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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

# Decision

**Matter of:** Eagle Home Medical Corporation--Costs

**File:** B-299821.3

**Date:** February 4, 2008

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Merilee D. Rosenberg, Esq., Department of Veterans Affairs, for the agency.  
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## DIGEST

Government Accountability Office recommends that the protester be reimbursed for the costs of filing and pursuing its protest, where the agency unduly delayed taking corrective action until after the submission of the agency report and the protester's comments, and the protest was clearly meritorious.

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## DECISION

Eagle Home Medical Corporation requests that we recommend that the firm be reimbursed the costs of filing and pursuing its protest challenging the terms of request for proposals (RFP) No. VA-247-RP-0037, issued by the Department of Veterans Affairs (VA) for supplies and services supporting the provision of oxygen to veterans being served by the VA Medical Center, Atlanta, Georgia. Eagle contended that the RFP should have been set aside exclusively for small business concerns.

We grant the request and recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest.

The RFP, issued on an unrestricted basis, provided for the award of a requirements contract to provide oxygen and rental oxygen equipment for a base year with 4 option years. In addition to the supply of oxygen and rental equipment, the contractor would provide a variety of services, including equipment delivery and set-up, patient education, re-supply, emergency services (for delivery of oxygen), and reporting. RFP, Statement of Work, at 11-24.

Eagle, a small business concern, protested that the RFP should have been set aside exclusively for small business concerns. Specifically, the protester argued that there

were more than 40 responsible small business firms in Georgia capable of satisfying the RFP requirements. In this regard, Eagle complained that the agency failed to perform any market research to establish whether or not there were two or more responsible small business concerns capable of performing these requirements.

Under Federal Acquisition Regulation (FAR) § 19.502-2(b), a procurement with an anticipated dollar value of more than \$100,000, such as this one, must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at a fair market price. Generally, a procurement set-aside determination in this context is a matter of business judgment within the contracting officer's discretion, which our Office will not disturb absent a showing that it was unreasonable. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53 at 2. However, an agency must undertake reasonable efforts to ascertain whether it is likely that it will receive offers from at least two small businesses capable of performing the contract work. FAR § 19.202-2(a); Information Ventures, Inc., B-294267, Oct. 8, 2004, 2004 CPD ¶ 205 at 3.

According to the VA, the RFP here was based upon the agency's "national template" for acquiring these services and supplies. While the VA previously set aside the services described in this template for exclusive small business participation, the United States Court of Federal Claims, in reviewing two other solicitations based upon the same template had found that the Small Business Act's "non-manufacturer rule" applied to those procurements and that the set-aside decisions of these solicitations based upon the belief that this rule did not apply were improper.<sup>1</sup> See Rotech Healthcare, Inc. v. United States, 71 Fed. Cl. 393, 424 (2006), appeal dismissed, No. 2006-5121 (Fed. Cir. 2006). The VA contended here that the contracting officer had conducted market research but found no small business concerns that could satisfy the "non-manufacturer rule." Therefore, the contracting officer concluded that the solicitation should not be set aside for small business concerns; this determination was provided to the VA's Office of Small and Disadvantaged Business Utilization (OSDBU), which concurred with the contracting officer's decision. VA Agency Report at 2; VA Second Supplemental Agency Report, Statement of VA's OSDBU Senior Procurement Analyst.

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<sup>1</sup> The Small Business Act's non-manufacturer rule provides that the offer of a non-manufacturer small business concern under a small business set-aside for "any procurement contract for the supply of a product" can be considered, provided, among other things, that the small business concern represents that it will supply the product of a domestic small business manufacturer or processor, or a waiver of this requirement is granted by the Small Business Administration (SBA). 15 U.S.C. § 637(a)(17) (2000). This rule is also included in the SBA's regulations. 13 C.F.R. § 121.406 (2007).

Eagle and the SBA<sup>2</sup> argued that, even if the non-manufacturer rule applies to the RFP, the VA's market research was inadequate.<sup>3</sup> In this regard, the SBA identified a number of small business manufacturers that it believes could provide the required supplies. See SBA Report, attach. 1, Dynamic Small Business Search (DSBS) Results.

Although the contracting officer in his report to our Office stated generally that he had searched for small business, section 8(a) small business, historically underutilized business zone small business, and service-disabled veteran-owned small business vendors that could satisfy the non-manufacturer rule and did not find any that would be able to perform the contract, there was little contemporaneous documentation or explanation from the agency describing the contracting officer's search. In this regard, the contracting officer only generally stated that he had identified a number of small business vendors in the Contractor Central Registration and contacted several vendors, but did not identify any of these vendors or state why he found that they could not satisfy the contract requirements or the non-manufacturer rule.

