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**Comptroller General
of the United States**

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

Decision

Matter of: Spur Design, LLC

File: B-412245.3

Date: February 24, 2016

Steven J. Koprince, Esq., Matthew P. Moriarty, Esq., and Matthew T. Schoonover, Esq., Koprince Law LLC, for the protester.

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DIGEST

Protest challenging the agency's decision not to set aside an indefinite-delivery, indefinite-quantity architect/engineer services contract for service-disabled veteran-owned small business (SDVOSB) concerns is sustained where the record shows that the agency had a reasonable expectation of receiving proposals from two or more SDVOSB concerns capable of performing the required services.

DECISION

Spur Design, LLC (Spur) of Oklahoma City, Oklahoma, protests the Department of Veterans Affairs' (VA) decision not to set aside for service-disabled veteran-owned small business (SDVOSB) or veteran-owned small business (VOSB) concerns solicitation number VA-255-15-R-0752 for architect/engineer (A/E) services. Spur, an SDVOSB, argues that the VA decision not to set the solicitation aside for SDVOSB concerns was in contravention of the VA Acquisition Regulation (VAAR) §§ 819.7004 and 819.7005.

We sustain the protest.

BACKGROUND

The solicitation was issued on September 4, 2015, as a small business set-aside seeking a variety of professional A/E services for nine Veterans Integrated Service

Network (VISN)¹ region 15 medical centers located in Missouri, Kansas, and Illinois. The solicitation stated that the VA intended “to award an adequate number of [indefinite-delivery, indefinite-quantity (IDIQ)] contracts for the needs of VISN 15” for a one-year base period and four one-year options. Solicitation at 2.² The solicitation also stated that the value of the task orders to be placed under the IDIQ contracts may range from \$3,500 to \$1 million each, with a maximum award value of \$5 million per contract over a five-year period. Id.

The solicitation sought firms that included multidisciplinary design teams capable of providing a variety of professional services and possessing a thorough working knowledge of applicable codes, requirements, and standards as they pertained to hospitals. Id. The solicitation, further, required that firms have “an established bonafide working office within a 200 mile radius of one of the VISN 15 Medical Centers” because the agency contemplated that the firms “primarily work with the closest medical center.” Id. However, the solicitation advised that task orders could be issued to support any of the VISN 15 medical centers and that “[f]irms must be capable of responding to and working on multiple task orders concurrently.” Id.

The solicitation 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; and (6) ability to comply with FAR clause 52.219-14, Limitation on Subcontracting. Id. at 3-8. The solicitation designated the North

¹ A Veterans Integrated Service Network (VISN) is an integrated network of VA facilities that are focused on pooling and aligning resources to best meet local needs in the most cost-effective manner and provide greater access to care. VAAR § 802.101.

² All citations to the solicitation are to the final version, as amended on September 28, 2015. See Agency Report (AR), Exh. 3, Solicitation. 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 a 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. Fire Risk Mgmt., Inc., B-411552, Aug. 20, 2015, 2015 CPD ¶ 259 at 2 (citing Risk Analysis and Mitigation Partners, B-409687, B-409687.2, July 15, 2014, 2014 CPD ¶ 214 at 2). Here, the solicitation was labelled as a “Presolicitation,” but the document clearly sought “Architect/Engineering Qualifications packages [] and supporting documentation.” Solicitation at 1, 9-15.

American Industry Classification System (NAICS)³ code 541310, architectural services, and 541330, engineering services, for this requirement. Id. at 1.

Prior to conducting market research, the agency determined that based on its projected needs for the next five years, it would need to award a minimum of 14 contracts. Id. The agency's integrated planning team (IPT) subsequently conducted market research to determine the availability of small business concerns in the region that could perform the services sought by the agency. The IPT first reviewed the market research conducted by the previous IPT in 2010.⁴ AR, Exh. 4, CO Declaration (Dec. 16, 2015) at 1; Exh. 16, CO Declaration (Jan. 29, 2016) at 1. The previous IPT searched for firms with the applicable NAICS codes using the VA's Veterans Information Pages (VIP)⁵ and the Small Business Administration's (SBA) Dynamic Small Business Search (DSBS) database. Id. The DSBS identified no SDVOSB concerns, while the VIP search identified five SDVOSB concerns. See AR, Exh. 6, Market Research VETBIZ Results; Exh. 7, Market Research DSBS Results; Exh. 13, Market Research Printouts Supporting Exh. 6.

