



Decision

Matter of: Veterans Healthcare Supply Solutions, Inc.

File: B-418038; B-418048; B-418049; B-418050; B-418051; B-418052;
B-418053; B-418054; B-418055; B-418056; B-418057; B-418058;
B-418059; B-417853.2; B-417854.2

Date: December 23, 2019

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Deborah K. Morrell, Esq., Department of Veterans Affairs, for the agency.
Sarah T. Zaffina, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging solicitation terms that apply Buy American Act requirements to quotations from small businesses instead of applying Trade Agreements Act (TAA) requirements, when the Small Business Administration has issued a waiver of the nonmanufacturer rule for the solicitation, is dismissed because acquisitions set aside for small businesses are excepted from the TAA.

DECISION

Veterans Healthcare Supply Solutions, Inc. (VHSS) a service-disabled veteran-owned small business (SDVOSB), of Jacksonville, Florida, protests the terms of request for quotations (RFQ) No. 36C24C19Q0046, issued by the Department of Veterans Affairs (VA), to establish blanket purchase agreements (BPAs) for the procurement of medical imaging-radiotherapy-nuclear medicine, cardiac catheterization lab, electrophysiology labs and hybrid operating room suite medical and surgical supplies.¹ The protester

¹ The protester also challenges the terms of 14 other solicitations providing a panoply of medical, surgical, dental, and laboratory supplies under the VA's Medical Surgical/Prime Vendor 2.0 (MSPV) Program. Protest at 1 n.1. The terms of the RFQs are nearly identical with the differences limited to the items supplied under the BPAs and contract administration information not relevant in this case. Accordingly, the protests for the following solicitations are consolidated here in a single decision, although the facts discussed in this decision are specific to RFQ No. 36C24C19Q0046: RFQ No. 36C24C19Q0046 (B-418038); RFQ No. 36C24C19Q0032 (B-418048); RFQ

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alleges that the solicitation improperly applies the Buy American Act (BAA), 41 U.S.C. §§ 8301-8305, instead of the Trade Agreements Act of 1979 (TAA), 19 U.S.C. §§ 2501-2582, to quotations from small business concerns.

We dismiss the protest.

BACKGROUND

The VA issued the RFQ on July 18, 2019. Agency Report (AR), Tab 3, RFQ, at 1. The solicitation seeks quotations to establish BPAs in support of the VA's MSPV Program to supply various medical imaging labs and hybrid operating room instruments and supplies. RFQ at 5.² The BPAs will be the mechanism to provide medical/surgical supplies to Veterans Health Administration facilities nationwide; facilities will order from the product list that the BPAs will establish. Id. Vendors may propose supplies from their respective catalogues that fit within the scope of a product category provided in the RFQ. Id. at 6.

The RFQ, issued in accordance with Federal Acquisition Regulation (FAR) parts 12 and 13, and VA acquisition regulations, was assigned North American Industry Classification System (NAICS) code 339112, Surgical and Medical Instrument Manufacturing. Id. at 1, 6, 12. The solicitation anticipates establishing multiple BPAs with a period of performance not to exceed 60 months. Id. at 5-6. The RFQ will establish BPAs with the responsible vendors whose quotations present the best value to the government considering technical and price factors. AR, Tab 3e, RFQ amend. 3, FAR provision 52.212-2 (Tailored) at 1-2.

The solicitation provides for a total set-aside award based on a tiered evaluation method and modeled after the order of priority set forth in 38 U.S.C. § 8127. Id. at 1. In accordance with VA Procurement Policy Memorandum (PPM) 2018-04, Guidance and

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No. 36C24C19Q0035 (B-418049); RFQ No. 36C24C19Q0040 (B-418050); RFQ No. 36C24C19Q0041 (B-418051); RFQ No. 36C24C19Q0042 (B-418052); RFQ No. 36C24C19Q0043 (B-418053); RFQ No. 36C24C19Q0047 (B-418054); RFQ No. 36C24C19Q0048 (B-418055); RFQ No. 36C24C19Q0049 (B-418056); RFQ No. 36C24C19Q0051 (B-418057); RFQ No. 36C24C19Q0052 (B-418058); RFQ No. 36C25519Q0053 (B-418059); RFQ No. 36C24C19Q0034 (B-417853.2); and RFQ No. 36C24C19Q0037 (B-417854.2). Protest attach. 2.

