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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: EMMES Corporation

File: B-402245; B-402245.2

Date: February 17, 2010

Brian A. Darst, Esq., Odin Feldman Pittleman PC, for the protester.
Cheryl S. Mpande, Esq., National Institutes of Health; Laura Mann Eyester, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies.
Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation for the award of a cost reimbursement contract for a data coordination center should be set aside for small business concerns is denied, where agency reasonably found, based upon market research and the publication of a sources sought notice, that the agency was not likely to receive proposals from at least two small businesses with sufficient experience to perform the overall requirement.

DECISION

The EMMES Corporation of Rockville, Maryland, protests the terms of request for proposals (RFP) No. NHLBI-HB-11-02, issued by the National Heart, Lung, and Blood Institute (NHLBI), National Institute of Health (NIH), Department of Health and Human Services, for the award of a cost reimbursement contract for a data coordination center. EMMES, a small business concern, argues that the solicitation should have been set aside exclusively for small business concerns.

We deny the protest.

NIH seeks a contractor to provide a data coordinating center (DCC) as part of the "Recipient Epidemiology and Donor Evaluation Study -- III" (REDS-III) program. The REDS-III program seeks "to assure safe and effective blood banking and transfusion medicine practices through a comprehensive, multi-targeted strategy involving basic, translational, and clinical research to improve the benefits of

transfusion while reducing its risks."[1] The RED-III program follows the REDS-II program; the REDS-II DCC was previously competed on an unrestricted basis and is currently performed by a large business. Contracting Officer's Statement at 3.

To determine whether this procurement should be set aside for small business concerns, NIH conducted market research, including posting a sources sought notice on the Federal Business Opportunities (FedBizOpps) website. Interested small business concerns were invited to submit capability statements to provide a DCC that would be responsible for overall coordination, communication, data management, and analytical/statistical support for the REDS-III domestic hubs and international programs. Agency Report (AR), Tab 5, Sources Sought Notice, at 3. Specifically, firms were informed that:

> The DCC shall perform the following . . . requirements: 1) coordinate REDS-III activities and participate as a member of the Oversight and Steering Committees to develop and implement a coordinated plan to achieve program objectives; 2) develop and maintain operating procedures for the RED-III program; 3) develop and maintain a public and private REDS-III website; 4) develop and finalize the protocols and associated Manuals of Operations for the cumulative centralized databases; 5) coordinate and participate in the development and finalization of REDS-III study protocols and develop corresponding Manual of Operations; 6) provide all necessary data management and tracking systems; 7) track all REDS-III biospecimens and their associated data, and identify biospecimens for retrieval; 8) provide training sessions and conduct site visits, as appropriate; 9) provide biostatistical support during protocol development and analyze database and study data collected during REDS-III; 10) assist the Oversight Committee and Steering Committees in preparation of scientific reports for publication and presentation; 11) help coordinate and convene the REDS-III Observational Study Monitoring Board (OSMB), provide administrative and logistic support for OSMB meetings/calls, prepare and present data reports to the OSMB, and prepare minutes of the sessions; 12) coordinate and convene the REDS-III External Review Panel, assist the NHLBI COTR(s) with the selection and invitation of the External Review Panel, provide administrative and logistic support for the External Review Panel meetings, prepare minutes from the External Panel sessions and coordinate and pay for External Review Panel members travel and honorarium; 13) prepare quarterly and annual technical reports; 14)

[1] The REDS-III program consists of the DCC, a central laboratory, up to four domestic hubs, and up to four international collaborative programs. The acquisition here is for the DCC only.

> interact with the COTR(s) on programmatic research activity issues; 15) at close-out of study, or earlier as directed by the COTR(s), create public use data sets for each data collection activity with documentation; and 16) ensure an orderly transition of REDS-III resources to a successor contractor at contract expiration.

The notice stated that the "capability statements must provide evidence of ability to perform and experience in performing the tasks described above," id. at 4, and firms were informed that the capability statements would be reviewed for:

> 1) evidence of the firm's status as a small business . . . ; 2) ability to coordinate and manage a domestic and international multi-center, multi-project large epidemiologic, survey, and laboratory research program and fulfill the DCC functions described in tasks 1 though 16 above . . . 3) qualifications and availability of personnel with experience in the development, coordination, data management and statistical analysis of large. . . multicenter epidemiologic, complex survey, laboratory studies, and interventional studies, in the area of blood banking and transfusion medicine; 4) experience in the operation of a coordination center for large multi-center international and domestic research programs; 5) adequacy of the organizational and administrative structure . . . ; 6) experience in the conduct/coordination of multiple large epidemiologic studies . . . both in the collection of epidemiologic data from multiple sites, as well as the experience of monitoring the quality and timeliness of data collected from a large number of individuals . . . and 7) availability of facilities, equipment, and resources necessary for the performance of the requirements identified above.

