

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

Decision

Matter of: Phoenix Environmental Design Inc.

File: B-407104

Date: October 26, 2012

C. Chad Gill for the protester.

Peter Kraemer, Esq., Department of Veterans Affairs, for the agency.

Gary R. Allen, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the Department of Veterans Affairs (VA) violated the Veterans Benefits, Health Care, and Information Technology Act of 2006, and its implementing regulations when the VA issued an order to a small business concern, is sustained where the VA was aware of service-disabled veteran-owned small business (SDVOSB) concerns that appeared capable of performing the order, and the agency did not determine that it could not expect to receive two or more quotations from SDVOSB concerns at fair and reasonable prices.

DECISION

Phoenix Environmental Design Inc., of Plankinton, South Dakota, a service-disabled veteran-owned small business (SDVOSB) concern, protests the issuance of purchase order No. VA78612P5101 to Golf Enviro Systems, Inc., of Colorado Springs, Colorado, a small business concern, by the Department of Veterans Affairs (VA) for the supply of bagged fertilizer for the Santa Fe National Cemetery, New Mexico. The protester complains that the agency's issuance of the order to a small business concern violates the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127–28 (2006) (the VA Act), and the agency's implementing regulations.

We sustain the protest.

BACKGROUND

On July 11, 2012, the agency's purchasing agent received a request from the administrator of the Santa Fe National Cemetery for a specific blend of fertilizer,

which had an estimated value of \$4,382. Agency Report (AR) at 2. Given the small dollar value of the acquisition, the purchasing agent decided to acquire the fertilizer using the simplified acquisition procedures of Federal Acquisition Regulation (FAR) Part 13. The purchasing agent searched VA's VetBiz database, www.vetbiz.gov, for possible vendors under North American Industry Classification System (NAICS) Code 424910, Farm Supplies Merchant Wholesalers. Statement of Purchasing Agent at 1. She found 16 SDVOSB concerns, including Phoenix, none of which were located in New Mexico.¹ AR, Tab 2, Vendor Information Page.² The purchasing agent contacted three vendors, but not Phoenix, via email seeking quotations by July 25. Statement of Purchasing Agent at 2-3. Two of the vendors did not submit quotations, and the third submitted a quotation for a different fertilizer mix. Id. at 2.

Also on July 25, the purchasing agent contacted Phoenix via email to request a quotation for fertilizer for the Fort Leavenworth and Fort Scott National Cemeteries in Kansas. Phoenix was previously issued an order on September 12, 2011, for fertilizer for these cemeteries, by the same purchasing agent. Phoenix was not informed of the agency's acquisition for the Santa Fe National Cemetery.

The purchasing agent contacted the director of the Santa Fe National Cemetery concerning the one quotation the purchasing agent received, but the director stated that the fertilizer mix would not meet the cemetery's needs. Rather than continue to try to find two or more SDVOSB concerns, the purchasing agent issued the order to Golf Enviro, a small business concern. Statement of Purchasing Agent at 2.

This protest followed. Performance of the order has been stayed, pending our resolution of the protest.

DISCUSSION

Phoenix complains that the agency issued the purchase order to a small business concern, where there are two or more SDVOSB concerns that could provide the fertilizer to the agency, and without soliciting the protester despite the fact that the very purchasing agent involved knew of Phoenix's interest in fertilizer acquisitions.

As an initial matter, the VA argues that Phoenix is not an interested party, because it did not submit a quotation. We disagree that Phoenix is not an interested party to

¹ The purchasing agent also searched for veteran-owned small business concerns under NAICS Code 424910, but found none. Statement of Purchasing Agent at 2.

² VA only provided one of the two pages of this document, which showed six SDVOSB concerns, including Phoenix, and another four concerns that were undergoing SDVOSB reverification.

challenge the agency's actions. Under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551- 56 (2006) and our Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1) (2012), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Here, Phoenix is challenging the agency's failure to solicit Phoenix for the order, and the agency's improper issuance of the order to a small business concern where there were other SDVOSB concerns, including Phoenix, that could satisfy this requirement. Under these circumstances, Phoenix is a prospective offeror whose direct economic interest is affected by the issuance of the order to Golf Enviro.

