



Decision

Matter of: AeroSage, LLC

File: B-414640; B-414640.3

Date: July 27, 2017

David M. Snyder, for the protester.

Kathryn M. Kelley, Esq., Defense Logistics Agency, for the agency.

Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's decision not to seek a waiver of the small business nonmanufacturing rule for a procurement of fuel is denied where there is no statutory or regulatory requirement for the agency to do so.
 2. Protest challenging the adequacy of the agency's market research regarding a partial set-aside for service-disabled veteran-owned small businesses is dismissed where the protester does not demonstrate that it is an interested party to challenge the solicitation.
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DECISION

AeroSage LLC, of Tampa, Florida, protests the terms of request for proposals (RFP) No. SPE600-17-R-0210, issued by the Defense Logistics Agency (DLA) for the supply of fuel to various installations and facilities in the Mid-Atlantic region of the United States. The protester argues that DLA should have set aside all of the RFP's contract line item numbers (CLINs) for delivery of fuel to the Department of Veterans Affairs (VA) for service-disabled veteran-owned small businesses (SDVOSBs), and that the agency should have sought a waiver of the small business nonmanufacturer rule for this procurement.

We deny in part and dismiss in part the protest.¹

¹ Our Office did not issue a protective order in connection with AeroSage's protest because it elected not to retain counsel eligible for admission under a protective order. Certain issues, such as AeroSage's proposed approach to meeting the solicitation

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BACKGROUND

DLA issued the RFP on March 31, 2017, as a combined synopsis/solicitation under the commercial item provisions of Federal Acquisition Regulation (FAR) subpart 12.6. Agency Report (AR), Tab 3, RFP, at 2.² The RFP seeks proposals to deliver various types of fuels to Department of Defense and civilian agency customers in Customer Organized Group 3 (COG 3) program, which consists of locations in Delaware, Indiana, Kentucky, Maryland, Ohio, Tennessee, Virginia, West Virginia, and the District of Columbia. Id. at 1. The RFP includes 834 CLINs, each of which is for a type of fuel at a delivery location. As relevant here, 39 of the CLINs are for delivery of fuel at 19 VA locations. Offerors are allowed to bid on multiple CLINs, and the RFP anticipates the award of requirements contracts for the CLINs for a 5-year period. The total estimated value of all CLINs is \$622,000,000. Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 1.

The agency assigned North American Industry Classification System (NAICS) code 324110 to the solicitation, which applies to petroleum refineries. RFP at 2. Prior to issuing the solicitation, DLA issued a sources sought notice on the FedBizOpps website. The notice requested information from prospective small business offerors regarding their interest in and capability of meeting the agency's fuel requirements for COG 3. AR, Tab 4, Sources Sought Notice. DLA Energy received responses from 19 prospective offerors. List of Sources Sought Responses at 1.

DLA's market research focused on small business refineries in the COG 3 region. The agency identified nine small business refineries that could meet the requirements of NAICS code 324110 because they did not have more than 1,500 employees or have the capacity to refine more than 200,000 barrels per day. AR, Tab 5, Market Research Report, at 3-6. The agency assumed for purposes of the market research that SDVOSB firms that were not refineries would need to comply with the small business nonmanufacturer rule, and that such firms would be required to obtain fuel directly from a small business refinery, as opposed to a fuel terminal that collects, stores, and distributes fuels from refineries. See COS/MOL at 3-4. For each of the 19 VA facilities for which delivery of fuel was required, the agency calculated the distance between the facility and the nearest small business refinery. AR, Tab 5, Market Research Report, at 3. The agency concluded that, based on the costs of transporting fuel, it was likely to receive a fair and reasonable price from SDVOSB offerors only for those VA locations that were within 100 miles of a small business refinery. Id.; COS/MOL at 7. Based on

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requirements and the responses to the agency's sources sought notice, are discussed at a general level to avoid disclosure of proprietary information.

² Citations to the record are to pages in the PDF files provided by the agency.

this research, the agency set aside 11 of the 39 VA CLINs for SDVOSB concerns; the remaining CLINs were solicited using full and open competition.³ Id.

On April 28, prior to the May 1 date for receipt of proposals, AeroSage filed this protest. On May 3, the agency extended the deadline for submission of proposals to May 8, 2017.

DISCUSSION

AeroSage argues that DLA should have set aside all of the 39 VA CLINs for SDVOSB firms. AeroSage raises two primary arguments: (1) DLA should have sought a waiver of the small business nonmanufacturer rule, and (2) DLA failed to conduct adequate market research to support its set-aside determination regarding SDVOSBs.⁴ For the reasons discussed below, we conclude that DLA was not required to seek a waiver of the nonmanufacturer rule. We also conclude that the protester fails to represent that it could meet the requirements of the contract absent a waiver of the nonmanufacturer rule. As a result, we dismiss the remainder of the protest because AeroSage is not an interested party to challenge these matters.