Id. at 4-5.

NIH received capability statements from EMMES and another small business concern. The statements were reviewed by two members of the agency's REDS-III program, including the program's project officer, and they concluded that neither firm had demonstrated sufficient experience to successfully perform the overall requirement. Specifically, they found that neither firm had experience coordinating a domestic and international multi-center, multi-project large epidemiologic, survey, and laboratory research program. AR, Tab 7, Program's Review of the Small Business Capability Statements, at 3, 5.

With regard to the protester's capability statement, NIH found that, "[w]hile they are capable of fulfilling the 16 functions described in the solicitation, these functions were never applied in the management of complex domestic and international epidemiologic and survey studies." Id. at 5. The agency noted that EMMES had highlighted only one epidemiology study ([DELETED]) in its list of current and selected completed projects, and the focus of that study was a series of clinical trials

involving [DELETED]. Id. The agency concluded that there "is no evidence of the company supporting epidemiology studies in the capability statement." Id. The agency also found that, although the firm had experience operating a coordinating center for large multi-center domestic research programs, the firm had not provided any evidence that it had coordinated any large multi-center international programs. Id. at 5. Furthermore, EMMES was found to lack experience with studies dealing with blood banking or transfusion medicine, and EMMES had not provided any evidence of personnel with experience in these areas. Id.

With regard to the capability statement of the other small business, NIH found that "while it appears that the company may be able to perform most of the functions performed by a traditional coordinating center (exception -- the company does not have a public or private web site), it provides no evidence that it has served as a coordinating center of any large multi-center research programs either domestically or internationally." AR, Tab 7, Program's Review of the Small Business Capability Statements, at 4. The agency also noted that the firm submitted no evidence that it had ever conducted or coordinated multiple large epidemiologic studies and complex survey studies, no evidence that the firm has staff with experience in conducting epidemiologic, survey, laboratory or interventional studies in the area of blood banking and transfusion medicine, and that the firm provided no information regarding the size of the company's facility, the equipment available, or access to other resources. Id. at 3-4.

The contracting officer reviewed the acquisition history for these services and found that no offers were received from small business concerns to provide the DCC under the REDS-II program. Specifically, only two proposals (from a large business concern and a non-profit entity) were received for the REDS-II DCC. Contracting Officer's Statement at 3. The offer of the non-profit entity was found to be technically unacceptable. The contracting officer states that the requirements for the DCC under the REDS-III program are more complex than that under the REDS-II program, because "it includes protocols for donors and recipients, where as the REDS-II program requirements only included donor products." Id.

The contracting officer concluded that there was no reasonable expectation of receiving offers from two or more small business concerns capable of performing the stated requirements and decided that the solicitation should be issued on an unrestricted basis. Id. at 2. This determination was reviewed by the agency's small business specialist and the Small Business Administration's (SBA) Procurement Center Representative, both of whom concurred with NIH's determination. AR, Tab 8, HHS Small Business Review Package. The RFP was issued on an unrestricted basis, and this protest followed.

Agencies generally are required to set aside for small businesses all procurements exceeding $100,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns. Federal Acquisition

Regulation (FAR) § 19.502-2(b). An agency must undertake reasonable efforts to ascertain whether it is likely that it will receive offers from at least two responsible small businesses capable of performing the work in question. Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 4. No particular method of assessing the availability of capable small businesses is required; rather, the assessment must be based on sufficient facts so as to establish its reasonableness. Id. at 5.

EMMES argues that the agency unreasonably determined that it and the other small business concern could not perform the work.[2] In this regard, EMMES notes that the agency had found that it was "capable of fulfilling the 16 functions described in the solicitation," and that the firm "has the facilities, equipment and resources necessary for the performance requirements delineated in the sources sought notice," and concludes that the agency should have found EMMES to be a responsible small business capable of performing the work. Instead, EMMES argues, the agency improperly relied on experience alone in determining that the firm is not fit to perform the work, and, in doing so, engaged in a "de facto" non-responsibility determination.

