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Decision

Matter of: RCG of North Carolina, LLC

File: B-419691

Date: June 24, 2021

Alan Grayson, Esq., for the protester.
Natica Chapman Neely, Esq., and Deborah K. Morrell, Esq., Department of Veterans Affairs, for the agency.
Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of short-term, sole-source awards to a service-disabled veteran-owned small business by the Department of Veterans Affairs is denied where the awards were properly made under the authority of the Veterans First Contracting Program.

DECISION

RCG of North Carolina, LLC, a service-disabled veteran-owned small business (SDVOSB), of Raeford, North Carolina, protests the award of three short-term, sole-source contracts to RAS Enterprise, LLC, also an SDVOSB, of Gulfport, Mississippi, by the Department of Veterans Affairs (VA), for medical grade bulk liquid oxygen and associated services. The protester alleges that the sole-source awards violate procurement law, and the agency should have competed the requirements amongst SDVOSBs.

We deny the protest.

BACKGROUND

The VA has a requirement for the provision of medical grade bulk liquid oxygen for medical facilities within its Veterans Integrated Service Networks (VISNs). Contracting Officer's Statement (COS) at 1. According to the agency, medical facilities performing procedures such as surgery or colonoscopy--where the patient is either unconscious or sedated short of unconsciousness--need supplemental oxygen to maintain metabolism and organ function. *Id.*, attach. 1, Mission Impact Statement at ¶ 4. Healthcare facilities use medical grade liquid oxygen, a concentrated pure form of oxygen without contaminants, to meet the patients' needs. *Id.* Because these procedures are

performed daily, medical facilities store a bulk form of this liquid oxygen in special containers--up to 20 feet in height and refilled regularly by special transportation trucks--as a reservoir for both planned and emergent procedures. *Id.* at ¶¶ 4, 6c.

The requirements that are the subject of this protest include two components: (1) the provision of medical grade bulk liquid oxygen; and (2) the provision of bulk liquid oxygen storage tank systems and backup tank systems, if the designated facilities do not have their own storage tank systems. Agency Report (AR), Memorandum of Law (MOL) at 2. Prior to 2020, the agency addressed its needs by issuing a single solicitation--covering multiple VISNs--and making awards to multiple SDVOSB firms. COS at 1. Under the prior solicitation, RAS was awarded contracts for VISNs 9, 15, and 16 in 2016.¹ *Id.*

In 2020, the agency decided that it would solicit and award a single indefinite-delivery, indefinite-quantity (IDIQ) contract for each VISN. *Id.* at 2. The contracting officer performed market research for the VISN 9, 15, and 16 requirements. *Id.* RAS was the only SDVOSB firm that responded to the sources sought notice published on the beta.SAM.gov website. *Id.* The contracting officer, therefore, believed that the VA “rule of two” could not be satisfied because the agency did not have a reasonable expectation that at least two capable SDVOSB concerns would submit offers for any of the three VISNs.² *Id.* As a result, the contracting officer concluded that awarding three contracts to RAS--the incumbent contractor for those VISNs--on a sole-source basis rather than competing them, was in the best interest of the government. *Id.*

On February 4, 2021, RCG filed a protest with our Office, challenging the agency’s award of the three contracts to RAS. MOL at 4. This protest was docketed as B-419571. In response to the protest, the agency advised that it would take corrective action by (1) terminating the three contracts; (2) reassessing the agency’s needs; and (3) performing additional market research. *Id.*; *RCG of North Carolina, LLC*, B-419571, Feb. 23, 2021 (unpublished decision). The VA also stated that it planned to award three short-term contracts on a sole-source basis to RAS, pursuant to its authority under section 8127(c) of the Veterans Benefits Act, for the medical grade bulk liquid oxygen

¹ These three VISNs include 19 healthcare systems, consisting of 30 medical facilities, located in the following states: Tennessee and Kentucky (VISN 9); Kansas, Missouri and Illinois (VISN 15); and Mississippi, Louisiana, Arkansas and Texas (VISN 16). COS at 1.

² The Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (hereafter, “Veterans Benefits Act”), requires the VA to set aside procurements for veteran-owned small businesses (VOSBs) or SDVOSBs, whenever it determines that there is a reasonable expectation that two or more offers will be received from VOSB or SDVOSB firms and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d). This has been referred to as the VA “rule of two.” *Esterhill Boat Serv. Corp.*, B-418356, B-418356.2, Mar. 20, 2020, 2020 CPD ¶ 109 at 2.

requirements in order to ensure that there was no delay or disruption to the provision of oxygen to the patients under VA's care in those three VISNs, pending the implementation of the corrective action. *Id.* On February 23, 2021, our Office dismissed the protest as academic. *Id.*

On March 3, RCG filed a protest with the agency, challenging the VA's intent to award the three short-term, sole-source contracts to RAS while corrective action was pending. COS at 2-3. The agency denied RCG's agency level protest on March 14. *Id.* at 3. That same day, the agency awarded to RAS three fixed-price short-term contracts for VISNs 9, 15, and 16. *Id.* Each contract had a three-month base period and two three-month option periods.³ MOL at 6. The contracting officer also posted, the same day, the justification and approval (J&A) for the sole-source awards on the beta.SAM.gov website.⁴ *Id.* This protest followed.