As a preliminary matter, the protester's allegations concern requirements under the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the VA Act), 38 U.S.C. § 8127. Specifically, the VA Act, together with VA's implementing regulations, require VA to set aside acquisitions for SDVOSBs whenever it is determined that there is a reasonable expectation that offers will be received from at least two SDVOSBs and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d); Veterans Administration Acquisition Regulation § 819.7005(a). We refer to this requirement as the VA Act's Rule of Two. The VA Act also requires that agencies procuring goods or services on behalf of VA--such as DLA here--comply with the VA Act Rule of Two "to the maximum extent feasible." 38 U.S.C.

³ Both the agency's small business specialist and the Small Business Administration's (SBA) procurement center representative concurred with the determination. AR, Tab 5, Market Research Report, at 2.

⁴ Although AeroSage raises other collateral issues that we do not discuss, we have reviewed all of the protester's arguments and find that none provide a basis to sustain the protest. For example, the protester argued in its initial protest that the solicitation failed to provide adequate information to allow offerors to submit bids. In its comments on the agency report, however, the protester did not meaningfully address this issue; instead, the protester merely repeated its contention that "[s]ufficient accurate information was not provided [] for a best price offer." Comments at 3. Because the agency report addressed this matter and the protester did not meaningfully respond in its comments, we dismiss this issue as abandoned. See Earth Res. Tech., Inc., B-403043.2, B-403043.3, Oct. 18, 2010, 2010 CPD ¶ 248 at 6; Cedar Elec., Inc., B-402284.2, Mar. 19, 2010, 2010 CPD ¶ 79 at 3 n.4.

§ 8127(j)(1); AeroSage LLC, B-414314, B-414314.2, May 5, 2017, 2017 CPD ¶ 137 at 4. The determination of whether there is a reasonable expectation of receiving offers from two or more SDVOSBs 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. In & Out Valet Co., B-411019, Apr. 15, 2015, 2015 CPD ¶ 128 at 3; Crosstown Courier Serv., Inc., B-410936, March 12, 2015, 2015 CPD ¶ 107 at 4.

Nonmanufacturer Rule

AeroSage's first argument concerns what is known as the small business nonmanufacturer rule. Ordinarily, in order to qualify as a small business concern to provide manufactured products or other supply items for a procurement assigned a manufacturing or supply NAICS code, an offeror must be the manufacturer or producer of the end item being procured. 13 C.F.R. § 121.406(a)(1). If the offeror does not manufacture the item being purchased, the nonmanufacturer rule provides that the offer of a nonmanufacturer small business concern can be considered, provided, among other things, the small business offeror 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); 13 C.F.R. § 121.406(b).

Whether the nonmanufacturer rule should be included in a procurement set aside for small businesses primarily depends on the NAICS code assigned to the procurement by the procuring agency. See BlueStar Energy Solutions, B-405690, Dec. 12, 2011, 2011 CPD ¶ 275 at 3. In this regard, "[t]he nonmanufacturer rule applies only to procurements that have been assigned a manufacturing or supply NAICS code." 13 C.F.R. § 121.406(b)(3); see FAR § 19.303(a)(2) ("A concern that submits an offer or [quotation] for a contract where the NAICS code assigned to the contract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a nonmanufacturer and deemed small if it meets the requirements of [the nonmanufacturer rule].").⁵

As discussed above, the agency assigned NAICS code 324110, Petroleum Refineries, to the solicitation. NAICS code 324110 falls under the subsector for petroleum and coal products manufacturing. 13 C.F.R. § 121.201. The nonmanufacturer rule therefore applies under this NAICS code. Id.; FAR § 19.102(f)(1); see RFP at 2. As discussed in a decision by the SBA Office of Hearings and Appeals, the SBA has concluded that the nonmanufacturer rule, as applied to NAICS code 324110, requires a prospective small

⁵ Questions regarding an agency's designation of a NAICS code is a matter for resolution by the SBA, which has exclusive authority over NAICS code determination appeals. See 13 C.F.R. § 121.1102; FAR § 19.303(c). Because an agency's choice of a NAICS code is a matter for review by the SBA, this is not a matter for consideration by our Office. Bid Protest Regulations, 4 C.F.R. § 21.5(b); BlueStar Energy Solutions, supra, at 3-4.

business offeror that is not a refinery to offer the product of one or more small business refineries. See AeroSage, LLC, SBA No. SIZ-5820, Mar. 23, 2017, 2017 SBA LEXIS 29.

