



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Charlie Mike Prosthetics; Half Milers Rule, LLC

File: B-409389; B-409389.2

Date: March 10, 2014

Timothy L. Kinnard for Charlie Mike Prosthetics, and John Loosen for Half Milers Rule, LLC, the protesters.

David W. Altieri, Esq., Department of Veterans Affairs, for the agency.

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DIGEST

Protests that a solicitation issued by the Department of Veterans Affairs (VA) for artificial limbs, orthotic appliances, and related services must be set aside for service-disabled veteran-owned small businesses (SDVOSB) is denied where the agency's market research led it to conclude reasonably that there are not two or more SDVOSBs that could provide all of the agency's requirements, and where the procurement was consistent with specific statutory authority accorded the VA for the acquisition of prosthetic appliances and services.

DECISION

Charlie Mike Prosthetics, of Altadena, California, and Half Milers Rule, LLC, of Matawan, New Jersey, protest the terms of request for proposals (RFP) No. VA-528-13-R-0334, issued by the Department of Veterans Affairs for artificial limbs, orthotic appliances, and related services. The protesters contend that the RFP, which was issued as partial small business set-aside, should have been set aside for service-disabled, veteran-owned small businesses (SDVOSB).

We deny the protests.

BACKGROUND

The RFP contemplates the award of multiple indefinite-delivery, indefinite-quantity (ID/IQ) contracts for the fabrication and repair of artificial limbs and orthotic/pedorthic appliances for five designated VA medical centers in Veterans Integrated Service Network (VISN) 2 (located in upstate New York). Offerors were

informed that the solicitation set aside “[a]t least 80 [percent]” of the contracts awarded for small businesses. RFP Amend. 1, at 9.

Prior to issuing the solicitation, the agency conducted market research that included reviewing information from previous acquisitions of similar supplies and services; searches of online sources of information, such as the VetBiz¹ and the System for Award Management (SAM) websites; and coordination with government personnel regarding the commercial nature of the requirements. Agency Report (AR), Tab 2, Market Research Report, at 1. Reviewing this information, the agency’s contract specialist found that there was adequate interest from potential small business offerors to support at least a partial small business set-aside. She also found, however, that the small businesses could not meet all of the VA’s requirements, such as providing support in rural regions, and more complex types of artificial limbs.

With respect to SDVOSB concerns, the contract specialist found that there were SDVOSB and VOSB concerns within the VISN 2 region that had the ability to provide some, but not all, of the agency’s requirements. *Id.* at 1-2. Put differently, the agency’s market research did not identify any SDVOSB or VOSB that met all of the requirements here. For example, the VA’s market research report located only one VOSB-certified vendor under the appropriate NAICS code located in New York state;² only one VOSB-certified vendor for artificial limbs; and no SBVOSB/VOSB prosthetists or orthotists. AR, Tab 2, Market Research Report, at 1-2. The contracting officer notes that, of the 26 proposals that were submitted during the competition for the prior contracts for these goods and services, none was from an SDVOSB, and that no SDVOSB has submitted a proposal under procurements for these services over the past 10 years. Contracting Officer’s Statement at 1.

As a result of this market research, and given additional statutory authority related to the procurement of prosthetic appliances and related services at 38 U.S.C. § 8123, the contract specialist recommended that 80 percent of the awards under this multiple-award procurement should be set aside for small businesses. *Id.* at 4. This recommendation was approved by the VA’s VISN 2 director of contracting, VISN 2 network director, and its Office of Small and Disadvantaged Business

¹ VetBiz is the web portal maintained by the VA, which hosts the Vendor Information Pages (VIP) database of businesses approved to participate in VA’s veteran-owned small business program. *See* 38 C.F.R. § 74.1.

² The RFP requires the contractor to have staff at its location(s) serving the five medical centers, since a veteran would travel to the contractor’s facility for its prescribed appliance, all of which are located in upstate New York. RFP ¶ 3.6; Contracting Officer’s Statement at 2.

Utilization (OSDBU) representative. Contracting Officer's Statement at 1; AR, Tab 3, OSDBU Set-Aside Approval, at 1.

These protests followed the posting of the RFP on the FedBizOpps website.

DISCUSSION

The protesters contend that the RFP should have been set aside for SDVOSBs, citing the Veterans Benefits, Health Care and Information Technology Act of 2006, 38 U.S.C. § 8127, and VA's implementing regulations.³ The protesters argue that, had the agency issued a sources-sought notice, it would have discovered that at least two SDVOSBs were interested in competing.

The VA responds that, pursuant to the specific authority accorded the agency in 38 U.S.C. § 8123, it was not required to set aside a procurement of prosthetic appliances for SDVOSBs. AR at 3-4. Section 8123 of Title 38 provides:

The Secretary may procure prosthetic appliances and necessary services required in the fitting, supplying, and training and use of prosthetic appliances by purchase, manufacture, contract, or in such other manner as the Secretary may determine to be proper, without regard to any other provision of law.

38 U.S.C. § 8123. The VA asserts that the statute reflects the intent of Congress to give the VA as much flexibility as possible in procuring prosthetic appliances, which are uniquely sensitive and personal to the needs of the individual veteran.

The VA states that, moreover, while this specific authority exempts this procurement from any set-aside requirements, the VA's decision not to set-aside the procurement for SDVOSBs was also supported by the agency's conclusion that it did not have a reasonable expectation of receiving fair market offers from at least two SDVOSBs. AR, Tab 2, Market Research Report, at 1.

We agree with the VA that 38 U.S.C. § 8123 allows the agency to procure prosthetic appliances and services without considering whether to set aside the procurements for SDVOSBs. Although the protesters characterize the VA's citation to this authority as an "after-the-fact justification of its improper procurement planning," see

³ Under the Veterans Benefits, Health Care, and Information Technology Act of 2006 and the VA's implementing regulations, the VA is generally required to set aside acquisitions for SDVOSBs whenever it determines that there is a reasonable expectation that offers will be received from at least two SDVOSB firms and that award can be made at a fair and reasonable price. See 38 U.S.C. § 8127(d); VA Acquisition Regulation § 819.7005.

Comments at 3, the contemporaneous record contains numerous citations to this authority. See, e.g., RFP Amend. 1, at 5; AR, Tab 2, Market Research Report, at 4; AR, Tab 4, Pre-solicitation Notice, at 2. For the same reason, we also find no merit to the protester's contention that the VA violated VA Acquisition Regulation § 806.302-5 (directing the contracting officer to cite 38 U.S.C. § 8123 and 41 U.S.C. § 253(c)(5) as authority when awarding a contract for orthopedic and prosthetic appliances and related services without providing full and open competition).

In any event, the record indicates that the VA considered whether there was a reasonable expectation of receiving offers from at least two SDVOSBs for these requirements and concluded that there was not such a reasonable expectation. As stated above, the VA noted from its experience procuring these goods and services that it did not receive offers from any SDVOSBs over the past 10 years. Although the protesters disagree with the VA's judgment in this regard, they have not shown it to be unreasonable, or to violate applicable procurement laws or regulations.

The protests are denied.

Susan A. Poling
General Counsel