



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Fire Risk Management, Inc.

File: B-411552

Date: August 20, 2015

W. Mark Cummings, for the protester.
David G. Fagan, Esq., Department of Veterans Affairs, for the agency.
Frank Maguire, Esq., and David A. Ashen, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where the agency's determination that there was not a reasonable expectation of receiving offers from two or more service-disabled veteran-owned small business (SDVOSB) concerns was not supported by the record.

DECISION

Fire Risk Management, Inc. (FRM), of Bath, Maine, protests the Department of Veterans Affairs' (VA) failure to set aside for service-disabled veteran-owned small business (SDVOSB) concerns request for proposals (RFP) No. VA-260-15-R-0295, for fire protection and life safety architect/engineer (A/E) services. The protester asserts that VA's decision not to set aside the acquisition for SDVOSBs was based on unreasonable market research.

We sustain the protest.

BACKGROUND

The RFP, issued on April 27, 2015, as a small business set-aside, requests proposals to provide fire and life safety A/E services for Veterans Integrated Service Network (VISN) 20 region medical centers located in Washington, Oregon, Idaho, and Alaska. Agency Report (AR) Tab 2. The solicitation's statement of work (SOW) describes the required A/E services as:

Design Services which includes Studies, Schematics/Design
Development, Contract Drawings, Specifications, Cost Estimates,

and/or Construction Period Services, Drawing Review Services, Code Compliance Reviews, and Joint Commission Statement of Conditions Support.

SOW at 1. According to the SOW:

These services are intended for project design for projects that are primarily fire and/or life safety in nature, fire and life safety plan code review, review of existing facilities for fire and life safety code compliance, and Joint Commission Statement of Conditions support. Services are to be provided by a professional fire protection engineer with a degree from an accredited university in fire protection.

Id. The solicitation designated North American Industry Classification System (NAICS) code 541330, for engineering services, for this requirement. RFP at 2.¹

The procurement is being conducted using Brooks Act procedures in Federal Acquisition Regulation (FAR) Part 36, Construction and Architect-Engineer Contracts. Under the Brooks Act, contractors are selected for A/E work on the basis of demonstrated technical competence and qualifications. The procedures do not include price competition; rather, the agency must select the most highly qualified firm and negotiate a contract with that firm at a fair and reasonable level of compensation. Risk Analysis and Mitigation Partners, B-409687, B-409687.2, July 15, 2014, 2014 CPD ¶ 214 at 2. The RFP provides for selection based on the following evaluation criteria: (1) professional qualifications; (2) specialized experience and technical competence; (3) capacity to accomplish the work in the required time; (4) past performance; (5) location in the general geographical area of the project and knowledge of the locality; (6) acceptability, including design credentials; (7) reputation and standing of the firm; (8) record of significant claims against the firm; and (9) personnel. RFP at 3-4.

Prior to posting the RFP, the VA contract specialist conducted market research to determine the availability of contractors that could satisfy the agency's requirements. AR at 1-2. The contract specialist advises that he searched the Small Business Administration (SBA) Dynamic Small Business Search website database and the VA Vendor Information Pages website database using NAICS Code 541330 (engineering services), and the keyword "fire" to limit the search to the engineering services firms likely to be qualified to furnish fire protection A&E services. AR, Tab 1, Contract Specialist Statement, May 28, 2015, at 1.

¹ The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. <http://www.census.gov/eos/www/naics/>.

The contract specialist's search of the SBA database identified two SDVOSB/Veteran Owned Small Business (VOSB) concerns registered under NAICS code 541330, with the keyword "fire" in the firm description, in Washington, Oregon, and Idaho, but neither of those firms was an A/E firm. AR, Tab 1, Contract Specialist Statement, May 28, 2015, at 1; AR, Tab 3, Contract Specialist Memorandum, Jan. 27, 2015, at 3. The search of the VA website identified two SDVOSB/VOSB firms registered under NAICS code 541330, with the keyword "fire," in the states of Washington, Oregon, and Idaho, but only one of the firms was an A/E firm. Id.

The contract specialist notes that while his search had identified only one SDVOSB/VOSB A/E firm, "[w]hen the SDVOSB/VOSB search restriction was removed, a search using the SBA Dynamic Small Business Search website database resulted in 27 firms; at least 10 of which were AE firms." AR, Tab 1, Contract Specialist Statement, May 28, 2015, at 1. The contract specialist further reports that:

Based on my market research, I recommended that this procurement action be 100% set-aside for small business concerns as I did not believe that the market research supports a reasonable expectation of two or more SDVOSB/VOSB AE firms submitting offerors with fair and reasonable pricing. In addition, and again based on the results of my market research, I made the recommendation that this procurement be set-aside for small business concerns because it would result in a large pool of contractors to ensure competition and to meet the Brooks Act process which is a Qualifications-Based Selection requiring contracts for design services to be negotiated on the basis of demonstrated competence and qualifications for the type of professional services required.

Id. at 1-2; see AR, Tab 3, Contract Specialist Memorandum, Jan. 27, 2015, at 1-2. Based on this research, the RFP was issued on April 27 as a small business set-aside with a closing date of May 28.

