



## Decision

**Matter of:** MCI Diagnostic Center, LLC

**File:** B-417901.3

**Date:** March 25, 2020

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Kathleen Henderson, for the protester.  
Scott N. Flesch, Esq., Major Wayne T. Branom, Lieutenant Colonel Stephen M. Hernandez, and Robert B. Neill, Esq., Department of the Army, for the agency.  
Heather Self, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest challenging agency's decision not to set aside a procurement for small businesses is denied because the agency reasonably concluded from its market research that it did not have a reasonable expectation of receiving quotations from two or more small businesses at a fair market price.

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### DECISION

MCI Diagnostic Center, LLC, a service-disabled veteran-owned small business (SDVOSB) of Tulsa, Oklahoma, protests the terms of request for quotations (RFQ) No. W81K00-19-Q-0198, issued by the Department of the Army for blood donor testing services. MCI argues that the solicitation should have been set aside for small businesses.

We deny the protest.

### BACKGROUND

In June and July of 2019, the agency conducted market research to assess the availability of small business concerns to perform blood donor testing services at government blood donor facilities located at Fort Hood, Texas, and Fort Leonard Wood, Missouri. The agency's market research included, among other things, issuance of a sources sought notice to gauge the capability of small businesses to perform the blood donor testing requirements, as well as their interest in performing the work. Agency Report (AR), Tab 19, Market Research Memorandum, July 16, 2019; Tab 18, Small Business Administration (SBA) Market Search Records, June 10, 2019. In response to

the sources sought notice, the agency received two responses--one from a small business (MCI) and one from a large business. AR, Tab 19, Market Research Memorandum, July 16, 2019, at 1.<sup>1</sup> On July 24, 2019, based on the results of its market research, the agency issued the solicitation on an unrestricted basis. AR, Tab 3, RFQ, at 1. The solicitation contemplated issuance of a single fixed-price purchase order with a 1-year base period and four 1-year option periods to the lowest-priced technically acceptable vendor. Id. at 3-13, 22.

Following issuance of the RFQ, MCI contacted an SBA Procurement Center Representative to inquire why the RFQ had not been set aside for small businesses; MCI copied the agency on this communication. Protest, exh. H, E-mail from MCI to SBA, July 26, 2019, at 5-6. MCI represented that in addition to itself, it was “aware of other small businesses who responded” to the sources sought notice. Id. at 5. As a result of MCI’s inquiry, the agency discovered that a second small business--NEO Services, LLC--had submitted a response to the sources sought notice, but its response had been delayed within the agency’s information technology system. Contracting Officer’s Statement (COS), at 1.

After discovering the second response, the agency conducted additional market research and learned that MCI and NEO appeared to have the same owner or chief executive officer. COS at 1; AR, Tab 14, Internet Search Records for MCI and NEO, July 29, 2019, at 58, 120. The record reflects that MCI represented to SBA that it and NEO are “affiliated by co-ownership” and share the same “owner/CEO [Chief Executive Officer],” but indicated that the two firms had separate contract managers, with MCI’s manager located in Tulsa, Oklahoma and NEO’s located in Dallas, Texas. Protest, exh.H, email from MCI to SBA, Aug. 1, 2019, at 1. After learning of the affiliation between MCI and NEO, the SBA Procurement Center Representative advised MCI that the agency’s decision not to set aside the procurement was appropriate because the only two small business concerns identified by the market research are commonly owned. Protest, exh. J, E-mail from SBA to MCI, Aug. 5, 2019, at 4. The SBA Procurement Center Representative also advised MCI that the agency’s decision was consistent with a decision issued by our Office, AeroSage, LLC, B-414314, B-414314.2, May 5, 2017, 2017 CPD ¶ 137. Id. Following this communication, and prior to the August 26 time set for receipt of quotations, MCI protested the terms of the solicitation to our Office. See COS at 2; AR, Tab 4, RFQ amend. No. 1, at 2.

