



## Decision

**Matter of:** Buy Rite Transport

**File:** B-403729; B-403768

**Date:** October 15, 2010

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Kenneth E. Jenkins, Jr. for the protester.  
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GAO, participated in the preparation of the decision.

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### DIGEST

Protest that solicitations should have been set aside for veteran-owned small businesses instead of service-disabled veteran-owned small businesses is denied where the agency reasonably determined, through a search of the Vetbiz database using the correct North American Industry Classification System code, the existence of significant numbers of potential offerors, and where under the prior solicitation the agency received more than two offers from service-disabled veteran-owned small businesses.

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### DECISION

Buy Rite Transport, of Manteca, California, protests the Department of Veterans Affairs's (VA) decision to set aside exclusively for service-disabled veteran-owned small businesses (SDVOSB) request for proposals (RFP) Nos. VA-261-10-RP-0301 and VA-261-10-RP-0282 for laboratory specimen courier services.

We deny the protests.

### BACKGROUND

The agency's requirements for laboratory specimen courier services was originally issued under solicitation No. VA-261-10-RP-0178 as a veteran-owned small business (VOSB) set-aside for the transportation of laboratory specimens between various locations within the VA Palo Alto Health Care System in California. Agency Report (AR) at 2. The VA's pre-solicitation notice for the procurement identified North

American Industry Classification System (NAICS) code 485310, the classification code for taxi services.<sup>1</sup> See VA-261-10-RP-0178 Presolicitation Notice. The solicitation was issued, however, under NAICS code 492110, the classification code for Couriers and Express Delivery Services. See RFP No. -0178 Solicitation Notice.

On July 20, Crosstown Courier Service, Inc., protested to our Office arguing that the solicitation should be set aside for SDVOSB firms. In response, the VA advised our Office that it would take corrective action, and we dismissed the protest as academic.<sup>2</sup>

The VA conducted research using Vetbiz, VA's online database of businesses eligible to participate in its SDVOSB program. AR, Tab 10, Declaration of Contracting Officer, Sept. 24, 2010. By searching under NAICS code 492110, couriers and express delivery services, the VA found over 100 SDVOSB firms nationwide.<sup>3</sup> *Id.* In addition, the contracting officer noted that the VA received four offers from SDVOSB firms in response to RFP No. -0178. *Id.*, Tab 14, Memorandum to File, Aug. 9, 2010.

The VA subsequently divided its requirements into two separate solicitations, both of which were set aside for SDVOSB firms under NAICS code 492110. AR at 3. Specifically, on August 13, the VA issued RFP No. -0301 for transportation of laboratory specimens among the Livermore, Modesto, Sonora, and Stockton VA facilities. *Id.*, Tab 12, at 1, 2. On August 20, the VA issued RFP No. -0282 for transportation of laboratory specimens among the Fremont, Livermore, Monterey, Palo Alto, and San Jose VA facilities. *Id.*, Tab 11, at 1, 2. Buy Rite, a VOSB firm, protests the VA's determination to set aside these solicitations for SVOSB firms.

## DISCUSSION

The Veterans First Contracting Program, created by the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. § 8127, and implemented by Veterans Affairs Acquisition Regulation (VAAR) §§ 819.7004, 819.7005, provides the

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<sup>1</sup> The NAICS code scheme is used by the federal government to identify and classify specific categories of business activity that represents the lines of business a firm conducts. See Federal Acquisition Regulation (FAR) § 19.102; Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 2 n.2.

<sup>2</sup> See Crosstown Courier Serv. Inc., B-403360, July 29, 2010.

<sup>3</sup> The VA did not provide us with contemporaneous records of its Vetbiz searches. Rather, the agency provided documentation of a search in the Vetbiz website (which showed over 100 SDVOSB firms under NAICS code 492110) that the VA conducted after the protests were filed. See AR, Tab 9, Vetbiz Search Results, Sept. 21, 2010. Our own search of Vetbiz confirms the existence of numerous SDVOSB firms under this NAICS code.