On May 4, FRM emailed the contract specialist, inquiring as to why the solicitation was not set aside for SDVOSB/VOSB concerns. AR, Tab 4, May 4, 2015, at 67-68. The contracting officer subsequently requested the contract specialist to "repeat your market research, but go nation-wide" to search for SDVOSB concerns. Id. At 65. The contract specialist conducted the expanded search and reported the results to the contracting officer later that day:

By changing the search criteria to nationwide, and leaving all other search criteria unchanged, the SBA Dynamic Small Business Search database found 127 profiles matching the criteria. Likewise the VA Vendor Information Pages resulted in 89 matches. It would appear

that I should amend the Request for Qualifications stating that the procurement will be a VOSB/SDVOSB set aside.

Id. The contracting officer responded:

Wow. Well, I'm not convinced this is worth a protest. That will hold up the world. Maybe we need to revise the announcement making these two changes:

1. 100% SDVOSB set aside
2. Relaxing the standard for evaluation factor 1 [professional qualifications]. . . .

Id. at 64.

Later on May 4, the agency project engineer, representing the customer, objected to setting aside the procurement for SDVOSB firms, explaining as follows:

I am definitely opposed to setting this solicitation aside for SDVOSB. I have done some research into this and have found two other VISNs that have solicited for similar services. They were forced to go with SDVOSB and eventually awarded to an SDVOSB contractor. In both cases, VISN 12 and VISN 6, they ended up not renewing the contract after 1 year. VISN 12 was preparing for Joint Commission and the product the SDVOSB contractor provided was so poor they had to do emergency hiring through other mechanisms to hire a competent fire protection engineer at the last minute to get them ready for Joint Commission. VISN 12 has since re-solicited and is working through the process of awarding to a Small Business that is qualified to do the work. . . .

I have nothing against using an SDVOSB firm if they have the necessary qualification, but I think VISN 12 can attest to the fact that they don't. I have no problem with them applying but I think we need to keep the field open to candidates that we know can do the job. If an SDVOSB happens to be the best candidate, then they will be selected. If not, then we should be allowed to pick someone who can properly provide the services that Veterans deserve.

I certainly don't want to end up in the same boat as VISN 12 and 6 did. . . . In my opinion, if we are going to be forced to set this aside for SDVOSB, then we should cancel the solicitation. It doesn't make any sense to hire someone who cannot do the job properly.

Id. at 63-64. When the agency failed to reverse its decision to set aside the procurement for small business concerns rather than SDVOSB concerns, FRM filed this protest with our Office on May 18.

DISCUSSION

FRM asserts that it was unreasonable for the agency to limit the market research to the local geographic area because, according to the protester, the “majority of the support requirements for this contract will be performed at the contractor’s own facility.” Comments at 5-6. The agency responds that:

it was necessary to limit . . . market research to the states of Oregon, Washington and Idaho because the solicitation clearly stated under the heading Construction Period Services that site visits would be expected . . . and again under Supplement B of the solicitation . . . that the ‘A/E shall visit proposed project site, as required’ . . .

Supplemental Agency Report at 4.

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, 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 firms and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d); 48 C.F.R. § 819.7005. The determination as to whether there is a reasonable expectation of receiving offers from two or more SDVOSB firms that are capable of performing the required work is a matter of informed business judgment within the contracting officer’s discretion that we will not disturb absent a showing that it was unreasonable. Crosstown Courier Serv., Inc., B-410936, Mar. 12, 2015, 2015 CPD ¶ 107 at 4; Buy Rite Transp., B-403729, B-403768, Oct. 15, 2010, 2010 CPD ¶ 245 at 3. The requirements of the 2006 VA Act do not dictate the use of any particular methodology in assessing the availability of SDVOSB firms 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., B-410936, *supra*; FlowSense, LLC, B-310904, Mar. 10, 2008, 2008 CPD ¶ 56 at 3. Further, we have held that, even where an RFP does not restrict competition to firms located in a particular geographical area, an agency may focus its market research on the geographical area in which performance will take place and consider the likelihood that firms from outside it would respond to the solicitation. In and Out Valet Co., B-411019, Apr. 15, 2015, 2015 CPD ¶ 128 at 3; Crosstown Courier Serv., Inc., B-407404, Nov. 30, 2012, 2012 CPD ¶ 333 at 3.

Here, we conclude that the agency's determination here that there was not a reasonable expectation that offers would be received from at least two SDVOSB firms that are capable of performing the required work is not supported by the record. As noted by the agency, our cases have recognized that in appropriate circumstances an agency may focus its market research on the geographical area in which performance will take place after reasonably concluding that there is little likelihood that firms from outside the area would respond to the solicitation. See, e.g., In and Out Valet Co., supra, at 4-5. The cases cited by the agency, however, are readily distinguished from the circumstances here, since they involved requirements that likely would be performed by local firms, such as those requirements necessitating a substantial, regular presence by the contractor at specific sites or a specific work area. See, e.g., Crosstown Courier Serv., B-407404, supra (courier services in a designated area); In and Out Valet Co., supra (valet parking services).

