



## Decision

**Matter of:** Becton, Dickinson and Company

**File:** B-417854

**Date:** November 15, 2019

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### DIGEST

Protest challenging solicitation terms that apply Buy American Act requirements to quotations from small businesses instead of applying Trade Agreements Act (TAA) requirements, when the Small Business Administration has issued a waiver of the nonmanufacturer rule for the solicitation, is dismissed because acquisitions set aside for small businesses are excepted from the TAA.

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### DECISION

Becton, Dickinson and Company (BD) of Franklin Lakes, New Jersey, protests the terms of request for quotations (RFQ) No. 36C24C19Q0037, issued by the Department of Veterans Affairs (VA), to establish blanket purchase agreements (BPAs) for the procurement of medical supplies. The protester alleges that the solicitation improperly applies the Buy American Act (BAA), 41 U.S.C. §§ 8301-8305, instead of the Trade Agreements Act of 1979 (TAA), 19 U.S.C. §§ 2501-2582, to quotations from small business concerns (SBCs).

We dismiss the protest.

### BACKGROUND

The VA issued the RFQ on June 25, 2019. The solicitation seeks quotations to establish BPAs in support of the VA's Medical Surgical/Prime Vendor 2.0 Program to supply patient exam room instruments and supplies. Agency Report (AR), Tab 3, RFQ, at 5. The BPAs will be the mechanism to provide medical/surgical supplies to Veterans Health Administration facilities nationwide; facilities will order from the product list that

the BPAs will establish. Id. Vendors may propose supplies from their respective catalogues that fit within the scope of a product category provided in the RFQ. Id.

The RFQ, issued in accordance with Federal Acquisition Regulation (FAR) parts 12 and 13, and VA acquisition regulations, was assigned North American Industry Classification System (NAICS) code 339113, Surgical Appliance and Supplies Manufacturing. Id. at 1, 6, 12. The solicitation anticipates establishing multiple BPAs with a period of performance not to exceed 60 months. Id. at 5-6. The RFQ provides for establishment of BPAs with the responsible vendors whose quotations present the best value to the government considering technical and price factors. Id. at 32-33.

The solicitation provides for a total set-aside award based on a tiered evaluation method and modeled after the order of priority set forth in 38 U.S.C. § 8127; the tiered evaluation also includes large business concerns. RFQ at 32. In accordance with VA Procurement Policy Memorandum (PPM) 2018-04, Guidance and Procedures Regarding the Use of Tiered Evaluation (Cascading) for Use in Solicitations Set-Aside in Accordance with the VA Rule of Two (2018),<sup>1</sup> the tiers are:

- a. Service-Disabled Veteran-Owned Small Business ([SDVOSB]) concerns;
- b. Veteran-Owned Small Business (VOSB) concerns;
- c. Small Business concerns with Historically Under-utilized Business (HUB) Zone small business concerns and 8(a) participants having priority; and
- d. Large business concerns.

RFQ at 32; see generally AR, Tab 5, VA PPM 2018-04. Under this policy, the contracting officer evaluates the quotations, if any, from SDVOSBs, the first tier. AR, Tab 2, Contracting Officer's Statement (COS) at 1. If none is received or no quotations would result in an award with a fair and reasonable price, the contracting officer documents the reason for not making an award to an SDVOSB, amends the solicitation to remove the SDVOSB set-aside, and proceeds to evaluate quotations from the next tier below--VOSBs. Id.

The contracting officer continues in this fashion until an award can be made to the vendor whose quotation represents the best value to the government. Id. at 1-2. Quotations from lower tiers shall not be considered for award unless award cannot be made at a higher tier. AR, Tab 5, VA PPM 2018-04, at 3. If an award cannot be made, the solicitation will be cancelled and the requirement will be resolicited. RFQ at 32.

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<sup>1</sup> The purpose of the tiered evaluation process is to minimize delays incurred in resoliciting the requirement after applying the VA Rule of Two for service-disabled veteran-owned small business (SDVOSB) or veteran-owned small business (VOSB) concerns. AR, Tab 5, VA PPM 2018-04, at 1.

