov as the Web portal that hosts the VIP. See 38 C.F.R. § 74.1.

Under the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. § 8127, and the VA's implementing regulations, VA Acquisition Regulation Supplement (VAAR), 48 C.F.R. §§ 819.7004, 819.7005, the VA is required to set aside acquisitions for SDVOSBs whenever it determines that there is a reasonable expectation that offers will be received from at least two SDVOSB concerns and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d); VAAR § 819.7005. The determination as to whether there is a reasonable expectation of receiving offers from two or more SDVOSB concerns that are capable of performing the required work is a matter of informed business judgment within the CO's discretion that we will not disturb absent a showing that it was unreasonable. Crosstown Courier Serv., Inc., B-407404, Nov. 30, 2012, 2012 CPD ¶ 333 at 3; Buy Rite Transport, B-403729, B-403768, Oct. 15, 2010, 2010 CPD ¶ 245 at 3. The requirements of the 2006 Act do not dictate the use of any particular methodology in assessing the availability of SDVOSB concerns to perform a requirement; measures such as prior procurement history, market surveys, advice from the agency's small business specialist, and information concerning prospective offerors' business history and capability or capacity may all provide a reasonable basis for a decision to set aside, or not set aside, a requirement for SDVOSBs. Crosstown Courier Serv., Inc., *supra*, at 3; FlowSense, LLC, B-310904, Mar. 10, 2008, 2008 CPD ¶ 56 at 3.

Here, we find the CO's market research and resulting set-aside decision were reasonable. The contractor will be required to provide labor, equipment, and transportation services each weekday for pick-up and delivery between the MVAHCS in Minneapolis and 10 CBOCs located throughout Minnesota and western Wisconsin. RFP at 11, 19-28. As detailed above, the CO's market research here included searches for Minnesota-based SDVOSB courier service vendors in VA, SBA, and GSA databases. Those searches identified only one Minnesota-based SDVOSB courier service vendor. *See* AR, Tab 4, Market Research Report, at 1-2; Tab 5, Minnesota Market Research. The CO also considered the procurement history for the incumbent, small business set-aside contract. *See* AR, Tab 4, Market Research, at 2. The agency explains that it did not set aside the solicitation for the incumbent contract, or a similar procurement for courier services in Iowa, for SDVOSB concerns because the pricing received from SDVOSB concerns in response to those solicitations exceeded the independent government estimate by an average of 212% and 163%, respectively. *See* AR, Tab 9, VA Decision on Agency-Level Protests of RFP Nos. VA-263-09-RP-0292 and VA-263-09-RP-0293 (Sept. 22, 2009), at 1. Additionally, the VA was concerned that awarding the contract to a SDVOSB concern not located in Minnesota could result in excessive subcontracting in violation of the limitation on subcontracting provisions at FAR clause 52.219-27(d) and VAAR clause 852.219-10(c). *See* AR at 4. Under these circumstances, we find the VA's market research and set-aside determination to be reasonable. *See* Crosstown Courier Serv., Inc., *supra*, at 3 (denying protest challenging a determination not to set aside a procurement for similar VA courier

services for SDVOSB concerns based on market research limited to the states where the majority of work would be performed).⁶

Next, Crosstown argues that the VA's limitation of its market research to Minnesota was not reasonable because the competition itself was not limited to Minnesota-based firms. As addressed above, however, the agency reasonably determined that it was appropriate to restrict its set-aside market research to Minnesota-based vendors based on the requirement for daily pick-up and delivery from the MVAHCS in Minneapolis and several CBOCs located throughout Minnesota and the solicitation's associated requirements regarding local contract management and contractor-ownership of vehicles. We do not believe that the agency was then obligated to restrict the subsequent competition to the same geographic area, because an agency's reasonable limitation on the geographic scope of market research for the purpose of identifying firms likely to compete does not justify or require the agency to restrict the competition to that geographic area, where the agency's needs do not otherwise necessitate such a restriction. Thus, we find the agency's decision not to restrict the competition only to Minnesota-based small business concerns to be reasonable and not evidence of any bad faith on the part of the agency.

In addition to challenging the limited geographic scope of the VA's market research, Crosstown also argues that other data available to the agency demonstrated that it was likely that two or more SDVOSBs could respond to the solicitation. We find that none of Crosstown's arguments provides a basis on which to sustain the protest.

First, Crosstown argues that it is currently performing similar courier services for the MVAHCS. See Protest at 2-3. The VA, however, demonstrated in its AR--and the protester did not endeavor to rebut in its comments--that the scope of Crosstown's current work is materially different than the work being acquired under the RFP. For example, Crosstown's current contract is limited to the Minneapolis-St. Paul metropolitan areas, while the instant procurement will require the contractor to

⁶ The VA conceded that "[c]onceptually, a vendor located in Wisconsin near the state line could logistically fulfill this requirement." AR at 3 n.2. In light of this concession, the agency's focus on Minnesota-based SDVOSB concerns alone arguably was unreasonably narrow. See Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 7 (finding market research in connection with a set-aside determination was unreasonable where the agency only researched firms in one state, while the effort specifically required performance in three states). As the agency explained--and the protester failed to rebut--however, including Wisconsin would not dictate a different result here. In response to the protest, the VA conducted similar searches in government databases for Wisconsin-based vendors, and identified no Wisconsin-based SDVOSB concerns. See AR at 3 n.2; Tab 6, Wisconsin Market Research.

service a much greater area across Minnesota and western Wisconsin. Compare AR, Tab 11, Contract No. VA263-12-C-0019, at 8-10 with RFP at 11, 19-28. In this regard, while Crosstown's current contract can generally be performed by one driver and vehicle, the VA estimates that the requirement being procured will require five or six drivers and vehicles. See CO's Statement at 1. As these differences demonstrate, the VA reasonably concluded that Crosstown's current contract was not relevant to its set-aside determination for this procurement. Furthermore, these differences go to the heart of the agency's concerns regarding a SDVOSB's ability to furnish company-owned vehicles and the requirement to locally manage the contract through a local prime or subcontractor SDVOSB concern, which was a significant part of the basis for the structure of its market research. See CO's Statement at 2. Again, Crosstown offered no rebuttal to these issues in its comments.

Crosstown also argues that our Office should consider that four of the five offers ultimately received in response to the solicitation were submitted by SDVOSB concerns. See Comments at 1. We do not find this subsequently-obtained information is relevant to the question of whether the agency's contemporaneous set-aside determination was reasonable. As an initial matter, the protester has not established that any of the four offerors are based in Minnesota or Wisconsin, and thus these firms were reasonably not considered in the initial market research. In any event, we have previously held that information that first becomes available after issuance of a solicitation does not demonstrate that the CO's prior determination not to set aside the procurement was unreasonable. E.g., Jacqueline R. Sims, dba JRS Staffing Servs., B-409613, B-409613.2, June 16, 2014, 2014 CPD ¶ 181 at 4, recon. dismissed, B-409613.3, Feb. 20, 2015. Although it is permissible for a CO to change a determination after a solicitation is issued, nothing in the procurement regulations requires the CO to cancel or amend a solicitation when that official subsequently learns of interested, responsible SDVOSB concerns, assuming the CO had conducted a reasonable investigation regarding the possibility of two or more responsible SDVOSB concerns competing on the procurement. See id.

The protest is denied.

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General Counsel