



Decision

Matter of: Utech, Inc- dba EndoSoft

File: B-420755

Date: July 29, 2022

Alan Grayson, Esq., for the protester.

Shawn Larson, Esq. and Aleia Barlow, Esq., Department of Veterans Affairs, for the agency.

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DIGEST

1. Protest that the solicitation did not clearly indicate whether the awarded contract would apply to all Department of Veterans Affairs locations is dismissed as untimely where the solicitation made it clear that the resulting contract could be utilized by all Department of Veterans Affairs locations in the United States and its territories.

2. Protest that agency amended solicitation is dismissed where agency asserts, and review of solicitation confirms, that no amendment was issued.

3. Protest that, because the competitive landscape has changed, it is no longer reasonable for the Department of Veterans Affairs to conduct procurement using a small business tiered evaluation approach is dismissed where solicitation as issued contemplated that the agency might not receive proposals from any category of small business concerns, and specifically allowed large business concerns to submit proposals.

DECISION

Utech, Inc., dba EndoSoft, of Schenectady, New York, protests the terms of request for proposals (RFP) No. 36C10G20Q0050, issued by the Department of Veterans Affairs (VA) for an endoscopy information system. EndoSoft argues that the solicitation does not meet the agency's needs.

We dismiss the protest.

The solicitation was issued on January 26, 2021, for an endoscopy information system on a brand name or equal basis.¹ As relevant to this protest, the solicitation provided for a set-aside based on an order of priority as established by 38 U.S.C. 8127, with the following tiers, in descending order of preference: (1) service-disabled veteran-owned small business concerns (SDVOSB); (2) veteran-owned small business concerns; (3) small business concerns, with historically underutilized business zone small business concerns and 8(a) participants having priority; and (4) large business concerns. Solicitation at 94. The solicitation provided for award on a best-value tradeoff basis considering technical, past performance, socio-economic, and price factors. *Id.* The closing date for the receipt of proposals was February 16, 2021. *Id.* at 1. EndoSoft did not submit a proposal, and instead states that it “arranged to provide this product through an offeror named Namtek, which is an SDVOSB concern.” Protest at 4.

On April 1, 2022, the protester filed an agency-level protest with the VA. EndoSoft stated that on March 22 it learned that a VA location for which EndoSoft held an endoscopy information system contract suspended its decision to upgrade the system due to an impending decision on the “national contract.” Agency Level Protest. According to EndoSoft, the term national contract referred to the solicitation at issue here, which the protester argues does not contemplate or instruct offerors to take over existing contracts. *Id.* at 2. EndoSoft also asserted that it learned at the same time that there was a change in the evaluation scheme which made performance of an existing project part of the evaluation process.² *Id.* Finally, EndoSoft asserted that the field of likely offerors changed since the solicitation was issued because the protester’s relationship with Namtek, the firm that would provide the protester’s endoscopic information system, had “collapsed.” *Id.* at 3. For this reason, the protester argued that a tiered evaluation was no longer a reasonable approach. *Id.* at 3. On May 6, the agency denied EndoSoft’s protest on the basis that EndoSoft was not an interested party because it did not submit a proposal in response to the solicitation. Response to Agency Level Protest.

On May 16, EndoSoft submitted its protest to our Office, in which EndoSoft raised the same issues that it raised in its agency-level protest. As discussed below, we dismiss the protest.

First, EndoSoft protests that the solicitation was unclear as to whether the contract that will be awarded will apply to all VA locations. EndoSoft explains that many, but not all, VA locations obtain endoscopy information systems through separate, location-specific

¹ The brand names specified were Provation, Pentax EndoPro, and Utech EndoSoft. Solicitation at 9.

² While EndoSoft does not explain what it means by existing project, we understand this as an allegation that the agency amended the solicitation to evaluate whether offerors have previously performed an endoscopy information system contract. See Protest at 3.

contracts. Protest at 2. EndoSoft asserts that the agency intends through the current solicitation to establish a framework for parts of the VA that do not obtain endoscopy information systems under stand-alone contracts. According to the protester, since the solicitation did not contemplate that the successful offeror under the solicitation would take over existing contracts, the agency should advise VA locations with stand-alone contracts that is not the case, or open the solicitation to new vendors.