As a consequence of this tiered evaluation methodology, there are some clauses of the solicitation that do not apply to every offeror. Id. at 27. For example, as relevant here, the RFQ incorporates by reference both FAR clause 52.225-1, Buy American--Supplies, and FAR clause 52.225-5, Trade Agreements. RFQ at 22. The solicitation advises that clause 52.225-1 applies to tiers for SDVOSB, VOSB, and HUBZone and 8(a) businesses only, and that clause 52.225-5 applies to large business concerns only. RFQ at 27.

The solicitation also includes the Buy American Certificate (which applies where clause 52.225-1 is included in a solicitation) and the Trade Agreements Certificate (which applies where clause 52.225-5 is included). RFQ at 38-39, 41-42. The Buy American Certificate requires vendors to certify that each end product, except those listed, is a domestic product, and provides that the government will evaluate offers in accordance with FAR part 25. The TAA Certificate requires vendors to certify that each end product, except those listed, is a U.S.-made or designated country end product, and provides that the government will evaluate offers in accordance with FAR part 25. Of particular relevance to this protest, the TAA Certificate further provides as follows:

The Government will consider for award only offers of U.S.-made or designated country end products unless the Contracting Officer determines that there are no offers for such products or that the offers for such products are insufficient to fulfill the requirements of the solicitation.

RFQ at 42.<sup>2</sup>

The solicitation here also provides that a nonmanufacturer rule (NMR) waiver has been obtained for this RFQ from the Small Business Administration (SBA). RFQ at 12. The NMR provides that the quotation of a nonmanufacturer SBC can be considered for award, provided, among other things, that the SBC represents it will supply the product of a domestic small business manufacturer or processor. 15 U.S.C. § 637(a)(17); 13 C.F.R. § 121.406. When the SBA issues an NMR waiver, a small business can supply the product of any size business without regard to the place of manufacture. 13 C.F.R. § 121.406(b)(7); see also FAR § 19.502-2(c). The SBA is permitted to waive the NMR where it determines that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications or where no small business manufacturer or processor is available to participate in the procurement. 15 U.S.C. § 657s(a)(4).

The deadline for submitting quotations was August 20, 2019. On August 14, prior to the time set for receipt of quotations, BD filed this protest with our Office challenging the terms of the solicitation.

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<sup>2</sup> The solicitation also contains language essentially the same as the language above, from FAR provision 52.212-3(g)(5)(iii). RFQ at 11.

## DISCUSSION

The protester challenges the terms of the solicitation and asserts that the solicitation improperly includes clauses that apply the BAA instead of the TAA to quotations from SBCs.<sup>3</sup> Protest at 5-6. BD argues that where, as here, the NMR has been waived, application of the BAA to small businesses and the TAA to large businesses, results in unequal treatment because the TAA requires domestic or TAA-designated country end products, whereas the BAA permits SBCs to propose end products from non-TAA countries such as China, which are cheaper than products from TAA-designated countries. Protest at 6. BD also contends that the solicitation terms are inconsistent with 13 C.F.R. § 406(b)(7), which states that the SBA's waiver of the nonmanufacturer rule does not waive the requirements of the BAA and the TAA, both of which involve domestic end products.<sup>4</sup> Protest at 5.

The VA essentially argues that the solicitation terms are reasonable and that it has no discretion in applying the BAA and the TAA requirements in this acquisition.<sup>5</sup> MOL at 2-3.

The BAA and the TAA are implemented by FAR part 25.<sup>6</sup> The BAA, which applies to small business set-asides establishes, with certain exceptions, a preference that only domestic end products be acquired for public use. 41 U.S.C. § 8302; FAR §§ 25.101(b), 25.102, 25.103 (exceptions). The preference is implemented by adding, solely for evaluation purposes, a specified percentage premium to the price of foreign end products if there is an offer of a domestic end product that is not otherwise lowest-priced. FAR § 25.105(b); see generally FAR subpart 25, Evaluation Foreign Offers--Supplies (providing specific instructions for evaluating quotations including

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<sup>3</sup> It is undisputed that the TAA applies to quotations from large business concerns because the total value of the resulting orders will exceed the application of TAA dollar thresholds set forth in FAR § 25.402(b). Protest at 4 n.2; AR, Tab 1, Memorandum of Law (MOL), at 5.