² The VA provided individual agency reports for each protested solicitation using a uniform table of exhibits. Page references here only refer to the agency report for this RFQ; corresponding documents can be found under the cited tabs in the agency reports for the other protests.

Procedures Regarding the Use of Tiered Evaluation (Cascading) for Use in Solicitations Set Aside in Accordance with the VA Rule of Two (2018),³ the tiers are:

- a. Service-Disabled Veteran-Owned Small Business ([SDVOSB]) concerns;
- b. Veteran-Owned Small Business (VOSB) concerns;
- c. Small Business concerns with Historically Under-utilized Business [HUBZone] small business concerns and 8(a) participants having priority; and
- d. Large business concerns.

RFQ at 37; see generally AR, Tab 5, VA PPM 2018-04. Under this policy, the contracting officer evaluates the quotations, if any, from SDVOSBs, the first tier. AR, Tab 2, Contracting Officer's Statement (COS) at 1. If none is received or no quotations would result in an award with a fair and reasonable price, the contracting officer documents the reason for not making an award to an SDVOSB, amends the solicitation to remove the SDVOSB set-aside, and proceeds to evaluate quotations from the next tier--VOSBs. Id.

The contracting officer continues in this fashion until an award can be made to the vendor whose quotation represents the best value to the government. Id. at 1-2. Quotations from lower tiers are not considered for award unless award cannot be made at a higher tier. AR, Tab 5, VA PPM 2018-04, at 3. If an award cannot be made, the solicitation will be cancelled and the requirement will be resolicited. RFQ at 37.

As a consequence of this tiered evaluation methodology, some solicitation clauses do not apply to every offeror. Id. at 32. For example, as relevant here, the RFQ incorporates by reference both FAR clause 52.225-1, Buy American--Supplies, and FAR clause 52.225-5, Trade Agreements. RFQ at 26. The solicitation advises that clause 52.225-1 applies to tiers for SDVOSB, VOSB, and HUBZone and 8(a) businesses only, and that clause 52.225-5 applies to large business concerns only. RFQ at 32.

The solicitation also includes the Buy American Certificate (which applies where clause 52.225-1 is included in a solicitation) and the Trade Agreements Certificate (which

³ The purpose of the tiered evaluation process is to minimize delays incurred in resoliciting the requirement after applying the VA "Rule of Two" for SDVOSB or VOSB concerns. AR, Tab 5, VA PPM 2018-04, at 1. The Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. § 8127(d), requires the VA to determine whether two or more service-disabled veteran-owned small businesses can meet its requirement at a reasonable price before proceeding with its acquisitions. Following enactment of the statute, the VA issued implementing regulations for its so-called "Rule of Two." 48 C.F.R. § 819.7005.

applies where clause 52.225-5 is included). RFQ at 44-45, 47. The Buy American Certificate requires vendors to certify that each end product, except those listed, is a domestic product, and provides that the government will evaluate offers in accordance with FAR part 25. The Trade Agreements Certificate requires vendors to certify that each end product, except those listed, is a U.S.-made or designated country end product, and provides that the government will evaluate offers in accordance with FAR part 25. Of particular relevance to this protest, the Trade Agreements Certificate further provides as follows:

The Government will consider for award only offers of U.S.-made or designated country end products unless the Contracting Officer determines that there are no offers for such products or that the offers for such products are insufficient to fulfill the requirements of the solicitation.