In March and early April 2015, the agency conducted market research for this acquisition in conjunction with the SBA by looking in 11 states at all businesses within a 200-mile radius of each VISN 15 medical center with the applicable NAICS codes and Product or Service Code⁶ (PSC) in the United States System for Award

³ 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. North American Industry Classification System, <http://www.census.gov/eos/www/naics/> (last visited Feb. 23, 2016).

⁴ As a result of the geographical restriction for the predecessor IDIQ contract (50 miles for larger cities and 150 miles for rural areas), 9 states were included as part of the agency's market research. See AR, Exh. 22, CO Declaration (Feb. 10, 2016) at 1-2; Exh. 6, Market Research VETBIZ Results; Exh. 7, Market Research DSBS Results; Exh. 13, Market Research Printouts Supporting Exh. 6.

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

⁶ Product or Service Codes (PSC) describe products, services, and research and development (R&D) purchased by the federal government. These codes indicate "what" was bought for each contract action reported in the Federal Procurement Data System (FPDS). FPDS PSC MANUAL, AUG. 2015 ED., at 5, https://www.fpds.gov/downloads/top_requests/PSC_Manual_FY2016_Oct1_2015.pdf (last visited Feb. 23, 2016). The agency used PSC C211 (Architect & Engineer Services-General) and C1DA (Architect & Engineering-Construction: Hospital &

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Management (SAM) and the VIP. AR, Exh. 16, CO Declaration (Jan. 29, 2016) at 1-3. As a result, the agency found 262 VOSB concerns registered under either of the solicitation's two NAICS codes; of those, a total of 142 were listed in 1 of the 2 PSC codes in SAM. Id. at 3. However, the agency did not consider these results because unlike the VIP, SAM allows self-certification of SDVOSB or VOSB status without any further verification. Id. The agency's VIP search found 48 SDVOSB concerns, 11 of which were listed in 1 of the 2 PSC codes in VIP. Id. The IPT determined, however, that because it anticipated needing at least 14 contracts, the 11 SDVOSB concerns could not satisfy the agency's requirements. Id.

The agency subsequently issued a sources-sought notice on April 6, 2015, to determine the availability and technical capability of small businesses that could meet the requirements listed in the notice.⁷ In response to the sources-sought notice, 46 capability packages were submitted, and the agency determined that 9 SDVOSB concerns were capable of meeting the agency's requirements.⁸ See AR, Exh. 12, Sources-Sought Evaluation. The agency determined, however, that there was an insufficient number of SDVOSB concerns to set the procurement aside for SDVOSB concerns, based on the agency's conclusion that a minimum of 14 contracts would be needed. AR, Exh. 5, Market Research Report at 4; Exh.16, CO Declaration (Jan. 29, 2016) at 4. Similarly, the agency determined that there were not sufficient responses (i.e., that exceeded 14) received in any socioeconomic category, e.g., SDVOSB, VOSB, historically underutilized business zone (HUBZone), woman owned, or small disadvantaged. AR, Exh. 5, Market Research Report at 4; Exh. 4, CO Declaration (Dec. 16, 2015) at 2. As a result, the agency concluded that only a set-aside for small businesses would be appropriate for this procurement. Id.

Spur filed an agency-level protest prior to the closing date for receipt of initial proposals, challenging the VA's decision not to set aside the procurement for

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Infirmaries) for its market research. See AR, Exh. 16, CO Declaration (Jan. 29, 2016) at 2; see also AR, Exh. 15, 2015 Market Research.

⁷ The sources-sought notice contained the same general requirements as the solicitation, but required less detailed information to be submitted. See generally AR, Exh. 8, Sources-Sought Notice.

⁸ The agency represented that seven SDVOSB concerns were capable; however, the agency's underlying capabilities package review documentation shows that nine were found to be capable. Compare AR, Exh. 12, Sources Sought Evaluation with AR, Exh. 4, CO Declaration (Dec. 16, 2015) at 1; Exh. 5, Market Research Report at 2. The 9 SDVOSB concerns were in addition to the 11 SDVOSB concerns found during the agency's VIP search. Compare AR, Exh. 12, Sources Sought Evaluation with AR, Exh. 15, 2015 Market Research, SDVOSB Pivot Table tab.

