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Decision

Matter of: Community Surgical Supply of Toms River, Inc.

File: B-416365.2

Date: January 28, 2019

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DIGEST

Protest that agency decision to issue solicitation for home oxygen services and supplies as a small business set-aside was improper is denied where record adequately supported agency's business judgment that market research, record of previous procurement efforts, and small business performance on awarded contracts for similar services justified setting aside the requirement.

DECISION

Community Surgical Supply of Toms River, Inc., of Tom's River, New Jersey, protests the terms of request for proposals (RFP) No. 36C25018R0234, issued by the Department of Veterans Affairs (VA) to provide home oxygen services and related equipment and supplies for veterans located in the service areas of Chillicothe, Cincinnati, Cleveland, Dayton, and Columbus, Ohio, known together as veteran integrated service network (VISN) 10 Ohio. Community, which is currently the incumbent contractor, argues that the VA decision to issue the RFP as a small business set-aside is improper mainly because the RFP anticipates that the contractor will be required to transition existing patients to home-fill oxygen systems from other types of oxygen systems.¹

¹ Although Community acknowledges that it is not a small business under the RFP, our Office regards a large business that is a prospective offeror as an interested party to challenge the basis of the decision to set aside a solicitation. Ace-Federal Reporters, Inc., B-241309, Dec. 14, 1990, 90-2 CPD ¶ 438 at 3 n.2.

We deny the protest.

BACKGROUND

The RFP at issue follows earlier efforts to complete a procurement for home oxygen services for VISN 10 Ohio. Some aspects of those efforts are relevant to the protester's challenge to the decision to set aside the RFP for small businesses. At the outset, research originally conducted by the VA during 2012-13 identified six small businesses and five other-than-small businesses as potential offerors. Based on that research, and after conferring with the agency's small business advocate, the VA issued an RFP in March 2014 as a small business set-aside, received eight proposals from small businesses, and awarded a contract. Agency Report (AR) at 2-4. That contract award was rescinded and the RFP was canceled as corrective action in response to a protest, however.² Id. at 4-5.

In preparation for issuing a new solicitation, the agency conducted additional market research and reassessed the home oxygen requirement for VISN 10 Ohio. Id. at 6. In doing so, the VA determined that, unlike the March 2014 RFP, the new solicitation should include a transition to home-fill oxygen for suitable patients.³ Id. The agency also issued a sources sought notice in April 2017, and received 12 responses, of which 10 were small businesses, including multiple veteran-owned small businesses (VOSB) and service-disabled veteran-owned small businesses (SDVOSB). Id. at 7-8.

In the responses to the sources sought notice, some of the small business respondents emphasized the scope of their experience in providing similar services, particularly for the VA. Some respondents also indicated that they planned to enter into partnerships or joint ventures with other firms in order to provide the capability to perform the VA's requirement. Id. The contracting officer then considered the responses in order to decide whether the requirement should be set aside for VOSBs or SDVOSBs under the "VA Rule of Two." The VA Rule of Two provides for a VOSB or SDVOSB set-aside where the contracting officer reasonably expects to receive at least two offers from

² At the same time, in 2014, the VA issued two solicitations for similar home oxygen services for VISN 10 patients in Michigan and Indiana. One of the solicitations was set aside for small businesses and the other was unrestricted, but each contract was awarded to a small business. Id. at 5. The VISN 10 contract/project manager reports that the transition of approximately half of the patients under those contracts to home-fill oxygen systems has been achieved satisfactorily. AR Tab 10, Statement of VISN 10 Prosthetics Program Contract/Project Manager, at 1-2.

³ The VA explains that a patient needing an oxygen system may use a standard oxygen concentrator, a compressed tank, both of those, or a home-fill oxygen system. AR at 6. For those patients for which the home fill system is suitable, the VA explains that for the patient, a home fill oxygen system is easier to use, provides greater mobility, and is a safer delivery method than liquid oxygen, while also providing the VA a significant cost savings. Id.

VOSBs or SDVOSBs, and to make an award at a fair and reasonable price that offers the best value. Id. at 8 n.7 (citing 38 U.S.C. §§ 8127-28). The contracting officer was uncertain whether the VA Rule of Two was met, and therefore elected to issue an RFP as a cascading set-aside in September 2017. The agency received eight proposals, of which four were from small businesses. Id. at 9. Before making award, however, the VA canceled that RFP in response to a protest from Community alleging that the cascading set-aside technique was improper. Id.