In response to MCI’s August protest, the agency submitted a notice of corrective action in which it committed to revising its market research and making a new set-aside determination. COS at 2. Based on the agency’s corrective action, we dismissed the protest as academic. Protest, exh. F, MCI Diagnostic Center, LLC, B-417901, Sept. 23, 2019 (unpublished decision). Following dismissal of MCI’s protest, the agency conducted additional market research, which included, among other things, coordination

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<sup>1</sup> This document, as well as others submitted by the parties, were included in the record without any pagination. Where appropriate, page citations to such documents have been added by our Office.

with the SBA Procurement Center Representative who noted that a contracting officer “may reasonably determine that the Rule of Two is not satisfied where only two co-owned firms would be expected to submit offers because of the lack of adequate price competition.” AR, Tab 11, Small Business Coordination Record, at Box 17.e.; see also Tab 8, Market Research Memorandum, Oct. 3, 2019; Tab 7, SBA Market Search Records, Nov. 19, 2019; Tab 9, Market Research Memorandum, Nov. 19, 2019.

Based on consideration of all the available market research information, the contracting officer decided not to set aside the agency’s blood donor testing requirements for small business concerns because the only small businesses from which he had a reasonable expectation of receiving quotations were the two co-owned firms--MCI and NEO. AR, Tab 10, CO Determination, at 1. The contracting officer was concerned that there would not be adequate price competition to ensure fair prices if the competition was limited to the two affiliated businesses. Id. The contracting officer noted that the two co-owned firms appeared to use the same phone number for business operations; they appeared to be located next door to one another, rather than one in Tulsa, Oklahoma and one in McKinney, Texas as represented by MCI and in the System for Award Management (SAM); there was not a record of NEO being a business in McKinney, Texas; and the same person had last updated both firms’ registrations in SAM. Id. at 1-2; see also AR, Tab 14, Internet Search Records for MCI and NEO, July 29, 2019, at 1-2, 57, 129, 132; Tab 8, Market Research Memorandum, Oct. 3, 2019, at 2.

On November 26, 2019, the agency re-issued the solicitation on an unrestricted basis. Prior to the time set for receipt of quotations, MCI again protested the terms of the solicitation to our Office, arguing that the solicitation must be set aside for small business concerns because there are at least two small business firms that are likely to submit quotations and to which award can be made at a fair price.

## DISCUSSION

In what is commonly referred to as the “Rule of Two,” the Federal Acquisition Regulation (FAR) requires an agency to set aside exclusively for small businesses a procurement with an anticipated dollar value above the simplified acquisition threshold when there is a reasonable expectation that: (1) offers, or, as here, quotations, will be received from at least two responsible small business concerns; and (2) award will be made at a fair market price. FAR § 19.502-2(b); Alpine Cos., Inc., B-416104.2, Aug. 23, 2018, 2018 CPD ¶ 289 at 4. An agency must undertake reasonable efforts to ascertain whether it is likely that it will receive offers, or, as here, quotations, from at least two responsible small businesses capable of performing the work in question. Id. 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. Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 4. Generally, we regard an agency’s set-aside determination as a matter of business judgment within the contracting officer’s discretion, which our Office will not disturb absent a showing that it was unreasonable. Id.; AeroSage, LLC, B-416381, Aug. 23, 2018, 2018 CPD ¶ 288 at 8.

MCI protests the agency's issuance of the solicitation on an unrestricted basis, and argues that the rule of two can be met because, based on its own and NEO's response to the sources sought notice. MCI argues that the rule of two also can be met here because of the inclusion of "approximately 81 SDVOSBs in the VETBIZ database, Vendor Information Page[s] (VIP)<sup>2</sup> that utilize the [solicitation's designated North American Industry Classification System (NAICS) code] 621511." With the inclusion of the vendors in the VETBIZ database, MCI contends the agency should have concluded it would receive quotations from at least two small businesses capable of performing the requirement. Protest at 5, 8.