RFQ at 47.⁴

The solicitation here also provides that a nonmanufacturer rule (NMR) waiver has been obtained for this RFQ from the Small Business Administration (SBA).⁵ RFQ at 12; AR, Tab 4, Nonmanufacturer Rule Waiver. The NMR provides that the quotation of a nonmanufacturer small business can be considered for award, provided, among other things, that the small business represents it will supply the product of a domestic small business manufacturer or processor. 15 U.S.C. § 637(a)(17); 13 C.F.R. § 121.406. When the SBA issues an NMR waiver, a small business can supply the product of any size business without regard to the place of manufacture. 13 C.F.R. § 121.406(b)(7); see also FAR § 19.502-2(c). The SBA is permitted to waive the NMR where it determines that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications or where no small business manufacturer or processor is available to participate in the procurement. 15 U.S.C. § 657s(a)(4).

The deadline for submitting quotations was October 23, 2019. COS at 2. On September 26, prior to the time set for receipt of quotations, VHSS filed this protest with our Office challenging the terms of the solicitation.

DISCUSSION

The protester challenges the terms of the solicitation and asserts that the solicitation improperly includes clauses that apply the BAA instead of the TAA to quotations from

⁴ The solicitation also contains language essentially the same as the language above, from FAR provision 52.212-3(g)(5)(iii). RFQ at 11.

⁵ The VA obtained NMR waivers from the SBA for each solicitation in this case. See AR, Tab 4, Nonmanufacturer Rule Waiver.

small businesses.⁶ Protest at 5-6. VHSS argues that where, as here, the NMR has been waived, application of the BAA to small businesses and the TAA to large businesses, results in unequal treatment because the TAA requires domestic or TAA-designated country end products, whereas the BAA permits small businesses to propose end products from non-TAA countries such as China, which are cheaper than products from TAA-designated countries. Id. at 6. VHSS also contends that the solicitation terms are inconsistent with 13 C.F.R. § 406(b)(7), which states that the SBA's waiver of the nonmanufacturer rule does not waive the requirements of the BAA and the TAA, both of which involve domestic end products.⁷ Protest at 5. Finally, VHSS maintains that it will suffer competitive prejudice because it is a SDVOSB reseller of TAA-compliant supplies and the VA's misapplication of the BAA will allow other SDVOSBs to offer items that are not TAA-compliant and thus cheaper. Id. at 6.

In response, the VA asserts that the solicitation terms are reasonable and that it has no discretion in applying the BAA and the TAA requirements in this acquisition. AR, Tab 1, Memorandum of Law at 1at 2-4. The agency also contends that if VHSS is disadvantaged by offering TAA-compliant goods, this is not the result of agency action. Id. at 6-7.

The BAA and the TAA are implemented by FAR part 25.⁸ The BAA, which applies to small business set-asides establishes, with certain exceptions, a preference that only domestic end products be acquired for public use. 41 U.S.C. § 8302; FAR §§ 25.101(b), 25.102, 25.103 (exceptions). The preference is implemented by adding, solely for evaluation purposes, a specified percentage premium to the price of foreign end products if there is an offer of a domestic end product that is not otherwise lowest-priced. FAR § 25.105(b); see generally FAR subpart 25, Evaluation Foreign Offers--Supplies (providing specific instructions for evaluating quotations including foreign end products). For civilian agency procurements, the price adjustment is either 6 or 12 percent. FAR § 25.105(b).

In comparison, the TAA provides that eligible products from World Trade Organization Government Procurement Agreement countries, and other countries with which the U.S. has entered into Free Trade Agreements, are entitled to "nondiscriminatory treatment."

⁶ It is undisputed that the TAA applies to quotations from large business concerns because the total value of the resulting orders will exceed the application of TAA dollar thresholds set forth in FAR § 25.402(b). Protest at 3 n.2.

⁷ A "domestic end product" is "[a]n unmanufactured end product mined or produced in the United States"; "[a]n end product manufactured in the United States, if . . . [t]he cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components . . . or . . . [t]he end product is a [commercial-off-the-shelf] item." FAR § 25.003.

⁸ Subpart 25.1 of the FAR implements the BAA, 41 U.S.C. chapter 83, and FAR subpart 25.4 implements the TAA, 19 U.S.C. §§ 2501-2582.