DLA's set-aside determination here assumed that, in order to comply with the nonmanufacturer rule, non-refinery offerors would need to obtain fuel from small business refineries. COS/MOL at 3-4, 6-7. AeroSage argues that the market for fuel involves a mixture of "fungible" fuel that is transported through intermediaries, and that fuel is therefore not traceable to specific refineries. See Comments at 2 ("There is a six-tier logistics network for direct delivery to individual installation[s] where fungible refined fuel goes into the pipeline throughout the country not at all directly to a location nearby."). The protester reaffirmed its belief regarding the fuel market in its response to questions from our Office. See Protester's Response to GAO Questions (June 26, 2017) at 3 ("As indicated [in] AeroSage DLA protest records, the practical realities of the multi-tier distribution system make it so no SDVOSB has ever met the unreasonable threshold . . . documenting . . . delivery orders from a specific refinery."). The protester therefore argues that DLA should have sought a waiver from SBA of the nonmanufacturer rule.

As our Office has explained, however, agencies are not required to seek waivers of the nonmanufacturer rule. In this regard, the FAR provides that, in a specific solicitation, a contracting officer "may request a waiver" of the requirement that products acquired under small business set-asides be manufactured by small businesses. FAR § 19.102(f)(5). Because this provision is discretionary, we have explained that an agency's refusal to seek a waiver of the nonmanufacturer rule does not provide a basis to sustain a protest. Latvian Connection, LLC, B-412701, Apr. 22, 2016, 2016 CPD ¶ 110 at 4 n.9. We therefore find no basis to conclude that the agency was required to seek a waiver of the nonmanufacturer rule and deny this protest allegation.⁶

Set-Aside Determination

AeroSage also contends that DLA's decision not to set aside 28 of the 39 VA CLINs for SDVOSBs was unreasonable based on what the protester contends was flawed market research. We conclude that the protester is not an interested party to raise these challenges.

Under our Bid Protest Regulations, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract. 4 C.F.R. § 21.0(a). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the

⁶ To the extent AeroSage believes that a class waiver of the nonmanufacturer rule for this NAICS code is appropriate, SBA's regulations allow individual firms to request such a waiver. 13 C.F.R. § 121.1204(a)(2).

protester, and the party's status in relation to the procurement. RELM Wireless Corp., B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2.

As discussed above, the nonmanufacturer rule applies to this procurement, meaning that a prospective SDVOSB offeror that is not a refinery, such as AeroSage, must offer the product of a small business refinery. Neither AeroSage's protest, nor its comments on the agency report, represented that the protester would offer the product of a small business refinery. Moreover, despite our Office's request that AeroSage address whether it could perform the RFP's fuel delivery requirements in the absence of a waiver of the nonmanufacturer rule, the protester did not make a specific representation that it would offer the product of a small business refinery. See Email from GAO to AeroSage (June 21, 2017); Protester's Response to GAO Questions (June 26, 2017). Instead, as discussed above, the protester argues that the market for fuel involves a mixture of fungible fuel that is not traceable to specific refineries. See Comments at 2.

Our Office does not review whether a firm can meet the nonmanufacturer rule, as such a determination is reserved for the SBA. 4 C.F.R. § 21.5(b)(1); Triad Isotopes, Inc., B-411360, July 16, 2015, 2015 CPD ¶ 220 at 9. We will review, however, whether a protester is an interested party to challenge an agency's decision not to set aside a procurement where the protester concedes that it cannot meet the nonmanufacturer rule or otherwise fails to affirmatively state that it will comply with that rule. See Tom Smith Fire Equip. Co., Inc., B-414349, May 15, 2017, 2017 CPD ¶ 148 at 6-7. In light of AeroSage's specific failure to represent that it could perform the requirements of the contract absent a waiver of the nonmanufacturer rule, we conclude that it is not an interested party to challenge DLA's decision not to set aside 28 of the 39 VA CLINs for SDVOSBs.⁷ Based on this conclusion, we also we conclude that the protester is also not an interested party to challenge the agency's alleged failure to conduct adequate market research in this regard.⁸

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel

⁷ Our decision here does not relate to whether AeroSage is a small business, as such a determination is reserved solely for the SBA. 4 C.F.R. § 21.5(b). Instead, our decision here relates solely to the protester's representations to our Office as to whether it will comply with the nonmanufacturer rule and its interested party status.

⁸ AeroSage also argues that the agency failed to provide a copy of a "suitable commitment letter" explaining how a firm could demonstrate that it was providing the product of a small business refinery. The protester does not cite any obligation under any procurement law or regulation for the agency to provide an offeror with such a sample of an acceptable letter.