MCI argues further that the agency also had a reasonable expectation of being able to make award at a fair market price. In this regard, MCI argues that although it and NEO are affiliated by ownership, and unlike the nature of the business relationship discussed in the AeroSage decision referenced by the SBA, "MCI and NEO are separately managed with different contract managers/principle negotiators responsible for developing and negotiating proposals." Id. at 6. MCI also contends that the agency's reliance on adequate competition as the method of determining the reasonableness of quotation prices is not required, and that the agency should use one of the other price analysis techniques set forth in FAR section 15.404-1(b)(2). Id. at 9. Finally, MCI argues that it and NEO establish their prices based on the "Center for Medicare and Medicaid (CMS) Clinical Laboratory Fee and Physician Fee Schedules" for Oklahoma and Texas, respectively, and that because the firms' prices "are set by the Government," prior to any discounts the firms provide, the prices should be considered fair. Id. For the reasons set forth below, we find no basis to sustain the protest.

With respect to the Rule of Two's first element--whether the agency had a reasonable expectation that it would receive quotations from at least two responsible small business concerns--we find that the agency reasonably concluded that MCI and NEO were the only two small business concerns that were likely to submit quotations in response to the RFQ. The record reflects that the agency posted a sources sought notice with a draft of the solicitation's performance work statement on the Federal Business Opportunities website (FBO)<sup>3</sup> from July 1-8, 2019, and that three responses were received--one from a large business and two from small businesses (MCI and NEO). AR, Tab 19, Market Research Memorandum, July 16, 2019, at 1; Tab 15, MCI

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<sup>2</sup> VetBiz is a web portal maintained by the Department of Veterans Affairs (VA) that hosts the VIP database of businesses approved to participate in the VA's veteran-owned small business program. See 38 C.F.R. § 74.1.

<sup>3</sup> At the time the agency posted its sources sought notice, the official public medium for providing notice of contracting actions by federal agencies was the FBO website, which was designated as the government-wide point of entry for procurements valued over \$25,000. FAR § 2.101 (July 1, 2019). The government-wide point of entry has since transitioned to the SAM. <https://beta.sam.gov/> ("This website has officially replaced FBO.gov.") (last visited Feb. 19, 2020).

Response to Sources Sought Notice; Tab 16, NEO Response to Sources Sought Notice; Tab 8, Market Research Memorandum, Oct. 3, 2019, at 1. In addition, the agency conducted multiple searches utilizing the SBA's online market search tool combining the solicitation's designated NAICS code--621511--and the keywords "blood donor testing" and "blood testing." AR, Tab 18, SBA Market Search Records, June 10, 2019, at 1-2; Tab 7, SBA Market Search Records, Nov. 19, 2019, at 1-2. The agency's search results showed eight small business firms potentially capable of meeting the solicitation's requirements.<sup>4</sup> AR, Tab 18, SBA Market Search Records, June 10, 2019, at 2-3; Tab 7, SBA Market Search Records, Nov. 19, 2019, at 2-3. The agency contacted each of the eight firms to inquire whether they could perform the needed blood donor testing services, and all eight said they could not. AR, Tab 8, Market Research Memorandum, Oct. 3, 2019, at 2-4; Tab 9, Market Research Memorandum, Nov. 19, 2019, at 1-2.

Notwithstanding MCI's assertion to the contrary, the agency was not required to utilize the VetBiz database as part of its market research. As discussed above, no particular method of assessing the availability of capable small businesses is required. Rochester Optical Mfg. Co., *supra*, at 4; CYIOS, Inc., B-402728.3, July 13, 2012, 2012 CPD ¶ 205 at 7. Measures such as prior procurement history, market surveys, and advice from the SBA may all constitute grounds for not setting aside a procurement for small businesses. Global Solutions Network, Inc., B-401230, June 26, 2009, 2009 CPD ¶ 133 at 3. Here, as detailed above, the agency undertook two types of market research--issuing a sources sought notice and conducting searches using the SBA's online market search tool--in addition to consulting with the SBA Procurement Center Representative, who concurred with the agency's recommendation to conduct the procurement on an unrestricted basis. Based on this record, we find reasonable the agency's efforts to ascertain whether it was likely to receive quotations from any small businesses other than the two co-owned firms MCI and NEO. *See* Global Solutions Network, Inc., *supra*, at 4 ; CYIOS, Inc., *supra*, at 3-5.