SDVOSB concerns and protesting the solicitation's 200 mile radius restriction. On November 4, 2015, the contracting officer issued a decision denying Spur's agency-level protest. As relevant to the protest, the contracting officer's decision explained that the procurement was not set aside for SDVOSBs because "VA believes between 14 and 20 contracts will be needed to support VISN 15's requirements."⁹ Since the market research identified only 7 SDVOSBs, I determined that setting aside the requirement for SDVOSBs will not result in an adequate number of IDIQ contracts under which VA can meet the needs of VISN 15." Protest, attach. 2, CO Decision at 1. This protest followed.

DISCUSSION

Spur argues that the VA's decision not to set the procurement aside for SDVOSB concerns was in contravention of the VA Act's Rule of Two, which is implemented by the VA Acquisition Regulation (VAAR) §§ 819.7004 and 819.7005.¹⁰ For the reasons set forth below, we agree.

The Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. § 8127 (VA Act), implemented by VAAR §§ 819.7004 and 819.7005, created the Veterans First Contracting Program and provides the VA with independent authority to set aside contracts for SDVOSB and VOSB concerns. Buy Rite Transport, B-403729, B-403768, Oct. 15, 2010, 2010 CPD ¶ 245 at 2-3; Apex Ltd., Inc., B-402163, Jan. 21, 2010, 2010 CPD ¶ 35 at 2. Under the Veterans First Contracting Program, acquisitions must be set aside for SDVOSB concerns if the VA determines that there is a reasonable expectation that offers will be received by at least two SDVOSB concerns and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d). We will refer to this requirement, grounded in Title 38, as the VA Act's Rule of Two.¹¹

⁹ While not relevant here, the IPT determined that a minimum of 14 contracts would meet the agency's needs but it was willing to make additional awards, to a maximum of 20, "depending on the quality of submittals and if A&Es had specialized experience that VISN 15 needed." See AR, Exh. 14, CO Declaration (Jan. 12, 2016) at 1; Exh. 20, CO Declaration (Feb. 3, 2016) at 1.

¹⁰ The protest, which was initially filed without the assistance of counsel, argued that the agency's actions were in contravention of regulations implementing the VA Act's statutory Rule of Two requirement. During the development of the protest, our Office, and the parties, ultimately focused on whether the agency's actions were in compliance with the VA Act's statutory Rule of Two requirements.

¹¹ Generally, the term "Rule of Two" describes a long-standing regulatory policy applicable to all federal agencies intended to implement provisions in the Small Business Act, 15 U.S.C. § 644(a), requiring that small businesses receive a "fair proportion of the total purchases and contracts for property and services for the

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Here, there is no dispute in the record that the literal requirement as set forth in the VA Act's Rule of Two was satisfied. Nonetheless, the agency maintains that because it needs a minimum of 14 contracts, the number of SDVOSB concerns capable of performing the required work was insufficient to meet its needs.¹² As a result, the VA concluded it was not required to set aside the procurement, or any subset of the procurement, for SDVOSB concerns.

During development of this protest, our Office asked the parties to brief the question of whether the VA Act's Rule of Two applies to multiple-award IDIQ contracts.¹³ The agency responded that "38 USC 8127(d) means that a set aside is required when there will be two or more SDVOSB offers per contract." Agency Brief (Feb. 8, 2016) at 2.

The plain language of the VA Act does not support the agency's position. Instead, the VA Act simply states that

a contracting officer of the Department **shall** award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d) (emphasis added). Nothing in the language of the VA Act supports the agency's position that in the context of multiple-award contracts, the

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Government." 49 Fed. Reg. 40,135 (Oct. 3, 1984). This government-wide Rule of Two requires agencies to set aside for small business participation an acquisition over \$150,000 if there is a reasonable expectation of receiving fair market offers from at least two responsible small business concerns. FAR § 19.502-2(b).

¹² In this regard, the agency repeatedly refers only to the number of responses to the sources-sought notice from SDVOSB concerns that it found capable. See, e.g., AR, Exh. 4, CO Declaration (Dec. 16, 2015) at 1, 3; Exh. 5, Market Research Report at 2-3; Exh. 16, CO Declaration (Jan. 29, 2016) at 3. The record shows these responses combined with the results of the agency's VIP search identify at least 20 SDVOSBs that the agency found to be capable of satisfying the agency's needs.

