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Decision

Matter of: Tech62, Inc.

File: B-420883; B-420883.2

Date: October 3, 2022

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DIGEST

1. Protest challenging agency's decision not to set aside a procurement for service-disabled veteran-owned small businesses (SDVOSBs) is denied where the agency reasonably concluded that it did not have a reasonable expectation of receiving quotations from two or more SDVOSBs capable of performing the required services at a fair and reasonable price.
 2. Protest alleging an ambiguity in the solicitation is denied where the protester did not demonstrate that its interpretation is reasonable when the solicitation is read as a whole and in a manner giving effect to all provisions.
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DECISION

Tech62, Inc., a service-disabled veteran-owned small business (SDVOSB) of Fairfax, Virginia, protests the terms of request for quotations (RFQ) No. 36C24822Q1383, issued by the Department of Veterans Affairs (VA), for onsite radiation oncology services by therapeutic medical physicists (TMP) at the VA's Bay Pines Healthcare System in Bay Pines, Florida. Tech62 argues that the agency improperly failed to set the acquisition aside for SDVOSB concerns or veteran-owned small business (VOSB) concerns and that the terms of the solicitation are unclear and ambiguous.

We deny the protest.

BACKGROUND

The VA first sought TMP services for the Bay Pines Healthcare System on March 1, 2021, when it issued solicitation No. 36C24821R0069 as a total SDVOSB set-aside. Agency Report (AR), Tab 3a, Initial Market Research Report at 1. The contracting officer set aside the requirement based on market research showing that there was a reasonable expectation of receiving two or more quotations from capable SDVOSBs. *Id.* 1-2. The agency's market research included a search of the VA's Vendor Information Page (VIP), a database for VA-verified SDVOSB and VOSB vendors, for vendors registered under the applicable North American Industry Classification System (NAICS) code.¹ *Id.* at 4-10. In addition, the agency reviewed responses to a request for information (RFI) issued on October 20, 2020. *Id.* at 9.

In response to the March 2021 solicitation, the agency received quotations from six vendors, including Tech62. Contracting Officer's Statement (COS) at 2. The agency's evaluation found only one quotation technically acceptable; the remaining five quotations, including the one submitted by Tech62, were found to be technically unacceptable and thus unawardable. *Id.*; AR, Tab 3c, Market Research Report Addendum 1 at 1-2. The technically acceptable vendor, however, could not obtain required liability insurance and the agency therefore did not make an award under the March 2021 solicitation. AR, Tab 3c, Market Research Report Addendum 1 at 2. Consequently, the agency cancelled the solicitation on October 25, 2021. *Id.* Tech62 did not file a protest, either of the agency's evaluation or of the subsequent cancellation of the solicitation.

After conducting further market research, the agency issued RFQ No. 36C24822Q0477 on April 6, 2022, which once again sought a vendor to provide TMP services at Bay Pines. *Id.* at 19. This time, the solicitation was issued as a small business set-aside with a tiered evaluation structure providing a preference for SDVOSB and VOSB concerns. *Id.* The contracting officer decided on this procurement method based on market research showing that the SDVOSB concerns identified as potential vendors were either the same vendors previously identified during the initial market research or the same vendors that had submitted unsuccessful quotations under the March 2021 solicitation. *Id.* at 15-17.

In response to the April 2022 RFQ, the agency received three quotations, all from SDVOSBs, including Tech62. COS at 3. After evaluating the quotations, however, the agency found none of them to be technically acceptable. *Id.*; AR, Tab 3c, Market Research Report Addendum 1 at 19; Tab 3d, Market Research Report Addendum 2 at 2. The agency informed the vendors of their unsuccessful quotations and provided Tech62 with a brief explanation in accordance with Federal Acquisition Regulation (FAR) part 13. COS at 3. Subsequently, the agency cancelled the April RFQ. *Id.* Again, Tech62 did not protest the agency's evaluation of its quotation or the subsequent cancellation of the solicitation. *Id.*

¹ The NAICS code was 541690, other scientific and technical consulting services.