The SBA, however, identified what it described to be several "small business manufacturers that make the required supplies." See SBA Report at 9. In this vein, the protester provided an un rebutted affidavit of its president recounting a telephone conversation with the contracting officer, in which the president reported that he was informed by the contracting officer that the contracting officer was aware of small business vendors that could satisfy the non-manufacturer rule. Eagle's president also stated in this affidavit that he had called one of the small business vendors identified by the contracting officer and was informed by that firm that it had sent a letter to the contracting officer indicating that the firm was a small business and could satisfy the non-manufacturer rule. See Protester's Comments, exh. 2, Affidavit of Eagle's President, ¶ 5.

The VA provided no specific response to the SBA's or Eagle's statements, despite several requests by our Office that the VA address them. Instead, the VA provided the statement of its OSDBU senior procurement analyst, who stated in extremely general terms that the contracting officer had informed her that he had contacted several, unidentified vendors and concluded that those firms could not perform the contract. Not only did the agency not provide any documentation supporting this statement, but the contracting officer's own statement (which was provided at the

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<sup>2</sup> The SBA submitted a report in response to our request for its views on the procurement.

<sup>3</sup> Eagle and the SBA also disagreed that the non-manufacturer rule applies to the RFP, because, in their view, the RFP provides for the award of a services contract, although it includes the provision of supplies.

same time as that of the statement of the OSDDBU senior procurement analysis) did not even mention his market survey or any calls allegedly made to small business vendors. In this regard, the VA failed to address in any respect the protester's statement that the contracting officer had informed Eagle's president that he was aware of small businesses that could satisfy the non-manufacturer rule.

Subsequently, we scheduled a hearing to elicit testimony from the contracting officer and from a contracting officer in a related procurement that Eagle had also protested. Although the hearing was scheduled to occur in GAO's hearing room in Washington, D.C., at the VA's request we agreed to take the testimony of the two contracting officers by telephone. Prior to the hearing, the VA informed us that it would take corrective action in response to the protest; specifically, the VA stated that it would conduct new market research, including considering the potential offerors identified by the SBA, and determine whether there were small business concerns that could perform the RFP's requirements, although the VA generally asserted that the protest was not meritorious.

Based upon the agency's proposed corrective action, we dismissed the protest as academic on October 10, 2007. Thereafter, Eagle timely requested that we recommend reimbursement of its protest costs.

Where a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency reimburse the protester its protest costs, where based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 4 C.F.R. § 21.8(e) (2007); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. AVIATE L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 16.

In a one-page response to Eagle's request for reimbursement, the VA generally disputes that Eagle's protest was clearly meritorious or that its corrective action was unduly delayed. In this regard, the VA contends that "the brevity of time allotted to the two contracting officers to take care of their family and personal needs before departing for a hearing in this protest in Washington, D.C. made it impossible for either of them to appear" and that the "loss of the opportunity for a hearing harmed the VA's ability to prove it had done its research properly." VA's Response to Eagle's Request for Reimbursement.

We find that Eagle's protest was clearly meritorious and that the VA unduly delayed taking corrective action in the face of that protest. With respect to the merits of Eagle's protest, the contracting officer's judgment that there were not two or more small business manufacturers that could satisfy the RFP's requirements was unsupported by the contemporaneous record, and despite repeated requests from

our Office, the VA did not substantively respond to the evidence provided by the protester and the SBA that, on its face, showed that the VA's market research was inadequate. The record also does not support the VA's contention now that its inability to produce the contracting officers for a hearing in Washington, D.C. "harmed" its ability to defend itself in this protest. In fact, although the contracting officers were originally requested to attend a hearing in GAO's hearing room in Washington, D.C., prior to the October 10 hearing date we informed the parties that the contracting officers' testimony would be taken by telephone and transcribed by a court reporter.<sup>4</sup> See GAO's Amended Confirmation of Hearing, Oct. 5, 2007, at 1.

With respect to the promptness of the agency's corrective action under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. See Chant Eng'g Co., Inc.--Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4; Carl Zeiss, Inc.--Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274 at 4. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. See CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

Here, the VA's proposed corrective action came not only after the agency filed its report on the protest but after our repeated requests for information and that the VA address the protester's comments and the SBA's views that indicated that the contracting officer erred in concluding that there were no small business manufacturers that could satisfy the RFP's requirements. Under the circumstances, we conclude that the VA's corrective action was unduly delayed.

We recommend that Eagle be reimbursed the reasonable costs of filing and pursuing its protest. Eagle should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the VA within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Gary L. Kepplinger  
General Counsel

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<sup>4</sup> Ordinarily, we would not regard a protest as clearly meritorious where resolution of the protest required further record development such as a hearing to complete and clarify the record. See New England Radiation Therapy Mgmt. Servs., Inc.--Costs, B-297397.3, Feb. 2, 2006, 2006 CPD ¶ 30 at 4. However, where corrective action is taken by an agency after a hearing has been scheduled, we may still conclude that the protest is clearly meritorious, where, as here, that conclusion is otherwise established by the record. See The Salvation Army Cmty. Corrections Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 6 n.3; AAR Aircraft Servs.--Costs, supra, at 4.