VA with independent authority to set aside contracts for SDVOSB and VOSB firms. See Apex Ltd., Inc., B-402163, Jan. 21, 2010, 2010 CPD ¶ 35 at 2. The Program provides that SDVOSB firms receive first priority for VA contract awards, and that VOSB firms receive second priority. 38 U.S.C. § 8127(i); VAAR § 819.7004. Further, under the Program, acquisitions must be set aside for SDVOSB firms if the VA determines that there is a reasonable expectation that offers will be received by at least two SDVOSB firms and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d); VAAR § 819.7005. Generally, a procurement set-aside determination is a business judgment within the contracting officer's discretion, which we will not disturb absent a showing that it was unreasonable. Eagle Home Med. Corp.--Costs, B-299821.3, Feb. 4, 2008, 2008 CPD ¶ 41 at 2. Here, Buy Rite does not show that the VA unreasonably determined that it would receive offers from two or more SDVOSB firms at fair and reasonable prices.

The VA explains that, in preparation for the initial solicitation, it conducted its initial search for SDVOSB firms using the wrong search term, and found no SDVOSB firms listed. AR at 2. The VA states that after Crosstown Courier protested to our Office, the agency recognized its error and conducted another search in its Vetbiz database under the appropriate NAICS code, 492110, couriers and express delivery services, and found over 100 SDVOSB firms listed. Id. The VA reissued the requirements as SDVOSB set-asides. Id. at 3. In addition, the contracting officer points out that it had received four offers from SDVOSB firms under the initial procurement. Id., Tab 14, Memorandum to File, Aug. 9, 2010.

Buy Rite disputes many of the factual details of the VA's statement of explanation about why it reissued the requirements as SDVOSB set-asides. For example, Buy Rite points out that the VA stated that their initial search term was "taxi services" but the documentation it provided concerning its searches does not include the term. Comments at 2. Buy Rite is correct; the documentation provided by the VA shows that the VA used the NAICS code for taxi services in its search, not the actual words "taxi services." Buy Rite also contends that the timing of the various searches that the VA states that it performed do not correspond with the documentation the VA provided to support its explanation. Id. Again, Buy Rite is correct. Nonetheless, even though the agency's after-the-fact explanation contains factual inaccuracies, we will not disturb a set-aside decision when subsequent events justify the decision. See York Int'l Corp., B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282 at 7. Regardless of the precise date when the VA conducted its search, the search results provided a reasonable basis for the VA to conclude that it would receive at least two offers from SDVOSB firms. In addition, we performed our own search to confirm the accuracy of the VA's results. Moreover, the receipt of four offers from SDVOSB firms in

response to the original RFP further confirms the VA's decision to set aside the requirements.<sup>4</sup>

Buy Rite also argues that the VA's determination is unreasonable because no California-based SDVOSB firms meet the RFP requirements. In this regard, Buy Rite appears to argue that the VA should have limited its search to SDVOSB firms located in California, as the VA did in its original search. Comments at 3. However, Buy Rite has not identified any provision in the solicitation or in any statute or regulation--nor are we aware of any--that would require such a limitation. Nor has Buy Rite explained why a firm with an address outside of California would be unable to perform these requirements. Moreover, the question of whether a company--wherever located--is capable of performing the contract is a matter of responsibility, which we generally will not consider. 4 C.F.R. § 21.5(c) (2010); see Marinette Marine Corp., B-400697, et al., Jan. 12, 2009, 2009 CPD ¶ 16 at 23.

In sum, we conclude that the VA's decision to set aside these procurements for SDVOSB firms was reasonable, considering its search of the Vetbiz database, and its receipt of four offers from SDVOSB firms in response to the prior solicitation, which was set aside for VOSB firms.

The protests are denied.

Lynn H. Gibson  
Acting General Counsel

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<sup>4</sup> The other factual inaccuracies identified by Buy Rite also do not affect the decision to set aside the solicitation for SDVOSB firms.