The agency conducted additional market research and again found as potential vendors the same SDVOSBs that had previously submitted unacceptable quotations or been identified in prior market research. AR, Tab 3d, Market Research Report Addendum 2 at 2. Based on this additional market research and unsuccessful procurement history, the agency decided to resolicit the requirement as an unrestricted procurement. *Id.*

On July 13, 2022, the agency issued the unrestricted solicitation at issue here under the simplified acquisition procedures of FAR part 13. COS at 1. As with the two prior solicitations, the RFQ seeks personnel--specifically two full-time equivalent, board-certified TMPs--to provide radiation oncology therapeutic medical physics support services to eligible beneficiaries at VA's Bay Pines Healthcare System in Florida. AR, Tab 4, RFQ at 6. The RFQ contemplates the award of a fixed-price contract for a base period of 1 year and up to four 1-year option periods. *Id.*

The solicitation includes a performance work statement (PWS) that specifies the required qualifications for the two TMPs: one chief TMP possessing a PhD, and one TMP possessing either a master's degree or a PhD. *Id.* at 10-53. As relevant here, PWS section 2.5 requires the proposed master's level TMP to be board certified with "at least three (3) years of continuous working experience within the last five (5) years to ensure [the] TMP's experience is current and relevant." *Id.* at 15. That same PWS section also specifies that the master's level TMP is required to have a minimum of five years of "experience, expertise, and knowledge on the . . . procedures, equipment and software" listed in sections 2.5.1 through 2.5.7 of the PWS as follows:

2.5.1. Five (5) years of experience – Documentation detailing experience in performing [quality assurance (QA)] procedures.

2.5.2. Five (5) years of experience – Documentation detailing Therapeutic Medical Physics in a healthcare system that is [American College of Radiology] certified.

2.5.3. Five (5) years of experience - Varian Linear Accelerators: IX and Trilogy with Brain Lab Accessories following standards of TG-142

2.5.4. Five (5) years of experience - Image Guided Radiation Therapy (IGRT) including Cone Beam CT (following standards of TG-142).

2.5.5. Five (5) years of experience - eclipse treatment planning system; and ARIA record & verify system, including the following treatment modalities: 2D/3D Conformal, [stereotactic radio surgery], [stereotactic radio therapy], [stereotactic body radio therapy], and [intensity modulated radiation therapy]/[volumetric modulated arc therapy] (following standards of TG-53)

2.5.6. Five (5) years of experience - [intensity modulated radiation therapy] QA: MapCheck I/II (or equivalent)

2.5.7. Five (5) year of experience - Phillips CT Simulator (or equivalent) and following standards of G-66

Id.

On July 13, the same day the agency issued the RFQ, Tech62 filed this protest with our Office.

DISCUSSION

Tech62 argues that the VA unreasonably failed to set aside the requirement for SDVOSB concerns. Protest at 2-3; Comments at 3-8. The protester also asserts that the terms of the solicitation are ambiguous and do not clearly reflect the agency's needs.² Supp. Protest at 2-4. For the reasons discussed below, we find no basis to sustain the protest.

Market Research and Set-Aside Decision

The protester first challenges the agency's decision to issue the solicitation on an unrestricted basis. Protest at 2-3. Specifically, the protester argues that the agency's market research was inadequate and the agency's reliance on the results of prior solicitation efforts was unreasonable. *Id.*; Comments at 3-8. As discussed below, we find no merit to the protester's arguments.

The VA is required by the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the VA Act) to set aside all acquisitions for SDVOSB or VOSB concerns where the agency's market research leads it to conclude that there is a reasonable expectation that two or more such concerns are likely to submit offers, or in this case quotations, and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d). We refer to this test as the VA Act's "Rule of Two." *CRAssociates, Inc.*, B-419346, Jan. 21, 2021, 2021 CPD ¶ 57 at 2. The determination of whether there is a reasonable expectation of receiving quotations 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

² The agency requests dismissal of the protest grounds raised in Tech62's August 10 supplemental protest. In this regard, the VA argues that these protest grounds are untimely since they were raised after the July 27 deadline for the initial submission of quotations. Supp. Memorandum of Law at 5-6. Our timeliness rules require that a protest based upon alleged improprieties in a solicitation, which are apparent prior to the closing time for receipt of initial quotations, be filed before that time. 4 C.F.R. § 21.2(a)(1). The record here shows, however, that the agency extended the deadline for the submission of initial quotations to 3 p.m. Eastern Time (ET), August 10. Supp. Comments at 2. Thus, the supplemental protest, which was filed at 2:31 p.m. ET on August 10, is timely. See *Booz Allen Hamilton, Inc.*, B-418449, May 18, 2020, 2020 CPD ¶ 178 at 4-5.

was unreasonable. *Id.*; *AeroSage LLC*, B-414314, B-414314.2, May 5, 2017, 2017 CPD ¶ 137 at 6.