<sup>4</sup> A “domestic end product” is “[a]n unmanufactured end product mined or produced in the United States;” “[a]n end product manufactured in the United States, if . . . [t]he cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components . . . or . . . [t]he end product is a [commercial-off-the-shelf] item.” FAR § 25.003.

<sup>5</sup> The agency asserted additional grounds for dismissal in its agency report. MOL at 3-8. Because we are dismissing on the basis explained below, we do not address these arguments.

<sup>6</sup> Subpart 25.1 of the FAR implements the BAA, 41 U.S.C. chapter 83, and FAR subpart 25.4 implements the TAA, 19 U.S.C. §§ 2501-2582.

foreign end products). For civilian agency procurements, the price adjustment is either 6 or 12 percent. FAR § 25.105(b).

In comparison, the TAA provides that eligible products from World Trade Organization Government Procurement Agreement countries, and other countries with which the U.S. has entered into Free Trade Agreements, are entitled to “nondiscriminatory treatment.” FAR § 25.403(a). For those eligible products, the President is authorized to and has waived the BAA. See 19 U.S.C. § 2511; Executive Order No. 12,260, 46 Fed. Reg. 1,653 (Dec. 30, 1980); FAR § 25.402(a)(1). In essence, the TAA treats eligible products from TAA-designated countries as if they were domestic end products. See 19 U.S.C. § 2511(a); FAR § 25.402(a)(1) (“Offers of eligible products receive equal consideration with domestic offers.”). In addition to providing for non-discriminatory treatment of eligible products from TAA-designated countries, the TAA requires the acquisition of “only U.S.-made or designated country end products or U.S. or designated country services, unless offers for such end products or services are either not received or are insufficient to fulfill the requirements.” FAR § 25.403(c). The TAA, however, does not permit the President to waive any small business or minority preference, 19 U.S.C. § 2511(f); thus, the TAA does not apply to “acquisitions set aside for small business.” FAR § 25.401(a)(1).

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Cybermedia Tech., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, our Bid Protest Regulations 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. 4 C.F.R. §§ 21.1(c)(4), (f). 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.

Here, the protester has failed to allege facts that, if uncontradicted, establish the likelihood that the VA violated applicable procurement laws or regulations. The procurement at issue here is set aside for SDVOSBs, VOSBs, and other SBCs, and quotations under these tiers must be evaluated before quotations from large business concerns can be considered. The FAR explicitly provides that the BAA applies to small business set-asides and that the TAA does not apply to acquisitions set aside for small businesses. FAR §§ 25.101(b), 25.401(a)(1). We therefore see nothing improper about the VA applying the BAA FAR clauses, and declining to apply the TAA FAR clauses, to quotations submitted by SBCs.<sup>7</sup>

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<sup>7</sup> To the extent that BD argues the VA has the discretion to waive BAA requirements and should have done so here, Comments at 3, it is well-established that the determination of whether to waive the BAA involves balancing competing policies to

(continued...)

We are also unpersuaded by BD's argument that the TAA should apply to SBCs that include supplies from non-TAA designated countries, i.e. foreign end products, when the nonmanufacturer rule has been waived because this is inconsistent with SBA regulation 13 C.F.R. § 121.406(b)(7). This regulation establishes that a "waiver of the nonmanufacturer rule means that the firm can supply the product of any size business without regard to the place of manufacture" and that "SBA's waiver of the nonmanufacturer rule has no effect on requirements external to the Small Business Act which involve domestic sources of supply, such as the [BAA] or the [TAA]." 13 C.F.R. § 121.406(b)(7). We do not find it inconsistent with the regulation that an SBC may submit foreign end products in accordance with the waiver of the nonmanufacturer rule when the BAA and the implementing regulations provide instructions for evaluating offers that include foreign end products.

The protest is dismissed.

Thomas H. Armstrong  
General Counsel

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determine what is in the public interest. Keuffel & Esser Co., B-193083, July 17, 1979, 79-2 CPD ¶ 35 at 2. The BAA and the FAR's implementing regulations clearly vest the discretion and authority to make waiver decisions in the head of the agency; accordingly, we will not review such determinations. SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30 at 5.