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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Encompass Group LLC

File: B-296602; B-296617

Date: August 10, 2005

H. K. Tyler, Jr., for the protester.

Maura C. Brown, Esq., Department of Veterans Affairs, and Laura Mann Eyester, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies. Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitations for linens and blankets should not be set aside for small business concerns because there are no small business manufacturers of bulk fabric from which the linens and blankets will be made is denied, where agency found from its market research two or more small business concerns that could provide the linens and blankets manufactured by small businesses and provided at fair market prices.

DECISION

Encompass Group LLC protests the terms of request for proposals (RFP) Nos. 797-NC-05-0044 and 797-NC-05-0045, issued by the Department of Veterans Affairs for linen and blankets.

We deny the protests.

The RFPs were each issued as a total small business set-aside under a combined synopsis/solicitation for commercial items in accordance with Federal Acquisition Regulation (FAR) Part 12.6.¹ Offerors were informed that North American Industry Classification System (NAICS) code 314129 (a small business size standard of 500 employees) applied to each procurement. In addition, offerors were warned that if they were not the manufacturer of the product, the end product provided must be

¹ FAR Part 12.6 provides streamlined procedures for the evaluation and solicitation of commercial items.

manufactured in the United States by a small business manufacturer.² See, e.g., RFP-0044 at 2.

Each solicitation provided for the award of a single indefinite-delivery, indefinite-quantity contract: RFP-0044 for sheets, pillow cases and operating room linen, and RFP-0045 for general purpose blankets. Offerors were informed that the basis for award would be the lowest-priced, technically acceptable offer, and that offers would be evaluated under the following criteria: technical acceptability, price, and past performance.

Encompass, which does not satisfy the small business standard applied to these procurements, first protests that the RFPs should not be set aside for small business concerns, because there are no small business manufacturers for the supplies sought and therefore VA will not receive offers from any qualified small business concerns under the RFPs.

An acquisition with an anticipated dollar value of more than \$100,000 must be set aside for small business concerns if the agency determines that there is a reasonable expectation that offers will be received from two or more responsible small business concerns, and that award will be made at a fair market price.³ FAR § 19.502-2(b). Generally, our Office regards such a determination as a matter of business judgment within the agency's discretion, which we will not disturb absent a clear showing that it has been abused. White Storage & Retrieval Sys., Inc., B-256952, July 20, 1994, 94-2 CPD ¶ 35 at 2-3.

² Under the Small Business Administration's (SBA) "nonmanufacturer" rule, the manufacturer of the end item being acquired is defined to be

the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired. The end item must possess characteristics which, as a result of mechanical, chemical or human action, it did not possess before the original substances, parts or components were assembled or transformed.

13 C.F.R. § 121.406(b)(2) (2005).

³ VA estimates that the acquisitions protested here are in excess of \$100,000. See Agency Report (AR) (B-296602), Tab 3, VA Bundling Review (including market research) at 1; AR (B-296617), Tab 3, VA Bundling Review (including market research), at 1.

Here, VA determined from its market research that it could expect to receive offers from two or more responsible small businesses at a fair and reasonable price.⁴ For both procurements, VA identified potential small business sources by reviewing past performance history within the agency and identifying potential small business sources from the General Services Administration's (GSA) Federal Supply Schedule (FSS). Potential small business sources were contacted and interviewed from which it was verified that some had manufacturing capability. In addition, VA consulted a variety of other databases and sources, including the Contractor's Central Registration, SBA's Dynamic Small Business Search (formerly called PRO-Net), and VA's National Acquisition Center's database. See Contracting Officer's Statement (B-296602) at 1; AR (B-296602), Tab 3, VA Bundling Review (including market research); Tab 4, Past Procurement History and Preliminary List of FSS Vendors; and Contracting Officer's Statement (B-296617) at 1; AR (B-296617), Tab 3, VA Bundling Review (including market research), and Tab 4, Past Procurement History and Preliminary List of FSS Vendors.