With respect to the Rule of Two's second element--whether the agency had a reasonable expectation that it would be able to make award at a fair market price--as noted above, the contracting officer concluded that the agency did not have such an expectation because the only two small businesses it found (MCI and NEO) were co-owned with close ties. The contracting officer concluded that a competition limited to these two affiliated businesses would potentially lack adequate price competition, thereby undermining the contracting officer's expectation of receiving fair prices.

In challenging the reasonableness of the agency's decision, MCI does not dispute the fact that it and NEO are co-owned, and therefore affiliated entities. Rather, MCI challenges as factually inaccurate the agency's research purporting to show multiple

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<sup>4</sup> MCI and NEO were not among the eight firms found by the agency in its searches using the SBA's online market search tool. *See* AR, Tab 18, SBA Market Search Records, June 10, 2019, at 1-2; Tab 7, SBA Market Search Records, Nov. 19, 2019, at 1-2; COS at 2.

ties other than co-ownership between it and NEO. MCI contends that the two firms have “separate corporate by-laws/organization and operating agreements,” separate organizational structures, a separate “Contract Manager/Principal Negotiator for business operations,” and have been assessed by the VA’s Center for Verification and Evaluation as “separate companies” both listed in the VetBiz VIP database. Protest at 6-7; see also Comments at 2. Based on our review of the record, we find unobjectionable the agency’s conclusion that it did not have a reasonable expectation of being able to make award at a fair price due to the firms’ co-ownership and other close ties.

The record reflects that the agency conducted extensive research<sup>5</sup> to ascertain whether receiving quotations from only the two co-owned firms MCI and NEO could produce adequate price competition to ensure award would be made at a fair price. Specifically, the agency reviewed both firms’s registrations in SAM; reviewed both firms’s medical provider identification records in the National Provider Identifier Registry maintained by CMS; reviewed information for both firms on the websites governmentcontracts.us, govtribe.com, opencorporates.com, pverify.com, npidb.org, and buzzfile.com; and searched Better Business Bureau records and state corporate registries. See AR, Tab 14, Internet Search Records for MCI and NEO, July 29, 2019; Tabs 22-23 and 25-28, Records of Various Internet Searches Conducted in July and Sept.-Oct. 2019. This research showed numerous ways in which these affiliated firms shared personnel and resources.

For example, the contracting officer reviewed the SAM registrations for the two firms and found that they list different addresses--MCI lists Tulsa, Oklahoma, and NEO lists McKinney, Texas. AR, Tab 14, Internet Search Records for MCI and NEO, July 29, 2019, at 1, 57. Nevertheless, the SAM registrations also show that the same individual made updates to both firms’ SAM entries. Id. This same individual was listed in SAM as having signed NEO’s representations and certifications as the firm’s senior operations manager. Id. at 65.

The contracting officer found that MCI’s SAM representations and certifications were signed by MCI’s chief operating officer (COO). AR, Tab 14, Internet Search Records for MCI and NEO, July 29, 2019, at 2. The record reflects that in the National Provider Identifier Registry, MCI’s COO is listed as the authorized official for MCI and as its director. AR, Tab 28, MCI Registry Report, at 4. The record further reflects that the National Provider Identifier Registry lists MCI’s COO as also being the authorized official and the COO for NEO. AR, Tab 14, Internet Search Records for MCI and NEO, July 29, 2019, at 129. Additionally, the record reflects that the National Provider Identifier Registry lists the same phone number for the shared authorized official for both firms as well as the same fax numbers for the firms’ business and mailing

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<sup>5</sup> When, as here, an agency conducts research into the corporate relationship between two co-owned entities as part of its set-aside determination, we will review the record only to determine whether the conclusions reached by the agency based on the research were reasonable.

addresses. AR, Tab 28, MCI Registry Report, at 3-4; Tab 14, Internet Search Records for MCI and NEO, July 29, 2019, at 128-129.

