



Decision

Matter of: Marathon Medical Corporation

File: B-422168.2

Date: February 14, 2024

Julie M. Nichols, Esq., Roeder, Cochran, Phillips, PLLC, for the protester.
Jared M. Levin, Esq., Department of Veterans Affairs, for the agency.
Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation defectively applied nonmanufacturer rule is dismissed where protest was filed more than 10 days after the closing date for receipt of quotations, which constituted initial adverse agency action on the protester’s pending agency-level protest raising the same issues.

DECISION

Marathon Medical Corporation, of Aurora, Colorado, a small business, protests the terms of request for quotations (RFQ) No. 36C241-23-Q-0765, issued by the Department of Veterans Affairs (VA), for the establishment of multiple blanket purchase agreements (BPA) under the VA’s medical surgical prime vendor program for 1,243 VA healthcare facilities nationwide. Protest exh. A, RFQ at 2. Marathon argues that the terms of the RFQ contravene requirements to set aside the requirement for service-disabled veteran-owned small businesses (SDVOSB).

We dismiss the protest as untimely because it was filed more than 10 days after initial adverse agency action on Marathon’s timely agency-level protest.

BACKGROUND

The VA issued the RFQ on August 28, 2023, under the simplified acquisition procedures in Federal Acquisition Regulation (FAR) part 13, to obtain quotations for BPAs to supply commercial medical supplies and surgical items. *Id.* at 1. The RFQ stated that the VA would establish BPAs with “Original Equipment Manufacturers (OEM), suppliers, and authorized resellers of medical/surgical supplies.” *Id.* at 6. For vendors that offered an item as an authorized distributor or supplier, rather than the

OEM, the RFQ stated that the offer had to include “an Authorized Distributor Letter from the OEM signed within the last 90 days,” to affirm the authenticity of the item. Protest, exh. A, RFQ amend. 7 at 9.

The VA describes the RFQ as a simplified acquisition¹ of commercial items that is “100 [percent] set aside for SDVOSBs and utiliz[ing] tiered evaluation procedures.” Req. for Dismissal at 2. The RFQ included an electronic spreadsheet that, as amended, listed 6,300 items, and identified the manufacturer of each item. *Id.* at 3 n.3; see generally Protest exh. A, RFQ amend. 8, Copy of “Q3 Quote Sheet” Spreadsheet (Nov. 22, 2023 revision) at All Supplies sheet.

The VA issued a series of amendments revising the requirement and the due date for quotations. Req. for Dismissal at 3. The RFQ incorporated the nonmanufacturer rule clause at FAR 52.219-33, Protest exh. A, RFQ at 33, and expressly affirmed that the nonmanufacturer rule (NMR)² applied to quotations, including those from SDVOSBs at the first tier as follows:

To be considered for award at the SDVOSB tier there must be a NMR Class waiver, or a SDVOSB must meet the 4-prongs of the NMR.

A business may qualify as a nonmanufacturer if it:

- Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas (see paragraph (c)(3) of this section for determining the manufacturer of an end item);
- Not exceed 500 employees, or 150 employees for information technology value-added resellers under NAICS [North American Industry Classification] code 541519;
- Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and
- Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

¹ The RFQ states “[a]lthough there are currently no plans for the government to order against this BPA, if that occurs, there is a \$500,000 individual order limitation.” Protest exh. A, RFQ at 7. Marathon notes that the VA described the BPAs as involving orders valued at “hundreds of millions of dollars.” Protest at 20.

² The nonmanufacturer rule imposes eligibility conditions under certain small business set-asides where a firm proposes to furnish an end item that it did not manufacture, process, or produce. See 13 C.F.R. § 121.406; FAR 19.505(c).

If no quotes were submitted by SDVOSB concerns, no [SDVOSBs] meet the NMR requirements, or if none of the quotes would result in an award at a fair and reasonable price that offers best value to the Government, then the SDVOSB set-aside will be withdrawn and the agency will review quotes from the next tier.

Protest exh. A, RFQ at 13, 49-50; *accord.* RFQ amend. 7 at 43.³

Marathon submitted a timely quotation on November 14, in which it identified itself as an SDVOSB. Req. for Dismissal exh. 1, Quotation Transmittal Email at 1. On November 29, Marathon filed an agency-level protest with the VA, arguing that the application of the NMR to the SDVOSB tier (and other tiers) was improper and would effectively eliminate small businesses from the competition. Protest exh. C, Agency-Level Protest at 3. Also on November 29, the VA extended the due date for submission of quotations to December 1. Protest exh. A, RFQ amend. 9 at 1.