DISCUSSION

RCG argues that the sole-source awards are inconsistent with section 8127 of the Veterans Benefits Act and its implementing regulation, Veterans Affairs Acquisition Regulation (VAAR) section 819.7007. According to the protester, the agency's actions are unreasonable because there is no reason to favor a sole-source award over a competitive set-aside when both would result in an award to an SDVOSB and help the agency meet its SDVOSB goals. Protest at 7-12; Comments at 2-5. RCG also argues that the J&A does not comply with various requirements of the Competition in Contracting Act of 1984, as implemented by subpart 6.3 of the Federal Acquisition Regulation (FAR).⁵ Protest at 4-7 (*citing* 41 U.S.C. § 3304(e)); Comments at 5-12.

The VA asserts, contrary to RCG's arguments, there is nothing in section 8127 of the Veterans Benefits Act that requires a contracting officer to make award to an SDVOSB on a competitive basis, rather than on a sole-source basis, where the same objective (*i.e.*, award to an SDVOSB) will be met in either instance. MOL at 14. The VA argues that the contracting officer reasonably exercised her discretionary authority under the Veterans Benefits Act, and in accordance with the applicable VAAR provisions in awarding the short-term, sole-source contracts to RAS. *Id.* at 11-16. Finally, the

³ The estimated total value of the three contracts is \$1,069,814. MOL at 6 n.4.

⁴ The J&A documents for each of the three sole-source awards are functionally identical. AR, Exh. 14, J&A for VISN 9 Award; AR, Exh. 15, J&A for VISN 15 Award; and Exh. 16, J&A for VISN 16 Award. For ease of reference, we refer to the J&A in the singular form. Citations to the J&A for one award (*e.g.*, VISN 9) also applies to the J&A for the other two awards (*i.e.*, VISNs 15 and 16).

⁵ In filing and pursuing this protest, RCG has made arguments that are in addition to, or variations of, those discussed below. While we do not address every issue raised, we have considered all of the protester's arguments and conclude that none furnishes a basis on which to sustain the protest.

agency states that the J&A document included sufficient facts and rationale justifying the use of the authority cited and provided sufficient information addressing why, under the circumstances, it was impracticable for the contracting officer to conduct market research and solicit from other sources.⁶ *Id.* at 16-18.

Veterans First Contracting Program

The Veterans First Contracting Program, created by the Veterans Benefits Act, and implemented by sections 819.7004 and 819.7005 of the VAAR, provides the VA with independent authority to award contracts using other than full and open competition (including set-aside procurements and sole-source awards) in certain circumstances. VAAR §§ 819.7004, 819.7005; *Crosstown Courier Serv., Inc.*, B-405492, B-405493, Nov. 8, 2011, 2011 CPD ¶ 248 at 3; *Buy Rite Transport*, B-403729, B-403768, Oct. 15, 2010, 2010 CPD ¶ 245 at 2-3. With regard to setting aside procurements exclusively for VOSBs or SDVOSBs, the Veterans Benefits Act states:

(d) Use of Restricted Competition.--(1) **Except as provided** in paragraph (2) and **in subsections (b) and (c)**, for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the [VA] shall award contracts on the basis of competition restricted to [VOSBs] or [SDVOSBs] if the contracting officer has a reasonable expectation that two or more [VOSBs] or [SDVOSBs] will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d) (emphasis added).

Subsection (c), referred to in the above provision, provides the VA with authority to award sole-source contracts to SDVOSBs in the following instances:

(c) Sole Source Contracts for Contracts Above Simplified Acquisition Threshold.--Except as provided in subsection (d)(2), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the [VA] may award a contract to a small business concern owned and controlled by veterans with service-connected disabilities using procedures other than competitive procedures if--

(1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;

⁶ The agency overrode the stay of contract performance during the pendency of this protest under section 3553(d)(3)(C)(i)(II) of title 31 of the United States Code. Electronic Protest Docketing System No. 6, Notice of Stay Override.

- (2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41 but will not exceed \$5,000,000; and
- (3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(c).

Section 819.7007 of the VAAR, implements this provision of the statute, permitting a contracting officer to award contracts--not exceeding \$5 million (including options)--to SDVOSBs on a sole-source basis if: a justification is prepared and posted; the firm is determined to be a responsible contractor; and award can be made at a fair and reasonable price. VAAR § 819.7007(a).