In addition to being listed as the authorized official for both MCI and NEO, the record reflects that the National Provider Identifier Registry lists MCI's COO as the authorized official and CEO for a sub-organization of NEO, Northeastern Oklahoma Physicians Group.<sup>6</sup> AR, Tab 26, Internet Search Records for NEO, Sept. 19, 2019, at 8. Further, while the National Provider Identifier Registry lists both NEO and Northeastern as having the same business address in McKinney, Texas, Northeastern's mailing address is listed as 7020 S. Utica Ave. in Tulsa, Oklahoma, which happens to be the address immediately adjacent to MCI's address. Id. at 7-8; AR, Tab 14, Internet Search Records for MCI and NEO, July 29, 2019, at 128-129. The record also reflects the same address link between the firms in Oklahoma's corporate registry. Specifically, the Oklahoma Secretary of State listed MCI and NEO as being located at 7018 and 7020 S. Utica Ave., Tulsa, Oklahoma, respectively. AR, Tab 23, State Incorporation Search Records, Oct. 1, 2019, at 1-2, 4-5.

Documents submitted by MCI as part of its protest filings also reveal the same close affiliation between MCI and NEO, and MCI admits that it shares resources, including key employees, with NEO. Comments at 3. For example, MCI submitted corporate operating agreements for itself and Northeastern (NEO's sub-organization), which show that both firms are incorporated in Oklahoma with their principal addresses at 7018 and 7020 S. Utica Ave. in Tulsa. Protester's Response to Request for Additional Documents, attach. 2, Operating Agreement of Mobile Cardiac Imaging, LLC, DBA: MCI Diagnostic Center, LLC, An Oklahoma Limited Liability Company, at 1; attach. 6, Operating Agreement of Northeastern Oklahoma Physicians Group, LLC, An Oklahoma Limited Liability Company, at 1. The operating agreements also establish that both firms have only two members who are the same for each firm. Id. at 23 and A-1. One member is listed as the corporate manager of each firm. Id. MCI represents that this individual is the CEO of both firms, MCI's COO is the director of operations and minority owner for both firms, and that the individual who updated the SAM entries for both MCI and NEO works as the senior operations manager for NEO while also working as a "shared resource" with MCI for operations matters. Protester's Response to Request for Additional Documents, attaches. 4.1 and 4.2.

In sum, the record supports the factual underpinnings of the contracting officer's conclusion that MCI and NEO, two co-owned companies, have close corporate ties

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<sup>6</sup> The record reflects that NEO Services, LLC is the parent organization of Northeastern Oklahoma Physicians Group and that the two entities share the same Dun & Bradstreet number (D&B). See AR, Tab 26, Internet Search Records for NEO, Sept. 19, 2019, at 11 (National Provider Identifier Registry listing NEO as the parent organization of Northeastern); Tab 14, Internet Search Records for MCI and NEO, July 29, 2019, at 57 (NEO's SAM registration listing its D&B number as 079772972); Protester's Response to Request for Additional Documents, attach. 12.2, Letter from VA to Northeastern, at 1 (listing Northeastern's D&B number as 079772972).

through shared personnel and resources, and that the close affiliation between these firms reasonably led the agency to conclude that the second element of the Rule of Two had not been met.