While the requirements of the VA Act do not dictate the use of any particular methodology in assessing the availability of potential SDVOSB concerns, our Office has explained that the assessment must be based on sufficient evidence to establish its reasonableness. *HurtVet Subcontracting, LLC*, B-419139, Dec. 2, 2020, 2020 CPD ¶ 392 at 2-3; *Veteran Shredding, LLC*, B-417399, June 4, 2019, 2019 CPD ¶ 210 at 3. Measures such as prior procurement history, market surveys, advice from the agency's small business specialist, and information concerning prospective vendors' 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. *AeroSage, LLC, supra*.

Here, the record shows that the agency took reasonable steps to ascertain whether two potentially eligible concerns would not only be interested in responding to the solicitation, but also be capable of performing the required work. The contracting officer's market research for the March 2021 solicitation, which included a search of the agency's VIP database and an RFI, resulted in the agency's initial determination that the requirement could be set aside for SDVOSBs. *See generally*, AR, Tab 3a, Initial Market Research Report. It was only as a result of finding all of the submitted quotations unawardable that the agency decided to solicit the requirement as a small business set-aside with a tiered evaluation structure for SDVOSBs and VOSBs. *Id.* at 2-3; *see FAR 19.1405(c)*.³ When this second set-aside solicitation--issued only three months before the current solicitation--also resulted in only unacceptable SDVOSB quotations being received, the agency concluded that it could not reasonably expect an award to be made to SDVOSB concerns. On this record, we find the agency's conclusion to be reasonable.

In support of its contention, the protester argues that the bulk of the agency's market research, conducted in December 2021, was outdated and inadequate. Comments at 3-6. In this regard, the protester argues that the agency should have "at least performed the same efforts that Tech62 did when it filed its [p]rotest" and conducted a more "nuanced" market research before issuing the current solicitation in July instead of relying on the evaluation of quotations received from the April solicitation. *Id.* at 6. The protester, however, ignores the fact that the agency's market research in December 2021 resulted in the set-aside solicitation issued in April 2022. In response to that solicitation, the agency received quotations from three SDVOSBs, including the protester, but all quotations were found to be technically unacceptable. Under these circumstances, we do not find that the agency was obligated to continue searching

³ As part of the regulations implementing the VA's Rule of Two, FAR provision 19.1405(c) states that "[i]f the contracting officer receives no acceptable offers from service-disabled veteran-owned small business concerns, the services-disabled veteran-owned set-aside shall be withdrawn and the requirement, if still valid, set aside for small business concerns as appropriate." FAR 19.1405(c).

additional resources for SDVOSB concerns that might be able to submit technically acceptable quotations in response to yet another set-aside solicitation.

Finally, we find no merit to the protester's argument that the agency unreasonably relied on the results of prior solicitations when the protester's own search shows a number of potential SDVOSBs beyond those that responded to prior solicitations. When investigating the availability of potential SDVOSB vendors, an agency must find not only the existence of SDVOSB concerns that might submit quotations, but also that these concerns have the capability to perform the contract. See *HurtVet Subcontracting LLC*, *supra* at 3. Tech62 has offered no evidence to show that any of the firms identified in its search have the capability to meet the agency's requirements, particularly when none of them responded to prior, set-aside solicitations, including one issued just three months prior to the current solicitation. In the absence of any awardable quotations received from SDVOSBs in response to two prior set-aside solicitations, it would have been unreasonable for the agency to expect that two or more SDVOSB concerns capable of performing the requirements would submit quotations if the solicitation was again issued as a set-aside. Accordingly, we deny this protest ground.