FAR § 25.403(a). For those eligible products, the President is authorized to and has waived the BAA. See 19 U.S.C. § 2511; Executive Order No. 12260, 46 Fed. Reg. 1653 (Dec. 30, 1980); FAR § 25.402(a)(1). In essence, the TAA treats eligible products from TAA-designated countries as if they were domestic end products. See 19 U.S.C. § 2511(a); FAR § 25.402(a)(1) (“Offers of eligible products receive equal consideration with domestic offers.”). In addition to providing for non-discriminatory treatment of eligible products from TAA-designated countries, the TAA requires the acquisition of “only U.S.-made or designated country end products or U.S. or designated country services, unless offers for such end products or services are either not received or are insufficient to fulfill the requirements.” FAR § 25.403(c). The TAA, however, does not permit the President to waive any small business or minority preference, 19 U.S.C. § 2511(f); thus, the TAA does not apply to “acquisitions set aside for small business.” FAR § 25.401(a)(1).

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §§ 21.1(c)(4), (f). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

VHSS’s allegation here is similar to an argument our Office addressed in a prior decision, Becton, Dickinson & Co., B-417854, Nov. 5, 2019, 2019 CPD ¶ 386. Although in that proceeding the protester was a large business concern, it also contended that it was improper for the agency to apply the BAA to small businesses instead of the TAA and that the solicitation terms were inconsistent with the NMR when the SBA issues a waiver. Id. at 4. Our Office rejected that argument, however, and concluded that the agency properly applied the BAA FAR clauses to small businesses because small business set-asides are exempt from the TAA. Id. at 5-6.

Here, as in our decision in Becton, Dickinson & Co., the protester has failed to allege facts that, if uncontradicted, establish the likelihood that the VA violated applicable procurement laws or regulations. The procurement is set aside for SDVOSBs, VOSBs, and other small businesses. The FAR explicitly states that the BAA applies to small business set-asides but that the TAA does not apply to acquisitions set aside for small businesses. FAR §§ 25.101(b), 25.401(a)(1). We therefore see nothing improper about

the VA's application of the BAA FAR clauses, and not the TAA FAR clauses, to quotations submitted by small businesses.⁹

We are also unpersuaded by VHSS's argument that the TAA should apply to small businesses that include supplies from non-TAA designated countries, *i.e.* foreign end products, when the nonmanufacturer rule has been waived because this is inconsistent with SBA regulation 13 C.F.R. § 121.406(b)(7). This regulation establishes that a "waiver of the nonmanufacturer rule means that the firm can supply the product of any size business without regard to the place of manufacture" and that "SBA's waiver of the nonmanufacturer rule has no effect on requirements external to the Small Business Act which involve domestic sources of supply, such as the [BAA] or the [TAA]." 13 C.F.R. § 121.406(b)(7). We do not find it inconsistent with the regulation that a small business may submit foreign end products in accordance with the waiver of the nonmanufacturer rule when the BAA and the implementing regulations provide instructions for evaluating offers that include foreign end products.

In as much as VHSS argues that it will be prejudiced because of the agency's application of the BAA FAR clauses and the SBA NMR waiver for the solicitation, we find that any harm VHSS may suffer is not the result of agency action. The solicitation does not require small businesses to supply items from TAA-designated countries. Indeed, the SBA NMR waiver expressly permits items from any country to be offered. VHSS's disagreement with these policies does not render the agency's conduct improper.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

⁹ To the extent that VHSS argues the VA has the discretion to waive BAA requirements and should have done so here, Comments at 3, it is well-established that the determination of whether to waive the BAA involves balancing competing policies to determine whether a waiver is in the public interest. Keuffel & Esser Co., B-193083, July 17, 1979, 79-2 CPD ¶ 35 at 2. The BAA and the FAR's implementing regulations clearly vest the discretion and authority to make waiver decisions in the head of the agency; accordingly, we will not review such determinations. SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30 at 5.