In addition to contesting the factual accuracy of the agency's conclusions, MCI cites several decisions of our Office for the proposition that the submission of two bids by affiliated firms does not violate the requirement for bidders to submit a certification of independent price determination, and that such submission is permissible when it is not prejudicial to the government's interests or done in an attempt to eliminate competition from other bidders. Protest at 7-8, citing Protimex Corp., B-204821, Mar. 16, 1982, 82-1 CPD ¶ 247; Atlantic Richfield Co., B-203607, Dec. 9, 1981, 81-2 CPD ¶ 453; Kepner Plastics Fabricators, Inc.; Harding Pollution Controls Corp., B-184451, B-184394, Jun. 1, 1976, 76-1 CPD ¶ 351; Grimaldi Plumbing & Heating Co., Inc., B-183642, May 20, 1975, 75-1 CPD ¶ 307; Informatics, Inc., B-181642, Feb. 28, 1975, 75-1 CPD ¶ 121; To David I. Abse, B-174449, Jan. 12, 1972, 51 Comp. Gen. 403; To the Secretary of Health, Education, and Welfare, B-142957, June 27, 1960, 39 Comp. Gen. 892; Comments at 3, citing Aarid Van Lines, Inc., B-206080, Feb. 4, 1982, 82-1 CPD ¶ 92.

The cited decisions are inapplicable because they involved invitations for bid (IFBs) that contained a requirement for bidders to submit a certification of independent price determination, and our analysis concerned whether or not the submission of multiple bids violated this requirement. Here, the solicitation does not contain a requirement for a certification of independent price determination.<sup>7</sup> More importantly, however, our Office found in those cases that the submission of multiple bids was not done in an attempt to limit competition from other bidders. In this case, MCI is, in essence, using the small business set-aside provisions to limit the competition to only two firms, MCI and its affiliate, NEO. Under these circumstances, we have no basis to question the contracting officer's concerns about limited price competition and the inability to reasonably expect to receive fair prices. See e.g., AeroSage, LLC, B-414314, B-414314.2, May 5, 2017, 2017 CPD ¶ 137 at 7 (agency reasonably concluded that rule of two was not met when the only two firms identified by market research shared common ownership, leading the agency to reasonably conclude that it could not expect to receive fair prices).

With respect to MCI's contention that the agency can and should use one of the price analysis techniques set forth in FAR section 15.404-1(b)(2) other than price competition to establish the reasonableness of quotation prices, we find the argument unavailing. MCI's reliance on the negotiated procurement procedures of FAR part 15 is misplaced,

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<sup>7</sup> MCI implies that it and NEO would submit certifications of independent price determination for the agency to use in determining that quoted prices are fair and reasonable. Protest at 9; Comments at 4. The firms' willingness to submit certifications that are neither required by the RFQ nor have been requested by the agency does not make applicable the rules related to IFB procurements in the decisions MCI cites to support its arguments.



as the procurement at issue here was conducted utilizing the simplified acquisition procedures of FAR part 13, including the price analysis requirements of FAR section 13.106-3. RFQ at 1. Further, by their terms, both sections 13.106 and 15.404 of the FAR apply when an agency is evaluating proposed prices received in response to a competition. See FAR §§ 13.106-3(a) (“[b]efore making award, the contracting officer must determine that the proposed price is fair and reasonable”) and 15.404-1(b) (“[p]rice analysis is the process of examining and evaluating a proposed price”). They have no application to the situation here, where an agency is conducting market research to assess the propriety of a set-aside decision.<sup>8</sup> Veteran Shredding, LLC, B-417399, June 4, 2019, 2019 CPD ¶ 210 at 4.

We also find unavailing MCI’s argument that it and NEO’s prices should be considered fair because the prices purportedly will be based on CMS fee schedules. See Protest at 9. The record does not reflect that either MCI or NEO represented an intention to be bound by these fee schedules in their responses to the sources sought notice. Nor has MCI cited to any provision of law or regulation that would require the firms to be bound by these fee schedules when responding to the agency’s solicitation. Rather, the information available to the agency at the time it made its set-aside decision was that MCI and NEO are two co-owned firms with close corporate ties through shared personnel and resources. Based on this information, the contracting officer reasonably was concerned about limited price competition and reasonably concluded that the agency did not have a reasonable expectation of receiving fair prices.

The protest is denied.

Thomas H. Armstrong  
General Counsel

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<sup>8</sup> This is not to say that the price evaluation techniques identified in these provisions cannot be used when an agency is assessing whether it expects to receive fair prices in response to a potential set-aside. We only reject the protester’s contention that the agency was bound to follow these provisions in this case.