VA also argues that it satisfied the competition requirements of Federal Acquisition Regulation (FAR) § 13.104(b) for simplified acquisitions where it solicited quotations from three SDVOSB concerns. In using simplified acquisition procedures, agencies are required to obtain competition to the maximum extent practicable. See FAR § 13.104. Where, as here, such procedures are used and notice is not to be provided through the FedBizOpps website, the FAR states that

maximum practicable competition ordinarily can be obtained by soliciting quotations or offers from sources within the local trade area. Unless the contract action requires synopsis pursuant to 5.101 and an exception under 5.202 is not applicable, consider solicitation of at least three sources to promote competition to the maximum extent practicable. Whenever practicable, request quotations or offers from two sources not included in the previous solicitation.

FAR § 13.104(b).

Although we agree that the purchasing agent's solicitation of three SDVOSBs generally satisfied the competition requirements of FAR Part 13, the agency fails to recognize Phoenix's complaint that the acquisition was required to be set aside for SDVOSBs and the fertilizer acquired from an SDVOSB concern. We have previously sustained protests filed with respect to VA procurements, where, as here, the protesters alleged that the VA failed to comply with requirements of the VA Act and its implementing regulations. See, e.g., Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183. We noted in those decisions that the VA Act in relevant part, 38 U.S.C. § 8127(d), provides as follows:³

³ The statute also sets out an order of priority for the contracting preferences it establishes, providing that the first priority for contracts awarded pursuant to 38 U.S.C. § 8127(d) shall be given to SDVOSB concerns, followed by VOSBs. 38 U.S.C. § 8127(i).

[A] contracting officer of [the VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

The VA issued regulations implementing the VA Act which, as relevant here, state as follows:

- (a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that:
 - (1) Offers will be received from two or more eligible SDVOSB concerns; and
 - (2) Award will be made at a fair and reasonable price.

Veterans Administration Acquisition Regulation, 48 C.F.R. § 819.7005(a) (2012).

Here, it is not disputed that the purchasing agent, in searching for SDVOSB concerns to supply the fertilizer for the Santa Fe National Cemetery, found a number of SDVOSB concerns, including the protester. In addition, the agency does not contend that it had no reasonable expectation of receiving two or more offers from SDVOSB concerns at a fair and reasonable price. There also is no analysis in the record supporting such a conclusion. Moreover, in this regard, Phoenix, which was not solicited, has previously received an order from the same purchasing agent to provide fertilizer for other VA national cemeteries. We see no basis on this record to conclude that the fertilizer for the Santa Fe National Cemetery could not be procured from an SDVOSB concern.

The agency's only explanation as to why it chose to procure the fertilizer from a non-SDVOSB concern is that it had already complied with the requirement to solicit three sources in accordance with FAR § 13.104(b). This explanation, however, reflects a fundamental misunderstanding of the agency's obligations under the VA Act. While an agency is only required to obtain competition to the maximum extent practicable in a simplified acquisition under FAR Part 13, this does not relieve the VA of its obligation to comply with the requirements of the VA Act and its own implementing regulations.

Specifically, absent a reasonable determination that the agency could not expect to receive quotations from two or more SDVOSB concerns at a fair and reasonable price, the VA was required to continue to conduct this procurement as a set-aside for SDVOSB concerns. See Kingdomware Techs., B-406507, May 30, 2012, 2012 CPD ¶ 165 at 2 (“the plain language of the VA Act mandates that the VA ‘shall’ conduct its procurements . . . using an SDVOSB set-aside when there is a reasonable expectation that two or more SDVOSB concerns can meet its requirements at a reasonable price.”) The VA decided not to solicit any of the other SDVOSB concerns identified by the purchasing agent, and instead issued this order to a non-veteran-owned small business. Accordingly, we find that the agency violated the VA Act and its own implementing regulations when it issued this order to Golf Enviro.

RECOMMENDATION

We recommend that the VA solicit quotations from other SDVOSB concerns, including Phoenix. If the agency receives an acceptable quotation from an SDVOSB concern at a fair and reasonable price, the VA should terminate Golf Enviro’s order for the convenience of the government, and issue an order to the successful SDVOSB concern. We also recommend that the agency reimburse the protester for its cost of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2012). The protester’s certified claim for costs, detailing the time spent and cost incurred, must be submitted to the agency within 60 days after receiving this decision.

The protest is sustained.

Lynn H. Gibson
General Counsel