¹³ The application of the VA Act's Rule of Two to A/E procurements is not at issue here. See Powerhouse Design Architects & Eng'rs, Ltd., B-403174 et al., Oct. 7, 2010, 2010 CPD ¶ 240 at 3 ("We see nothing in the VA Act or the VA regulations that exempts A/E procurements from the set-aside requirement.").

VA Act's Rule of Two requires set asides only when there will be two or more SDVOSB or VOSB offers per contract.

In addition, the agency does not argue that its implementing regulations exempt, or even address, whether the VA Act's Rule of Two applies to multiple-award IDIQ contracts. Rather, the agency contends that "common-sense and sound business judgment" dictate that the VA Act's Rule of Two should not be applied when the number of qualified SDVOSB concerns is less than the agency's anticipated minimum number of awards because it is impractical. See Agency Brief (Feb. 8, 2016) at 2-3. In this regard, the agency argues that "blindly apply[ing] the [VA Act's] Rule of [Two]" to require the agency to set aside a multiple-award IDIQ procurement for SDVOSB concerns would result in "abandon[ing] the benefits of competition and simply award[ing] the 7-9 SDVOSBs with contracts." This, the agency contends, "fails to consider the real needs of the [agency]," which "was surely not the intent of Congress." Id. at 1, 3.

Congress's apparent intent when it passed the VA Act was to broadly foster participation in VA procurements by SDVOSB and VOSB concerns.¹⁴ See Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112 at 5. Prior to the enactment of the VA Act, contracting officers were allowed, but not required, to restrict competition to SDVOSB and VOSB concerns under the Small Business Act, as amended by the Veterans Benefits Act of 2003. See 15 U.S.C. § 657f. Under the 2006 VA Act at issue here, the VA "shall" set aside its acquisitions for SDVOSB or VOSB concerns once the Rule of Two is satisfied. Further, in implementing the VA Act, the VA additionally required that "[i]n determining the **acquisition strategy** applicable to an

¹⁴ The House Committee on Veterans' Affairs report accompanying the bill that ultimately was enacted stated that

[T]he bill would improve the competitive status of small businesses owned by veterans and service-disabled veterans when competing for VA contracts Indeed, the Committee believes that small businesses owned and controlled by veterans and service-disabled veterans should routinely be granted the primary opportunity to enter into VA procurement contracts The Committee expects VA to set the example among government agencies for procurement with veteran and service-disabled veteran-owned small businesses. The bill would provide new tools and procedures for VA contracting officers to enable them to do more business with veteran and service-disabled veteran entrepreneurs The Committee also expects the Department to make significant effort to ensure that its contracting officers understand the new tools and utilize these tools effectively.

H.R. Rep. No. 109-592 (2006) at 14-16.

acquisition, the contracting officer **shall** consider, in the following order of priority, contracting preferences that **ensure contracts will be awarded**” first to SDVOSB concerns, then VOSB concerns, to the extent the Rule of Two is met, prior to considering whether to award to any other category of small business contracting preferences, including small business concerns. VAAR §§ 819.7004, 819.7005 (emphasis added).

We cannot find reasonable the agency’s decision not to set aside this acquisition, or any portion of this acquisition, for SDVOSB or VOSB concerns because its market research yielded fewer of these concerns than the anticipated number of contract awards. We recognize it is within the agency’s discretion to determine the number of IDIQ contracts required to satisfy its needs. However, we see no basis to conclude that the agency has the discretion to ignore the requirements of the VA Act and the VA’s own implementing regulations because it anticipates making multiple awards under an IDIQ contract.

In conclusion, the VA Act and its implementing regulations require that the agency set aside its acquisitions for SDVOSB and VOSB concerns when the conditions of the statute are met. There is no dispute that those conditions are satisfied here. Since we conclude that the agency’s decision not to set aside any of these contracts was inconsistent with the requirements set forth in the VA Act and its implementing regulations, we sustain the protest.

RECOMMENDATION

The VA Act and its implementing regulations require that SDVOSB and VOSB concerns must receive priority when the conditions of the statute are met. While the precise method the VA uses to meet its statutory obligation is within its discretion, we see no basis to ignore this requirement entirely, and recommend that the VA revise its solicitation, choosing an approach that addresses its statutory requirement to set aside this acquisition for SDVOSB or VOSB concerns. We also recommend that the agency reimburse Spur its reasonable costs of filing and pursuing its 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 cost incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

This protest is sustained.

Susan A. Poling
General Counsel