Here, the VA awarded the short-term, sole-source contracts to RAS pursuant to the agency's authority under the Veterans Benefits Act. As emphasized above, the VA is required to set aside certain procurements "[e]xcept as provided . . . in subsections (b) and (c) . . ." 38 U.S.C. § 8127(d). Subsections (b) and (c) of the statute set forth the VA's authority under the Veterans First Contracting Program to award sole-source contracts to SDVOSBs. See 38 U.S.C. §§ 8127(b) and (c). Because the VA complied with the requirements of the statute and section 819.7007(a) of the VAAR, we find unobjectionable the VA's action in awarding the sole-source contracts to RAS--an eligible SDVOSB firm. Accordingly, the protester's assertion that the VA should have competed the procurements is without merit, because the requirement to set aside certain procurements only applies when the VA does not use its sole-source authority--as it did here--under the Veterans First Contracting Program. *Crosstown Courier Serv., Inc., supra* at 3-4.

Moreover, we find reasonable the agency's decision to use its statutory authority, under the circumstances, to award short-term, sole-source contracts for the uninterrupted supply of critical medical grade bulk liquid oxygen to the affected healthcare facilities. As contemplated by the Veterans First Contracting Program, "[t]he contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer[.]" and "[a] determination that only one SDVOSB concern is available to meet the requirement is not required." VAAR §§ 819.7007(b) and (c). The record here reveals that the agency's decision to award these short-term, sole-source contracts to RAS was in accordance with the applicable statutes and regulations. Specifically, prior to awarding the three short-term contracts to RAS, the contracting officer found the following: (1) that RAS was a responsible source with respect to performance of the requirements; (2) the anticipated award price of the individual contracts did not exceed \$5,000,000; and (3) the contract awards could be made at a fair and reasonable price offering best value to the United States. AR, Exhs. 11-13, Contracting Officer's Award Decisions for VISN 9, 15, and 16; AR, Exhs. 17-19, Responsibility Determination for Awards for VISN 9, 15, and 16.

Justification and Approval

Finally, with regard to the J&A issued for the sole-source awards, RCG's arguments--that the J&A issued for each of the sole-source awards fails to comply with statutory requirements--do not provide a basis to sustain the protest. Here, the J&A explains that each requirement is specifically for a short-term period in order to "bridge the gap in supply and associated services" while the agency fully implements its corrective action and a long term contract is awarded. AR, Exh. 14, J&A for VISN 9 Award at 6-7. The J&A elaborates that medical grade bulk liquid oxygen is critical to the care of veterans and any delay or interruption of supply would result in "a significant, dangerous interruption that will adversely affect all aspects of patient care and the agency's mission." AR, Exh. 14, J&A for VISN 9 Award at 6. The J&A document also states that the "[p]ending corrective action requires the agency to perform additional market research for medical grade bulk liquid oxygen to determine the acquisition approach that will best support the agency's requirements" for the affected VISNs. Section 3304(e) of the Competition in Contracting Act of 1984 (CICA) only requires that a justification for a noncompetitive award include "a description of the market survey conducted or a statement of the reasons a market survey was not conducted[.]" 41 U.S.C. § 3304(e)(2)(D). Although, the protester may not be satisfied with the agency's statement regarding its need to conduct further market research, the protester's disagreement provides no basis to sustain the protest.⁷

Similarly, CICA specifically provides that noncompetitive procedures may not be used as a result of a lack of advanced planning by contracting officials. 41 U.S.C. § 3304(e)(5)(A)(i). The protester argues that the agency's actions in awarding the short-term noncompetitive awards were due to the agency's lack of advanced planning. Here, the J&A explains that the short-term, sole-source contracts are necessary to allow the agency to implement corrective action in response to RCG's earlier protest challenging the agency's award of the long-term contracts. AR, Exh. 14, J&A for VISN 9 Award at 6-7. On this record, we find no basis to conclude that the need to award the short-term, sole-source contracts to RAS was the result of a lack of advanced planning. *Systems Integration & Mgmt., Inc.*, B-402785.2, Aug. 10, 2010, 2010 CPD ¶ 207 at 3 (explaining that our Office "do[es] not consider an immediate need for services that arises as a result of an agency's implementation of corrective action in

⁷ We note again that the protester never responded to the sources sought notice issued by the contracting officer when conducting market research for the long-term contract award in 2020. As a result, the contracting officer awarded the sole-source contracts to RAS, the only SDVOSB firm that replied to the notice. In response to the protest filed by RCG, the agency decided to take corrective action by terminating the awarded contracts. In order to ensure that the VA continued to receive the critical supply of oxygen, uninterrupted, the VA awarded the short-term interim contracts to RAS while it plans to implement the corrective action. The protester's failure to respond to the attempt to conduct market research cannot be used as a basis to conclude the research was inadequate.

response to a protest to be the result of a lack of advance planning”). We find no merit to RCG’s challenge to the agency’s J&A, and this allegation is denied.

The protest is denied.

Thomas H. Armstrong
General Counsel