We do not agree that NIH could not consider EMMES's and the other small business firm's experience in assessing their capability to perform.[3] See ViroMed Labs., B-298931, Dec. 20, 2006, 2007 CPD ¶ 4 at 3-4; Information Ventures, Inc., B-279924, Aug. 7, 1998, 98-2 CPD ¶ 37 at 3 (in determining the availability of responsible small business concerns for set-aside purposes, the contracting agency's investigation goes not only to the existence of the businesses, but also to their capability to perform the contract). In this regard, the agency need not make either an actual determination of

[2] EMMES also argued that the agency had mistakenly believed that it required an expectation of receiving offers from three or more responsble small business concerns to set aside a procurement for small businesses. EMMES withdrew this ground of protest after receiving the report, which showed that the agency was not so mistaken.

[3] In response to our Office's request for SBA's views on the protest, SBA objected to the amount of information requested by the sources sought notice, which SBA believed was more equivalent to a request for proposals, and also objected to the North American Industrial Classification System (NAICS) code assigned to the procurement. SBA, however, did not assert that EMMES, the other small business concern that responded to the sources sought notice, or any other small business concern could perform the overall requirement. With respect to the NAICS code assigned to the RFP, SBA has exclusive authority to assign NACIS codes, and the decision is not reviewed by our Office. 4 C.F.R. § 21.5(b)(1) (2009); Encompass Group LLC, B-299602, B-299617, Aug. 10, 2005, 2005 CPD ¶ 159 at 4. EMMES has not questioned the NAICS code assigned to the RFP. See Supp. Comments at 4.

responsibility or a decision tantamount to a determination of responsibility, but must make an informed business judgment that there is a reasonable expectation of receiving acceptably priced offers from two small business concerns that are capable of performing the contract. The considerations relevant to this judgment may be similar to responsibility standards. Railroad Constr. Co., Inc., B-249748.3, Dec. 29, 1992, 92-2 CPD ¶ 446 at 5. In the final analysis, the set-aside decision necessarily entails consideration of whether small businesses can be expected to perform satisfactorily; if the agency reasonably determines that they cannot, a set-aside is not warranted.

We also do not agree with EMMES that the agency's review (in response to the sources sought notice) of the small business concerns' experience in performing the requirement reflected requirements that exceeded the RFP's scope of the work. See Comments at 2. Here, the RFP specifically provided for an evaluation of offerors' experience in performing the overall requirement. See AR, Tab 10, RFP at 84. Moreover, the RFP's statement of work laid out, in greater detail, the same 16 tasks described in the sources sought notice. AR, Tab 10, RFP, attach. 3, Statement of Work, at 6-13. Although the RFP provided that experience would be weighted 20 percent in the technical evaluation, this does not show that the lack of experience in performing the overall requirement could not be considered in NIH's assessment of the firm's capability to perform the contract.

EMMES also challenges NIH's conclusion that, although the protester and the small business firm likely could "perform most of the functions performed by a traditional coordinating center," neither had demonstrated that they had experience as a coordinating center of the size and type being procured here, and a set-aside therefore was not warranted.[4] EMMES complains that NIH unreasonably found that EMMES had not provided evidence that the firm had ever been involved in conducting or coordinating multiple large epidemiologic studies and complex survey studies, both in the collection of epidemiologic data from multiple sites and experience in monitoring the quality and timeliness of such data from a large number of individuals.[5] See AR, Tab 7, Program's Review of the Small Business Capability

[4] EMMES's protest primarily focuses on the agency's evaluation of its own capability statement. To the extent EMMES could protest this issue, EMMES also similarly challenges NIH's evaluation of the other small business concern's capability statement. We need not address the agency's evaluation of the other firm's capability statement, given our resolution of EMMES's similar arguments with respect to its own statement.

[5] The protester asserts that its capability statement showed that it has engaged in epidemiologic studies, as demonstrated by the [DELETED]. EMMES, however, provided no explanation in its capabilities statement--nor does it do so here--of the epidemiologic aspects of this study. As stated above, the agency specifically found that, based on EMMES's description of the study, that the "major focus of the project

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Statements, at 6. EMMES asserts that the agency has overlooked its experience with the [DELETED]--one of the projects listed in a chart contained in the capability statement--which consisted of a multicenter, multiprotocol epidemiologic and clinical trial research program of human blood products.

We find no basis in the record to conclude that NIH unreasonably assessed EMMES's experience. EMMES did not highlight the [DELETED] or provide any explanation or description for why the work the firm did there was relevant to the work being procured here. The capability statement merely listed the study under a table of current and selected completed projects, without any explanation. Even assuming that the study consisted of a multi-center, multi-protocol epidemiologic research program involving blood that demonstrated relevant experience, we find no reason for the agency to have credited EMMES with this experience, given EMMES lack of explanation in its capability statement.[6]

The protester also argues that NIH unreasonably concluded that EMMES lacked qualified staff. In this regard, EMMES notes that NIH's acquisition plan states that the requirements for the DCC "cannot be defined in measurable terms or with measurable performance standards," and argues that it is not possible, without a specific work requirement, to determine whether EMMES staff lacks the necessary qualifications. EMMES also argues that, in any event, the firm identified [DELETED] as a resource for subject matter expertise, which NIH failed to acknowledge.