The VA then undertook additional market research by posting a new source sought notice on the federal business opportunities website (fbo.gov) in November 2017 and received eight responses, of which seven were from small businesses. The VA branch chief documented the information received regarding the capabilities of each firm and its size status. AR Tab 1, Memorandum for Record, Sept. 20, 2018, at 5-6. After considering the results of the market research, and the fact that proposals from multiple small businesses had been submitted in response to the earlier procurement efforts, the agency determined that issuing the RFP as a small business set-aside was proper. Id. at 6.

The RFP at issue here was issued on April 6, 2018, as a small business set-aside, seeking proposals to supply commercial home oxygen services, the rental of related equipment, and provision of consumable supplies for approximately 5500 home oxygen patients within the VISN 10 Ohio service area. AR Tab 17, RFP, at 185. The RFP anticipated the award of a single indefinite-delivery, indefinite-quantity commercial item contract for a base year and four option years. Id. at 6-7, 232, 256. The RFP provided for the contractor to supply various types of home oxygen services and equipment, among which were home-fill oxygen systems, which were to be used to transition the patient from an existing oxygen system to a home-fill system when specified by the individual patient's prescription. Id. at 188-89. The RFP also provided that the contractor would have 90 days for phase-in, during which the contractor would replace the incumbent contractor's equipment. Id. at 215.

PROTEST

Community argues that the decision to set aside the RFP is improper because the record does not show that the contracting officer adequately supported the determination that two or more small businesses had the capability to perform the agency's requirement. Community argues that there are no small businesses that have the required capital, equipment, relevant past performance, medical accreditation, physical facilities in VISN 10 Ohio, and ability to serve the patient population as specified in the RFP. Protest at 2, 4, 7. As such, Community contends that the RFP improperly restricts competition because the VA cannot meet the requirements for a set-aside as set forth in Federal Acquisition Regulation (FAR) § 19.502-2(b). Id. at 9.

More specifically, Community argues that the agency previously determined that the capability of small businesses was "inconclusive," and that small businesses simply cannot meet the requirements to perform the RFP. Protest at 10. According to the

protester, the RFP will require the contractor to obtain \$[DELETED] in capital just to purchase the required home-fill oxygen equipment, then obtain home-fill systems for over 2500 veterans in the first 90 days after award, possess experience in providing service to 5500 patients monthly, meet medical accreditation requirements, open multiple accredited offices in the service area, and transition over 2500 individual veterans that currently use other systems to home-fill oxygen systems. Id. at 11-14. Community contends that these requirements are impractical and unrealistic, and more importantly, clearly beyond the capability of a small business to meet. Id. at 15-17. As a result, Community argues that the VA lacks a factual basis to reasonably conclude that it would receive proposals from two or more small businesses and could award a contract at a fair price. Id. at 18-19.

The VA argues that it has conducted and reviewed considerable specific market research, has considered the successful performance of similar services by a small business in a nearby region, and has reached a reasonable business judgment that the standards for a small business set-aside have been met.⁴ In particular, the VA argues that its market research showed that multiple small businesses submitted responses to two sources sought notices in 2017, including both firms that asserted the ability to perform the contract on their own, and those that intended to utilize subcontractors or joint venture partners. AR at 7-11. Additionally, the agency sent more specific questions to six small businesses that had responded to the sources sought notice. Even though three of the firms expressed uncertainty about achieving the transition, and one also expressed concern about obtaining the required home-fill equipment, the other three explained their capability and experience to meet all of the RFP requirements. Id. at 15. Finally, the agency reviewed proposals submitted in response to an earlier canceled RFP and concluded that those proposals showed that there were multiple small business offerors with the capability of performing the agency's requirement. In addition, the agency's review also determined that the prices for these proposals were reasonable, so issuing the new RFP as a small business set-aside would be proper. Id. at 17-19.