On January 17, 2024, the VA notified Marathon in writing that its agency-level protest had been denied. Marathon filed this protest with our Office on January 29, principally arguing that application of the NMR to the establishment of BPAs with SDVOSBs is contrary to 38 U.S.C. § 8127, FAR 19.505(c)(5), and the VA's own procurement regulations and therefore the contracting officer should have sought a waiver of the NMR.⁴ Protest at 15-18.

DISCUSSION

The VA requests dismissal of the protest as untimely, arguing that the closing date for submission of quotations on December 1, 2023, served as initial adverse agency action on Marathon's pending agency-level protest challenging the terms of the RFQ. The agency contends that any subsequent protest to our Office had to be filed within 10 days of that closing date (that is, by December 11), to be timely. Accordingly, the VA argues, Marathon's filing of this protest with our Office on January 29, 2024, is untimely and should be dismissed. Req. for Dismissal at 4-5.

Our Bid Protest Regulations contain strict rules for the timely submission of protests that reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Lifecare Mgmt. Partners*, B-297078, B-297078.2, Nov. 21, 2005, 2006 CPD ¶ 8 at 10-11. Where an agency-level protest challenges the terms of the solicitation and the contracting activity subsequently proceeds to close the period for submitting quotations, the protester is on notice that the contracting activity has not taken corrective action to address the challenged terms. *See Kahn Indus., Inc.--*

³ The RFQ contained similar provisions for the other tiers. *E.g.*, Protest exh. A, RFQ at 43-44.

⁴ As it had done in its agency-level protest, Marathon also challenges the application of the NMR at other tiers. *Id.* at 15-21.

Recon., B-237322.2, Oct. 31, 1989, 89 2 CPD ¶ 411 at 2; *Ann Riley & Assocs.*, B-237365, Nov. 15, 1989, 89-2 CPD ¶ 463 at 2.

Our regulations provide that any subsequent protest to our Office must be filed within 10 calendar days of “actual or constructive knowledge of initial adverse agency action” to be considered timely, and further that adverse agency action means any action or inaction on the part of a contracting agency that is prejudicial to the position taken in a protest filed with the agency--expressly including the “opening of bids or receipt of proposals.” 4 C.F.R. §§ 21.2(a)(3), 21.0(e); see *MLS-Multinational Logistic Servs., Ltd.*, B-415782, B-415708.2, Mar. 7, 2018, 2018 CPD ¶ 105 at 4 (protest dismissed as untimely when filed more than 10 days after closing date for receipt of proposals, not when protester learned that agency-level protest had been denied). In short, where a timely agency-level protest is filed by the closing date for receipt of proposals (or quotations, as here) the protester is on notice that the agency is not taking the desired corrective action, so timeliness for a subsequent GAO protest is measured from the closing date. *DAI, Inc.*, B-408625, B-408625.2, Nov. 6, 2013, 2013 CPD ¶ 259 at 3 (protest dismissed as untimely when filed more than 10 days after closing date for receipt of proposals).

Marathon opposes dismissal and contends that the closing date for receipt of quotations here was not prejudicial to the challenges in its protest in a way that would constitute adverse agency action under either our regulations or the decisions cited. The protester notes that it had submitted a quotation and that it had no objection to the closing date itself. Resp. to Req. for Dismissal at 2-3. Marathon argues that it timely filed its protest within 10 days of January 17, when the VA informed the firm that the agency-level protest had been denied. *Id.* at 4.

We disagree. As discussed above, our Bid Protest Regulations and our decisions are consistent in treating the closing date for receipt of quotations as adverse agency action, at which point the protester with an agency-level protest pending at the closing time has 10 days to file a timely protest with our Office raising those challenges. Moreover, the presence of the NMR at closing time affected which products a SDVOSB firm could quote and, therefore, whether a firm such as Marathon could represent that it qualified as an SDVOSB (or for other set-aside tiers). Consequently, as Marathon filed this protest with our Office more than 10 days after the December 1 closing date for submission of quotations, it is untimely.

The protest is dismissed.⁵

Edda Emmanuelli Perez
General Counsel

⁵ In dismissing the protest as untimely, we express no view on the application of the NMR to the establishment of these BPAs or the contracting officer’s discretion to seek a waiver of the NMR from the Small Business Administration.