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Decision

Matter of: CRAssociates, Inc.

File: B-418194

Date: January 23, 2020

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Daniel J. McFeely, Esq., Department of Veterans Affairs, for the agency.
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DIGEST

Protest challenging the agency's decision to set aside the procurement for service-disabled veteran-owned small businesses is denied where the agency had a reasonable expectation that offers would be received from at least two such firms and that award would be made at a fair and reasonable price.

DECISION

CRAssociates, Inc. of Newington, Virginia, protests the terms of request for proposals (RFP) No. 36C25718R0773, issued by the Department of Veterans Affairs (VA), to provide medical services at a community-based outpatient clinic (CBOC) in Wise County, Texas. The protester challenges the agency's decision to set aside the procurement for service-disabled veteran-owned small businesses (SDVOSBs).

We deny the protest.

BACKGROUND

The RFP, issued as a total SDVOSB set-aside on September 10, 2019, contemplates the award of an indefinite-delivery, indefinite-quantity contract (IDIQ) for a base period of a year and up to four 1-year option periods. RFP at 6, 170.¹ The successful contractor will provide primary care and mental health care services in a clinical environment to veterans who primarily reside in Wise County at either Bridgeport or

¹ References to page numbers in this decision are to the VA's Bates numbering in the Agency Report (AR).

Decatur, which are between 55 and 65 miles from Dallas. Id. at 14. The solicitation requires services for an estimated 1,692 patients per month during the base year and increasing to an estimated 1,847 patients per month in the fourth option year. Id. at 11-13. The RFP was issued pursuant to Federal Acquisition Regulation (FAR) parts 12 and 15, and VA acquisition regulations. The solicitation was assigned North American Industry Classification System (NAICS) code 621498, All Other Outpatient Care Centers. Id. at 6.

Prior to issuing the solicitation, the agency conducted market research. The VA issued a sources sought notice on December 21, 2016, and received five responses; only one of the responding firms was an SDVOSB.² AR, Exh. 7, Acquisition Plan, at 252. On March 9, the agency conducted a search of the Small Business Administration's Dynamic Small Business website for small businesses registered under the NAICS code 621498. The search found no such businesses. AR, Exh. 6, Market Research Memorandum, at 239-40. Based on the research conducted, the initial market report, which was signed on November 29, 2017, recommended that the VA use tiered evaluation procedures to solicit proposals.³ See AR, Exh. 6, Market Research Memorandum, at 241; AR, Exh. 7, Acquisition Plan, at 253-54.

In June 2019, the contracting officer determined that the original market research needed to be updated in light of the time that had passed since the original market research was conducted and the contracting officer's personal knowledge regarding other contracts in the area that had been set aside for SDVOSBs.⁴ COS at 2; AR, Exh. 6, Market Research Memorandum, at 234. The updated market research included a search of the VA's Vendor Information Pages (VIP) database for SDVOSB/VOSBs, which returned three SDVOSB firms that appeared responsible. AR, Exh. 6, Market Research Memorandum, at 234. The contracting officer further investigated the firms individually to verify their capabilities and performance. Id. The contracting officer also relied on his personal knowledge of Dallas-area CBOC procurements that had been set

² This firm was subsequently identified as a potential offeror in the updated market research analysis conducted on June 18, 2019. AR, Exh. 6, Market Research Memorandum, at 234, 236. Moreover, this firm also submitted a timely proposal in response to the RFP. AR, Exh. 8, Proposals, at 264.

³ The tiered evaluation allows offers from both small and other than small businesses to be evaluated in the following order of precedence: (1) SDVOSBs; (2) Veteran-Owned Small Businesses (VOSBs); (3) other small business concerns; and (4) other than small businesses. If an award cannot be made at the first tier, i.e., to an SDVOSB, offers from the next tier will be evaluated, and so on until award can be made. AR, Exh. 7, Acquisition Plan, at 254.

⁴ The current contracting officer assumed responsibility for this procurement on January 4, 2019. Contracting Officer's Statement (COS) at 2. Previously, he acted as a contract specialist and assisted his predecessor in preparing the initial market research report for the requirement here. Id.

aside for SDVOSBs. Id. Based on his updated research and personal knowledge, the contracting officer determined that the procurement should be set aside for SDVOSBs.

Prior to the deadline for receipt of proposals, CRAssociates timely filed this protest with our Office challenging the terms of the solicitation.

DISCUSSION

The protester, which is the incumbent contractor, challenges the agency decision to set aside the procurement for SDVOSBs, arguing that the VA cannot reasonably expect proposals from two or more SDVOSBs at fair and reasonable pricing. Protest at 3-6. The protester alleges that no SDVOSB has the financial capacity to lease or build the CBOC space and be ready to perform the contract in accordance with the required schedule. Id. at 4-6. CRAssociates further contends that the contemporaneous record does not support the agency's market research, and thus, the agency's decision was unreasonable. Comments at 2-5.⁵

The VA responds that it conducted market research that was adequate to support the set-aside decision, citing the detailed history of the procurement and the market research conducted. Memorandum of Law (MOL) at 5-17; COS at 3-4. The agency argues that it had a reasonable expectation that at least two responsible SDVOSBs would submit proposals at fair and reasonable pricing and contends the protester's challenge is general and speculative. MOL at 17-23. Moreover, the VA argues, [DELETED] responsible SDVOSBs submitted offers by the deadline for receipt of proposals and therefore, its expectation was realized. Id. at 16-17.

The Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. § 8127, and the VA's implementing regulations, 48 C.F.R. §§ 819.7004, 819.7005, require the VA to set aside procurements for SDVOSBs whenever it determines that there is a reasonable expectation that two or more offers will be received from SDVOSB firms and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d); VA Acquisition Regulation (VAAR) § 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

⁵ CRAssociates raises additional objections to other solicitation terms. Protest at 7-9. Under our Bid Protest Regulations, only an interested party--that is, an actual or prospective offeror whose direct economic interest would be affected by the award of a contract--may protest a federal procurement. 4 C.F.R. § 21.0(a). Because, as explained below we conclude that the agency's determination to set the procurement aside for SDVOSBs was proper, and because the protester acknowledges that it is not an SDVOSB, CRAssociates is not an interested party to maintain the various remaining protest grounds it has raised. This is so because even were we to sustain its protest on another basis, CRAssociates would be ineligible for award. RELM Wireless Corp., B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. Accordingly, CRAssociates' remaining protest grounds are dismissed.

within the contracting officer's discretion that we will not disturb absent a showing that it was unreasonable. In and Out Valet Co., B-411019, Apr. 15, 2015, 2015 CPD ¶ 128 at 3; Crosstown Courier Serv., Inc., B-410936, Mar. 12, 2015, 2015 CPD ¶ 107 at 4. The 2006 VA Act does 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 specialists, 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. In and Out Valet Co., *supra*; Crosstown Courier Serv., Inc., *supra*.

Here, we find reasonable the contracting officer's market research and resulting set-aside decision. As described above, the contracting officer recognized that market research conducted in 2017 was possibly outdated and determined an updated report was necessary. After searching the VIP database in June 2019, the agency identified three SDVOSBs for the NAICS code 621498. The contracting officer verified the capability statement of Firm 1, which had started three CBOCs in New Mexico. A search for Firm 2 showed that it had received three CBOCs; the contracting officer verified with the contracting officer for those procurements that this information was correct and that the company was performing. For Firm 3, the contracting officer confirmed that it was listed in VIP as a verified SDVOSB. AR, Exh. 6, Market Research Memorandum, at 234.

In addition, the contracting officer considered his own personal experience with two procurements set aside for SDVOSBs in the Dallas area for which he was the assigned contracting officer. The first procurement was for a CBOC in Granbury, which is approximately 70 miles from Dallas, treating an estimated 1,600 patients per month. COS at 4. The VA received three proposals for this procurement--the three SDVOSB firms identified in the market research for the solicitation here--and made award to one of the SDVOSBs in August 2019. *Id.* A second procurement was for a CBOC servicing approximately 3,600-3,700 patients per month in Sherman, which is about 60 miles from Dallas. *Id.* The [DELETED] SDVOSB firms submitted proposals for the Sherman CBOC. *Id.* Award to one of these SDVOSBs is pending. *Id.* The contracting officer noted that for these two procurements, the SDVOSBs offered better pricing than the incumbent large business contractors. *Id.* Both the updated market research and the contracting officer's personal knowledge support the reasonableness of his finding that at least two SDVOSBs could be expected to submit reasonably-priced offers.

Further, CRAssociates has not provided a reasonable basis upon which to question the agency's position that competition between these SDVOSBs may reasonably be expected to result in award at a reasonable price. Although the protester explained in great detail what it believes it will cost to lease or build space and staff the clinic, the protester has done no more than speculate that SDVOSBs and other small business would not have the financial capability to perform. Protest at 4-5. The protester provides no evidence to support its assessment of the capital requirements needed to fulfill the contract and does not challenge the ability of any specific SDVOSB to obtain

the necessary financing. To the extent the protester contends that, as part of its market research, the agency should have requested each prospective offeror to submit information demonstrating its ability to perform and meet the financial requirements of the contract, Protest at 5, agencies need not make actual determinations of responsibility or decisions tantamount to determinations of responsibility in making set-aside decisions; rather, they need only make an informed business judgment that there is a reasonable expectation of receiving acceptably priced offers from small business concerns that are capable of performing the contract. Walker Dev. & Trading Group, Inc., B-414365, May 18, 2017, 2017 CPD ¶ 151 at 2; InfoReliance Corp., B-413298, Sept. 19, 2016, 2016 CPD ¶ 263 at 4.

The protester also complains that there are no contemporaneous records documenting the agency's updated market research in 2019, and that we should give little weight to the contracting officer's post-protest explanation. Our Office will not limit its review of an agency's evaluation to contemporaneously documented evidence, but instead will consider all the information provided, including a party's arguments and explanations. Walden Sec., B-407022, B-407022.2, Oct. 10, 2012, 2012 CPD ¶ 291 at 5; see also Serco, Inc., B-406683, B-406683.2, Aug. 3, 2012, 2012 CPD ¶ 216 at 7. Post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review as long as those explanations are credible and consistent with the contemporaneous record. NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16.

Here, the contracting officer's post-protest explanations fill in previously unrecorded details and provide credible rationales for his conclusions. In addition, the information provided by the VA in response to the protest here is consistent with the contemporaneous record. As a result, we see no reason that we should not consider these explanations in our review.

Finally, we note that the reasonableness of the agency's decision to set aside this procurement for SDVOSBs is confirmed by the fact that the VA received [DELETED] proposals from SDVOSB firms--the [DELETED] identified in the market research review of the VIP database in response to the RFP. In this regard, we will consider the proposals actually received in determining whether a set-aside decision was reasonable. See Guardian Moving & Storage Co., Inc., B-410171, Nov. 6, 2014, 2014 CPD ¶ 334 at 4 n.2.; The Atlantic Co. of Am., Inc., B-293974, July 1, 2004, 2004 CPD ¶ 182 at 2; York Int'l Corp., B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282 at 7. The protester does not assert that any of these particular firms is not technically capable or

otherwise ineligible for award. In sum, we find that the VA's decision to set aside this solicitation for SDVOSB competition was reasonable.

The protest is denied.

Thomas H. Armstrong
General Counsel