



Decision

Matter of: AeroSage LLC

File: B-414314; B-414314.2

Date: May 5, 2017

David M. Snyder, for the protester.

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DIGEST

Protest challenging agency's decision not to set aside a procurement for service-disabled veteran-owned small businesses (SDVOSB) is denied where the agency reasonably concluded from its market research that it did not have a reasonable expectation of receiving quotations from two or more SDVOSBs capable of performing the required services at a fair and reasonable price.

DECISION

AeroSage LLC, of Tampa, Florida, protests the terms of request for quotations (RFQ) No. SPE600-17-P-2175, issued by the Defense Logistics Agency (DLA) on behalf of the Department of Veterans Affairs (VA) for 4,500 gallons of ultra-low-sulfur diesel fuel to be delivered to the Veterans Administration Medical Center (VAMC) in Milwaukee, Wisconsin. AeroSage asserts that DLA should have conducted the procurement as a service-disabled veteran-owned small business (SDVOSB) set-aside.

We deny the protest.

BACKGROUND

On January 23 and 24, 2017, DLA conducted this procurement on behalf of VA using the simplified acquisition procedures of Federal Acquisition Regulation (FAR) part 13.¹ AR at 2-3. The procurement was to meet an urgent requirement for fuel at the Milwaukee VMAC, to avoid that facility's fuel storage tanks from reaching "critically low levels." AR, Tab 12, Mem. for Rec., at 1. At the outset, the DLA contracting officer conducted market research to identify prospective fuel vendors. AR at 2. The contracting officer's research included, among other things, reviewing the agency's contracting information system to identify vendors that provide service to Wisconsin, reviewing vendors that previously had expressed interest in doing business with the agency in Wisconsin, and reviewing procurement history to identify current and prior vendors. AR, Tab 12, Mem. for Rec., at 1. Through this research, the contracting officer identified AeroSage as a prospective vendor for the requirement. AR at 3.

In addition to the market research described above, the contracting officer searched VA's Vendor Information Page (VIP) database for VA-verified SDVOSB and veteran-owned small business (VOSB) vendors registered in the state of Wisconsin under the applicable North American Industry Classification System (NAICS) code.² AR, Tab 12, Mem. for Rec., at 1. Only one firm matched these search criteria: SageCare, Inc., of Tampa, Florida. AR at 3; AR, Tab 3, VIP Database Search Results, at 1. Based on prior experience, the contracting officer knew that SageCare and AeroSage are 100 percent owned and operated by the same individual and that this individual is the chief negotiator for both firms. AR at 4; AR, Tab 3, Mem. for Rec., at 1; AR, Tab 10, Small Business Administration (SBA) Size Determination No. 3-2017-010.

The contracting officer considered whether there was a reasonable expectation that quotations would be received from two or more eligible SDVOSBs or VOSBs and that award could be made at a fair and reasonable price. See AR at 3; AR, Tab 12, Mem. for Rec., at 1-2. She concluded this was not the case because the only two prospective SDVOSB or VOSB vendors identified through the market research--AeroSage and SageCare--were owned by the same individual and, therefore, these two firms effectively "would be aiming to compete against [each other]." AR, Tab 12, Mem. for Rec., at 1. Accordingly, the contracting officer decided to conduct the procurement as a small business set-aside rather than as an SDVOSB or VOSB set-aside. See AR at 3.

On the afternoon of January 23 (a Monday), a DLA acquisition specialist sent the RFQ via e-mail to five small business vendors, including AeroSage. AR, Tab 1, RFQs E-Mails. The RFQ provided that the fuel must be delivered to the Milwaukee VMAC before 3:00 p.m. on January 25. RFQ at 1. The RFQ also stated that quotations must

¹ DLA conducted the procurement on behalf of VA pursuant to a federal civilian agency fuel purchase agreement between the agencies. Agency Report (AR) at 2.

² The NAICS code was 324110, petroleum refineries.

be received by 11:00 a.m. January 24. RFQ at 1. Two firms--AeroSage and Foster Fuels, of Brookneal, Virginia--timely submitted quotations. See AR, Tab 5, Abstract of Quotations, at 1.

On the morning of January 24, DLA evaluated the quotations. AeroSage's total evaluated price was \$10,786. AR, Tab 5, Abstract of Quotations, at 1. Foster Fuels' total evaluated price was \$9,440. Id. DLA selected Foster Fuels' lower-priced quotation for award. AR, Tab 8, Award Notice, at 1. Late in the morning of January 24, DLA notified AeroSage that its quotation was not successful and that Foster Fuels' quotation had been selected for award. See AR, Tab 6, Notice of Unsuccessful Quotation, at 1; Protest at 1. Upon learning of the award, AeroSage found that Foster Fuels was not listed as a verified SDVOSB in VA's VIP database. See Protest at 1. On the afternoon of January 24, AeroSage submitted an agency-level protest to DLA, arguing that the agency improperly failed to conduct the procurement as an SDVOSB set-aside. Id.

