

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Commonwealth Home Health Care, Inc.

File: B-400163

Date: July 24, 2008

Robert A. Giannini for the protester.

Harold W. Askins III, Esq., Department of Veterans Affairs, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly set aside procurement for small business concerns is denied where the agency performed market research and reasonably concluded that adequate small business competition could be expected.

DECISION

Commonwealth Home Health Care, Inc. protests the terms of request for proposals (RFP) No. VA-247-08-RP-0160, issued by the Department of Veterans Affairs (VA) for supplies and services supporting the provision of oxygen to veterans in Decatur, Georgia and the surrounding area. Commonwealth argues that the solicitation was improperly restricted to small business concerns and was improperly categorized as a “supply” contract, as opposed to a contract for “services.”

We deny the protest.

Commonwealth is the incumbent VA contractor providing home oxygen to veterans in the Decatur, Georgia area. The RFP provides 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 is to 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 13-25.

The VA states that it initially issued the RFP on an unrestricted basis. Subsequently, another firm filed a protest challenging the VA’s issuance on an unrestricted basis of a similar solicitation for home oxygen in the area of Atlanta, Georgia; that protest

prompted the VA to take corrective action in the form of conducting new market research to determine the potential for small business competition. See Eagle Home Medical Corp.--Costs, B-299821.3, Feb. 4, 2008, 2008 CPD ¶ 41. The contracting officer in this case then decided to conduct market research to gauge the potential for small business competition in the procurement at issue here, which included reviewing relevant small business databases, researching and contacting firms, and obtaining advice from the agency's Office of Small Disadvantaged Business Utilization. As a result of those efforts, the agency identified numerous small business firms which it believed were capable of meeting the solicitation requirements. The contracting officer subsequently re-issued the solicitation as a total small business set-aside, under NAICS Code 532291--Home oxygen equipment, with a size standard of \$6.6 million. The agency also designated the solicitation as one for supplies, as opposed to services, thereby invoking the Small Business Act's "non-manufacturer rule."¹ The record reflects that in making its set-aside determination, the agency specifically considered the impact of the non-manufacturer rule on the pool of potential small business competitors. Agency Report (AR), Tab 1, Contracting Officer's Statement; AR, Tab 4, Small Business Research.

Commonwealth filed its protest challenging the set-aside decision and designation of the requirements as "supplies" prior to the solicitation closing date of May 30, 2008. Subsequently, the agency received offers from six small business concerns in response to the solicitation.

Under Federal Acquisition Regulation (FAR) § 19.502-2(b), a procurement with an anticipated dollar value of more than \$100,000, such as the one here, 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. The use of any particular method of assessing the availability of small businesses is not required so long as the agency undertakes reasonable efforts to locate responsible small business competitors. National Linen Serv., B-285458, Aug. 22, 2000, 2000 CPD ¶ 138

¹ 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). Following the decision of the United States Court of Federal Claims in Rotech Healthcare, Inc. v. United States, 71 Fed. Cl. 393 (2006), the VA determined that the requirements at issue should be classified as supplies, which resulted in the application of the "non-manufacturer rule" to the solicitation.

at 2. The decision whether to set aside a procurement may be based on an analysis of factors such as the prior procurement history, the recommendations of appropriate small business specialists, and market surveys that include responses to sources sought announcements. SAB Co., B-283883, Jan. 20, 2000, 2000 CPD ¶ 58 at 1-2; PR Newswire, B-279216, Apr. 23, 1998, 98-1 CPD ¶ 118 at 2. Because a decision whether to set aside a procurement is a matter of business judgment within the contracting officer's discretion, our review generally is limited to ascertaining whether that official abused his or her discretion. Admiral Towing and Barge Co., B-291849, B-291849.2, Mar. 6, 2003, 2003 CPD ¶ 164 at 3-4. We will not question a small business set-aside determination where the record shows that the evidence before the contracting officer was adequate to support the reasonableness of the conclusion that small business competition reasonably could be expected. National Linen Serv., *supra*, at 2.

Here, the protester questions the accuracy and reliability of the agency's market research and opines that it is simply not possible for a small business concern meeting the designated size standard to perform the contract from a financial or operational standpoint. Protester's Comments at 2. The record, however, establishes that the agency did in fact conduct adequate market research to determine whether it was reasonable to set aside the requirement for small business concerns, and, based upon the results of this research, reasonably determined that it could expect small business competition.² While the protester argues that the set-aside determination was unreasonable because it does not believe that a small business is capable of performing the work, this argument reflects nothing more than the protester's disagreement with the agency's judgment regarding the viability of a set-aside, which does not establish a basis for our Office to question the agency's determination. IBV, Ltd., B-311244, Feb. 21, 2008, 2008 CPD ¶ 47 at 2.

The protester also challenges the agency's decision to classify the solicitation as one for supplies as opposed to services. However, given our conclusion that the procurement was properly set aside for small business concerns, the protester is not

² In this regard, we note that the agency's conclusions regarding the potential for obtaining competitive proposals from small businesses appear to have been validated by the fact that it received offers from six small business firms in response to the solicitation.

eligible to compete under the RFP, and therefore is not an interested party to raise this issue.³ See Bid Protest Regulations, 4 C.F.R. §§ 21.0(a), 21.1(a) (2008).

The protest is denied.

Gary L. Kepplinger
General Counsel

³ The protester does not argue that changing the classification of the solicitation from supplies to services would have reduced the pool of eligible small business firms and thereby affected the agency's set-aside determination. Rather, the protester suggests just the opposite, that by categorizing the requirement as "supplies"—and thereby triggering application of the SBA's non-manufacturer rule—it is more difficult for small business concerns to perform the work.