We find that the agency reasonably evaluated the protester's capability statement in this regard. Given that the agency is procuring a coordination center for blood related studies, we find nothing improper with the agency evaluating the small business's personnel for experience and expertise in this area. NIH found that EMMES did not describe or identify the type of expertise that [DELETED] would bring to the procurement. Contracting Officer's Statement at 2. In this regard, EMMES's capability statement merely contained a letter from [DELETED] stating that it was "excited about the potential opportunity to collaborate with EMMES," and that [DELETED] had "extensive experience and access to additional resources in all of the key areas necessary to support REDS III." See AR, Tab 6, Small Business Capability Statement, at 13. While the letter identified some specific studies

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was a series of clinical trials," and not epidemiologic studies. Given this, we find nothing improper with the agency's evaluation.

[6] EMMES asserts that the relevancy of this study was "too close at hand" for the agency to ignore, since the study was performed on behalf of the NHLBI. Protester's Comments at 12. Apart from the protester's general allegation, the record does not show that any of the agency staff involved with this procurement had any knowledge or experience with the protester's prior contract, which ended in 2006.

[DELETED] had been involved with, the letter did not identify the manner in which [DELETED] would provide expertise or experience here.

In short, we find nothing in the agency's actions or determination that was unreasonable or otherwise improper. See Belleville Shoe Mfg. Co. et al., B-287237 et al., May 17, 2001, 2001 CPD ¶ 87 (set-aside not required where record supports finding that firm had never produced boots of the type and quantity required under the solicitation); MCS Mgmt., Inc., B-285813, B-285882, Oct. 11, 2000, 2000 CPD ¶ 187 (set-aside not required where there is no indication that small business concerns could perform food service contracts of the scope and complexity required under the solicitation).

The protester also complains that the project officer, who was involved in the evaluation of the protester's and the other small business firm's capability statements, was a former employee of the incumbent large business who performed various REDS program functions, and argues that therefore the agency's capability assessment was not independently performed. Comments at 18. EMMES contends that "there is no evidence that NIH considered whether [the project officer] had any continuing financial or other personal ties to [the incumbent] prior to conducting this review." Id. at 21-22.

Contracting agencies, as a general matter, are responsible for reviewing potential conflicts of interest posed by relationships between evaluators and offerors in order to ensure impartiality in the evaluation and to preserve the integrity of the procurement process. Laerdal Med. Corp., B-297321, B-297321.2, Dec. 23, 2005, 2006 CPD ¶ 12 at 6-7; DRI/McGraw-Hill, B-261181, B-261181.2, Aug. 21, 1995, 95-2 CPD ¶ 76 at 3. Where, as here, a protester infers that agency officials are biased because of their past experiences or relationships, we focus on whether the individuals involved exerted improper influence in the procurement on behalf of the awardee, or against the protester. See George A. Fuller Co., B-247171.2, May 11, 1992, 92-1 CPD ¶ 433; Advanced Sys. Tech., Inc.; Eng'g and Prof. Servs., Inc., B-241530, B-241530.2; Feb. 12, 1991, 91-1 CPD ¶ 153 (no evidence of bias by evaluation panel member who was formerly employed by the awardee's subcontractor).

The record shows that the project officer was employed by the incumbent large business firm until 2006, when she became an employee of NIH. The project officer, however, did not work (either directly or indirectly) on any programs involving the incumbent firm for 12 months after joining the government. Affidavit of Project Officer at 1. In addition, the project officer divested herself of all financial interests in the incumbent firm, selling all her company shares and her stock appreciation rights. Also, with respect to her 401(k) retirement plan with the incumbent firm, she states that the firm stopped all contributions to the retirement plan when she left their employ, and her retirement plan is invested in general mutual funds "with no financial ties to" the incumbent firm. Id. at 2. EMMES arguments provide no basis to question NIH's assessment of the firm's capability statement. There is simply no

credible evidence in the record to support the protester's attribution of unfair or prejudicial motives to the project officer's review. A protester's claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Shinwha Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6.

The protest is denied.

Lynn H. Gibson
Acting General Counsel