Community responds that the agency's market research is not sufficiently specific to the requirements of this RFP to justify the conclusion that small businesses are capable of performing the requirement. Protester's Comments at 10-22. Furthermore, the protester argues that the VA has mischaracterized the results of its inquiries. Specifically, Community argues that the small businesses that the agency contends were capable actually acknowledged that they had not performed a requirement as

⁴ The VA characterizes the RFP requirement as an "expectation . . . for roughly half of the oxygen-using patients, where feasible and appropriate, to be transitioned to home fill oxygen systems throughout the life of the contract," rather than converting roughly half of the patients during the 90-day phase-in period as Community characterizes the requirement. AR at 11; see also RFP at 6; RFP amend. 2, Answers to Offeror Questions, at 12 (patient system to be specified only by prescription), 14 (home-fill systems to be introduced during 90-day phase-in).

extensive as the RFP, and thus did not adequately demonstrate their capability. Id. at 21-22. Additionally, Community argues that the VA previously assessed the capability of small businesses for this requirement as “inconclusive,” and therefore the agency cannot now reasonably support the conclusion that a small business set-aside is appropriate. Id. at 5-6. Community also argues that the prices proposed by four of the small businesses in the earlier procurement (including two of the three firms that the agency identified as being the most capable), were above the agency estimate, while the third firm’s price was allegedly so far below the agency estimate that the VA should have questioned whether the firm understood the requirement. Id. at 25. As such, the firm argues that the VA could not reasonably justify issuing this RFP as a small business set-aside.

As Community recognizes, contracting officers generally are required to set aside for small business all procurements exceeding \$150,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns. FAR § 19.502-2(b). Section 19.202-2 of the FAR generally requires contracting officers, before issuing solicitations, to make “every reasonable effort to find additional small business concerns” and to maximize small business participation.

As a general matter, we regard such a determination as a matter of business judgment within the contracting officer’s discretion that we will not disturb absent a showing that it was unreasonable. Neal R. Gross & Co., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53 at 2. A contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the work. Safety Storage, Inc., B-280851, Oct. 29, 1998, 98-2 CPD ¶ 102 at 3. Our Office will review a protest to determine whether a contracting officer has made such efforts. Library Sys. & Servs./Internet Sys., Inc., B-244432, Oct. 16, 1991, 91-2 CPD ¶ 337 at 7. In this regard, we have found unreasonable the determination to issue a solicitation on an unrestricted basis where that determination is based upon outdated or incomplete information. McSwain & Assocs., Inc. et al., B-271071 et al., May 20, 1996, 96-1 CPD ¶ 255 at 2.

Contracting officers may consider procurement history, market surveys, and advice from the agency’s small business specialist and technical personnel to provide an adequate basis on which to make the decision whether to set aside a procurement. American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3.

Our review of the record confirms that the contracting officer exercised reasonable business judgment in deciding to set aside this RFP for small businesses. While the protester identifies numerous differences between the capabilities illustrated by the prospective offerors and the precise requirements of this RFP, and between previous solicitations and the Indiana and Michigan contracts and this RFP, these differences do not undermine the reasonableness of the contracting officer’s judgment. The legal standard for our review of such a decision requires business judgment about a reasonable likelihood of small business competition, and thus recognizes that a

contracting officer may set aside a solicitation even where a skeptical competitor can identify contrasting information that could arguable justify rejecting the set-aside, and holding a full and open competition instead. See, e.g., Encompass Group, LLC, B-296602, B-296617, Aug. 10, 2005, 2005 CPD ¶ 159 at 4 (protest denied where record supported small business set-asides notwithstanding protester's allegation that market research was insufficient).

Here, the VA considered multiple rounds of market research that provided specific statements by multiple small businesses asserting the ability to meet the agency's requirements, the agency's experience with contracts awarded to a small business for similar requirements elsewhere within VISN 10, and the responses to previous (albeit canceled) solicitations that preceded the RFP at issue here. In our view, the record provides adequate support for the reasonableness of the conclusion that small business competition reasonably could be expected. See Med-South, Inc., B-401214, May 20, 2009, 2009 CPD ¶ 112 at 2-3 (denying protest challenging small business set-aside of home oxygen services where record adequately supported of contracting officer's business judgment).

The protest is denied.⁵

Thomas H. Armstrong
General Counsel

⁵ To the extent Community's protest also appears to challenge other terms of the RFP, we do not address those issues because the protester's size renders it ineligible to compete for an award under an RFP set aside for small businesses. As a result, Community is not an interested party to challenge other terms of the RFP. See Encompass Group, LLC, supra, at 4-5.