Here, in contrast, the protester asserts that A/E firms are typically not required to be "on site" for extended periods of time, and the level of effort that would actually need to be performed within the VISN area would be "a small percentage" of the overall required effort. Comments at 3. In this regard, the protester explains that:

Whether in support of an upcoming facility renovation or a part of a "Statement of Conditions" review, the time spent on site by the engineer(s) is relatively small in comparison to the time needed to develop the design documentation or final report of code compliance or conditions; all of which would be performed at the contractor's facility, with all submissions of documents, including drafts for Government review, now being performed electronically.

Id.

Further, we note that the protester's position appears to be consistent with the solicitation, which indicates that the A/E services to be performed under the RFP are "Design Services," which include studies, schematics/design development, contract drawings, specifications, cost estimates, and/or construction period services, drawing review services, code compliance reviews, and Joint Commission Statement of Conditions support. SOW at 1. Although the RFP makes it clear that site visits will be necessary, see, e.g., SOW at 2 (the required construction period services will include "conducting site visits," while the required existing facility code review "will include on-site inspection and review"), it is not evident from the solicitation how often the required services will require substantial performance "on site" in addition to design services that can be performed at the A/E firm's office(s). In this regard, when asked by our Office to respond to the protester's assertions, the agency did not specifically address the frequency of when the contractor would be required to visit the VA facilities, and instead noted only that the solicitation provides

for site visits “as required.” Supplemental AR at 4; see RFP, Supplement B, at 3. Further, when the agency considered whether the solicitation should be restricted to A/E firms located within the VISN 20 region, the agency project engineer rejected setting a “distance limit,” proposing instead only that firms that are located closer should be rated higher. AR, Tab 4, Mar. 24, 2015, at 30. Thus, it appears that the project engineer recognized that firms located outside of the VISN 20 region could perform the contract. In any case, given that the VISN 20 region includes facilities in Washington, Oregon, Idaho, and Alaska, it seems likely that even A/E firms located within VISN 20 will be required to travel significant distances away from their office(s) for necessary site visits.

Thus, the record here does not support the agency’s determination to limit its market research to firms within the VISN 20 region. Further, as indicated above, the contract specialist, in a database search specifically directed by the contracting officer, found more than 127 profiles of SDVOSB concerns nationwide “matching the criteria.” Id., May 4, 2015, at 64. Thus, it appears that had the agency expanded its market research beyond the VISN 20 region it would have discovered numerous SDVOSB A/E concerns doing fire protection work.

Although the agency now argues that the inadequate number of SDVOSB A/E firms in the VISN 20 region warranted not setting aside the procurement for SDVOSB firms, the protest record suggests that agency officials may, in fact, have been concerned with presumed poor performance by an SDVOSB awardee. In this regard, when the contracting officer, in reconsidering the set-aside decision after receiving the contract specialist’s expanded search results, indicated on May 4 that a “100% SDVOSB set aside” may be necessary, id., the agency project engineer responded that he was “definitely opposed to setting this solicitation aside for SDVOSB,” due to the poor performance of the SDVOSB contractor in the VISN 6 and VISN 20 regions. Id. at 63-64. As noted, the engineer concluded that, “[i]n my opinion, if we are going to be forced to set this aside for SDVOSB, then we should cancel the solicitation. It doesn’t make any sense to hire someone who cannot do the job properly.” Id. In our view, however, such anecdotal evidence of poor performance by an SDVOSB contractor, unsupported by any detailed analysis indicating that a small business concern would be unlikely to possess the specific skills and resources needed to perform the specific work required under the contemplated contract, does not represent the reasonable exercise of informed business judgment required under the statute. See Crosstown Courier Serv., Inc., B-410936, Mar. 12, 2015, 2015 CPD ¶ 107 at 4.²

² The protester also asserts that the agency unreasonably included the restriction “fire” in its database searches. Comments at 2. The protester asserts that “[u]se of the term ‘fire’ in a company name, or lack thereof, should in no way be used as a factor in determining a company’s qualifications or area of expertise/services.” Id. The agency responds that using the criteria “fire” to search among the many A/E

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RECOMMENDATION

We find that the VA's market research was insufficient to conclude that the agency would not receive proposals from at least two responsible SDVOSB concerns that could meet the requirements in the RFP at a fair market price. For this reason, the agency's decision not to set aside the solicitation for SDVOSB concerns was unreasonable. We recommend that the contracting officer conduct a proper market survey in accordance with the agency's requirements for this procurement and this decision to ascertain whether there is a reasonable expectation that at least two or more responsible SDVOSB concerns will submit proposals at fair market prices. We also recommend that the agency reimburse the protester for the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.

Susan A. Poling
General Counsel

(...continued)

firms was reasonable "because, although a company may not have the word 'Fire' in its company name, any company performing Fire and Life Safety AE services as required by the solicitation would have the word 'Fire' in its company description or company capabilities narrative." Supp. AR at 3. We find the agency's explanation reasonable.