Ambiguous Solicitation Provision

The protester next asserts that the solicitation contains ambiguous terms that preclude vendors from competing intelligently. Specifically, the protester contends that the provision at PWS section 2.5, requiring the master's level TMP to possess both three years of continuous experience as well as a minimum of five years of experience with certain procedures, equipment, and software, creates an internal conflict that constitutes a patent ambiguity. Supp. Protest at 4; Supp. Comments at 6-7. In this regard, the protester argues that this provision could be interpreted, on one hand, as requiring only three years of experience for the master's level TMP, but on the other hand, as requiring a minimum of five years of relevant experience for the same TMP. *Id.*; Resp. to Agency's Additional Briefing at 1-2.

In response, the agency argues that the solicitation provision is not ambiguous because the protester's interpretation is unreasonable. Agency's Additional Briefing at 2-3. The VA maintains that the only reasonable interpretation of the provision is that it provides for two separate and distinct sets of requirements for a qualified master's level TMP. *Id.*

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *TGC, Inc.*, B-417610, B-417610.2, Sept. 3, 2019, 2019 CPD ¶ 312 at 5; *Crew Training Int'l, Inc.*, B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. *TGC, Inc.*, *supra*; *Colt Def., LLC*, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. A solicitation requirement is only considered ambiguous when it

is susceptible to two or more reasonable interpretations. *TGC, Inc., supra; Plum Run*, B-256869, July 21, 1994, 94-2 CPD ¶ 38 at 4.

As noted, the PWS requires that the master's level TMP have at least three years of "continuous working experience" within the last five years "to ensure [the] TMP's experience is current and relevant." RFP at 15. That same section of the PWS also requires that the master's level TMP have a minimum of five years of "experience, expertise, and knowledge on . . . [the] procedures, equipment and software" found in PWS sections 2.5.1 through 2.5.7. *Id.*

Here, we disagree with the protester's assertion that the solicitation is ambiguous and that a prospective vendor would be "left to question whether the non-[PhD]-level physicist is indeed required to only have three years of experience or five." Resp. to Agency's Additional Briefing at 2. In our view, the solicitation language, read as a whole and in a manner that gives meaning to all of the provisions, does not create such a conflict. Rather, the only reasonable and straightforward interpretation of the solicitation provision as written is that the proposed master's level TMP must meet two separate and distinct requirements. First, to ensure that the TMP's experience is "current and relevant," the solicitation requires that the TMP have at least three years of continuous experience obtained within the last five years. Second, the TMP is also required to have a total of at least five years of experience, expertise, and knowledge on the specified procedures, equipment, and software--without any requirement for it to be continuous or recent.

The protester argues that the ambiguity alleged above is compounded by the solicitation requirement that the PhD-level TMP--required to have five years of continuous experience within the last five years--also must have five years of experience with the same list of "procedures, equipment, and software." Supp. Comments at 6-7; see RFP at 14-15. The protester speculates that the agency may have "erred by simply copy-and-pasting the [PhD]-level requirements into the non-[PhD]-level section of the RFQ" without changing the number of years to match the three years of experience required for the master's level TMP. Supp. Comments at 7.

We do not find any basis to support the protester's speculation in this regard. First, the record shows that the solicitation does not specify the exact same procedures, equipment, and software for the PhD-level TMP and the master's level TMP qualifications. Indeed, the list of specific procedures, equipment, and software for the PhD-level TMP includes experience with acceptance testing of a linear accelerator and commission of a linear accelerator for a treatment planning system, which is not required for the master's level TMP. RFP at 15. The requirement for the master's level TMP position, on the other hand, includes specified technical proficiency and continuing education units, which are not required for the PhD-level TMP. *Id.* at 15-16. Moreover, the requirement that the master's level TMP have three years of continuous work experience within the last five years is not inconsistent with the requirement for the TMP to also have five years of experience, expertise, and knowledge of the specific procedures, equipment, and software listed at PWS sections 2.5.1 through 2.5.7.

Nothing in this solicitation language, read as a whole and in a manner that gives effect to all of its provisions, gives credence to the protester's conjecture that the agency inserted this requirement in error.

In sum, because we find that there is only one reasonable interpretation of the challenged solicitation provision, we do not find the provision to be ambiguous. Accordingly, we deny this protest ground.

The protest is denied.

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General Counsel