With respect to the solicitation for sheets, pillow cases and operating room linen, VA found that 10 "capable small businesses possess GSA schedules" for the solicited supplies and validated these small businesses' manufacturing capability from the Dunn & Bradstreet reports. The agency concluded that it could expect to receive 10 to 15 qualified proposals from small businesses. VA also concluded from its review of the contract prices of small business vendors on GSA's FSS schedules that VA would be offered fair market prices. Contracting Officer's Statement (B-296602) at 2.

With respect to the solicitation for general purpose blankets, VA found 33 small business vendors for blankets on the FSS schedules and two or more small business manufacturers. The agency concluded that it could expect to receive two or more qualified proposals from small businesses. VA also concluded from its review of the contract prices of small business vendors on GSA's FSS schedules that VA would be offered fair market prices. Contracting Officer's Statement (B-296617) at 2.

Encompass argues that VA's market research is inadequate because it merely lists organizations that sell the solicited supplies, but "does not address who provides the products, the country of origin of these products, does not ask for the size of the manufacturer that provides these products to distributors." Comments (B-296602, B-296617) at 1. In this regard, Encompass complains that a small business set-aside for the solicited supplies is not possible because bulk fabric is only manufactured by large mills and that the bulk fabric comprises the greatest value of the end product. See Protest (B-296602) at 3, 4, 7.

⁴ In its report to our Office, SBA agrees that VA's market research was adequate and that VA reasonably set these solicitations aside for small business concerns.

We find that Encompass's arguments do not demonstrate that VA's judgment that the agency would receive two or more offers from responsible small business concerns at a fair market price was unreasonable. That is, even accepting the protester's argument that bulk fabric can only be obtained from large businesses, a small business concern would not necessarily be unable to satisfy the "nonmanufacturer" rule simply because the small business firm obtains bulk fabric from a large business. This is so because VA is not purchasing bulk fabric, but finished goods, which require the transformation of the bulk fabric. As noted above, SBA's regulations provide that the manufacturer of an end item "is the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired." 13 C.F.R. § 121.406(b)(2). Under this rule, a firm that transforms the bulk fabric into end items such as sheets, pillow cases or blankets could qualify as a manufacturer of the end items despite the origin of the bulk fabric. Accordingly, we find that Encompass's argument that there are no small business manufacturers of the bulk fabric does not show that the agency was unreasonable in concluding that it would obtain two or more offers from small business manufacturers of the sheets, pillow cases and blankets.

Encompass also challenges a number of other aspects of the RFPs, arguing that various solicitation terms are either vague, inadequate or restrictive and that VA assigned the wrong NAICS code. With respect to the assignment of NAICS code 314129 to these solicitations, challenges to the selected standard industrial classification are heard solely by the SBA, and are not reviewed by GAO.⁵ 4 C.F.R. § 21.5(b)(1) (2005). With respect to the protester's remaining challenges to the solicitations, Encompass is not an interested party, because Encompass would

⁵ SBA reports that Encompass did challenge VA's selection of NAICS code in these solicitations and that its appeal to SBA's Office of Hearings and Appeals was denied. SBA Report at 6 n.3.

not qualify as a small business concern under these solicitations and therefore is not a prospective offeror under these RFPs eligible to protest them.⁶ 4 C.F.R. §§ 21.0(a), 21.1(a).

The protests are denied.

Anthony H. Gamboa
General Counsel

⁶ Encompass also complains that VA improperly bundled various items into one solicitation, which Encompass argues will deter “business from potentially other suppliers who may only have certain items available.” See, e.g., Comments (B-296602) at 2. Encompass “suggests” that VA’s purchase of each and every item being solicited should be the subject of full and open competition. Because Encompass does not qualify as a small business concern under these RFPs, it is not an interested party to challenge this aspect of the solicitations. Moreover, Encompass does not assert that it would be unable to compete for these “bundled” requirements if the solicitations were not set aside for small business competition. That is, while the set-aside nature of the procurements is apparently preventing Encompass from competing, it is not clear that their allegedly bundled nature, alone, would impede Encompass’s ability to compete.