We find this basis of protest is untimely. Under our bid protest regulations, a protest that concerns a solicitation impropriety must be filed prior to the closing date for the receipt of quotations. 4 C.F.R. § 21.2(a)(1). Where a protester files an initial protest with the procuring agency, a subsequent protest to GAO is timely only if the agency level protest was timely filed in accordance with this requirement (or a more stringent timeliness requirement imposed by the agency), and is filed at GAO within 10 days after the protester has actual or constructive notice of initial adverse agency action on the agency level protest. 4 C.F.R. § 21.2(a)(3).

Here, the solicitation notified offerors: “The Veterans Health Administration (VHA) . . . identified . . . Endoscopy Information Systems (EIS) as a candidate for VA-wide (otherwise referred to as “national”) contract award.” Solicitation at 9. The solicitation further advised: “Tasks . . . shall be performed at VHA facilities throughout the United States and all of its territories.” *Id.* at 11. Finally, the solicitation provided: “The period of performance (POP) shall be a twelve (12) month base period, with four (4) consecutive option periods of (12) months each. Any VA Medical Center (VAMC) that adopts this contract after the beginning of the base year or any option shall only be entitled to the benefit of the period remaining in the base year or option period, as applicable.” *Id.*

While it is not clear if all VA locations will be required to utilize this contract, these solicitation provisions clearly notify offerors that the contract resulting from this solicitation was eligible to be used by all VA locations in the United States and its territories. If EndoSoft objected to this requirement, EndoSoft was required to protest prior to the February 16 due date for quotations. Since EndoSoft did not submit its protest to the agency until April 1, the agency-level protest, and the subsequent protest to our Office, are untimely.

EndoSoft next protests that on March 22 it also learned that the evaluation scheme under the solicitation was amended to require performance of an existing project. According to EndoSoft, because this materially changed the evaluation process the agency is required to allow new offerors to compete.

The agency responds, and our review of the solicitation confirms, that the solicitation was not amended to change the evaluation scheme to require performance of an existing project. Request for Dismissal at 2, 7; see Solicitation at 96-98. Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), 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. 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. Since the protester has not provided any evidence to demonstrate that the solicitation was amended, as alleged, we dismiss this basis of protest. See 4 C.F.R. § 21.5(f).

Finally, EndoSoft protests that the competitive landscape has changed since the issuance of the solicitation, and it is therefore no longer reasonable for the VA to conduct the procurement using a tiered evaluation. Specifically, the protester states that “its communication with Namtek,” the firm that submitted an offeror as a prime contractor with EndoSoft as its supplier, “have collapsed.”³ Protest at 4. For this reason, EndoSoft asserts that the agency may not receive sufficient offers from one or more offerors in the relevant small business categories.⁴ The protester argues therefore that the agency should amend the solicitation to remove the tiered evaluation criteria and request new proposals. Protest at 5. The protester states in this regard that it would submit a proposal in its own name if given the opportunity. *Id.*

We conclude EndoSoft’s protest fails to state adequate legal or factual bases of protest. Specifically, the tiered approach to evaluating proposals which was included in the solicitation as issued contemplated that the agency might not receive proposals from any category of small business concerns, and specifically allowed large business concerns to submit proposals.⁵ The fact that EndoSoft did not submit a proposal, but now would like to, is not a basis to find that the agency violated any procurement law or regulation, or that the agency must amend the solicitation.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

³ The agency points out that in fact Namtek has not been in business as of December 22, 2021, at the latest. Request for Dismissal at 6.

⁴ EndoSoft additionally asserts that one of the offerors has been acquired by another offeror, which further reduces competition. Protest at 5.

⁵ We also note that the fact that only one small business actually submits an offer does not render unreasonable the contracting officer’s decision to set aside the procurement, since the reasonableness of the decision is determined as of the time the decision was made. See *Synchrogenix Info. Strategies, LLC.*, B-414068.4, Sept. 8, 2017, 2017 CPD ¶ 283 at 4 n.6.