On January 25, the DLA acquisition specialist, the DLA contracting officer, and AeroSage's principal discussed the matter via telephone. See AR, Tab 12, Mem. for Rec., at 1-2. Afterwards, the acquisition specialist and contracting officer prepared a memorandum for the record regarding the matter. Also on January 25, AeroSage filed a protest with our Office.

DISCUSSION

As it did in its agency-level protest, AeroSage asserts that DLA improperly failed to conduct the procurement as an SDVOSB set-aside. Before considering the merits of AeroSage's protest, we consider its timeliness. In this regard, we first observe that the protest concerns an alleged impropriety with the terms of a solicitation. Our Bid Protest Regulations require that protests based on alleged improprieties in a solicitation that are apparent prior to the time set for receipt of initial proposals (or quotations, as in the case here) must be filed prior the time set for receipt of initial proposals (or quotations). 4 C.F.R. § 21.2(a). Protests based on other allegations generally must be filed within 10 days after the basis of protest is known or should have been known (whichever is earlier). Id. § 21.2(b). Because AeroSage filed its protest after the time set for receipt of quotations, we asked DLA and AeroSage to comment on its timeliness.

In response, DLA argued that the protest should be dismissed as untimely. AeroSage, in turn, argued that the protest was timely because the firm did not learn that DLA had not conducted the procurement as an SDVOSB set-aside until after award, when AeroSage found that Foster Fuels was not listed in VA's VIP database. See Comments at 5-6. In support of this argument, AeroSage drew our attention to a December 16, 2016, e-mail from a DLA ground fuels division chief to AeroSage's principal. Protest, attach. 1, AeroSage/DLA E-Mails, at 11. This e-mail addresses the resolution of a prior protest in which AeroSage raised the same allegation as it has here with regard to the same type of DLA fuel requirement. In the e-mail, the DLA division chief writes that the parties' "mutual agreement and understanding" regarding resolution of the protest was as follows: AeroSage agreed to withdraw the protest, while DLA agreed that "[i]n the

future we will provide consideration and will set-aside VA Open Market requirements for SDVOSBs' consideration first [in accordance with] the requirements set forth in the Secretary of the VA [Procurement Policy Memorandum]." Protest, attach. 1, AeroSage/DLA E-Mails, at 11. AeroSage subsequently withdrew the protest. See Comments at 4.

We resolve doubts regarding timeliness in favor of protesters. Sigmattech, Inc., B-296401, Aug. 10, 2005, 2005 CPD ¶ 156 at 5; Precise Constr. Mgmt., B-278144.2, Feb. 24, 1998, 98-1 CPD ¶ 63 at 2-3. Under the circumstances here, we conclude that AeroSage's protest is timely, notwithstanding the fact that it concerns an alleged solicitation impropriety and was filed after the time set for receipt of quotations. In this regard, we note that nothing on the face of the solicitation indicated that it was (or was not) set aside for SDVOSBs. However, based on the above-discussed e-mail--in which a DLA division chief informed AeroSage that DLA generally would conduct the type of procurement under protest here as an SDVOSB set-aside--we think it was reasonable for AeroSage to assume that the solicitation had been set aside for SDVOSBs. Since AeroSage filed its protest within 10 days after learning that the procurement had not, in fact, been conducted as an SDVOSB set-aside, we find the protest is timely.

Turning to the merits, AeroSage's allegations concern requirements under the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the VA Act). 38 U.S.C. § 8127. Specifically, the VA Act, together with VA's implementing regulations, require VA to set aside acquisitions for SDVOSBs whenever it is determined that there is a reasonable expectation that offers will be received from at least two SDVOSBs and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d); Veterans Administration Acquisition Regulation (VAAR) § 819.7005(a). We refer to this requirement as the VA Act's Rule of Two. The VA Act also requires that agencies procuring goods or services on behalf of VA--such as DLA here--must comply with the VA Act Rule of Two "to the maximum extent feasible." 38 U.S.C. § 8127(j)(1).

AeroSage challenges DLA's decision not to conduct this procurement as an SDVOSB set-aside on two principal grounds. First, the firm alleges that DLA's market research was "incomplete and improper" and that DLA "artificially restricted" its research to "Wisconsin-capable companies." Protest at 3; Comments at 4-5; Supp. Comments at 4. Second, AeroSage alleges that it was improper for the contracting officer to decide that AeroSage and SageCare did not satisfy the VA Act's Rule of Two because they are owned by the same individual. Comments at 1-2; Supp. Comments at 3.

In response to the allegation regarding the market research, DLA asserts that its market research was sufficient under the circumstances. In this regard, DLA describes the different types of market research the contracting officer performed, including her search in VA's VIP database for SDVOSBs registered in Wisconsin under the applicable NAICS code. AR at 7-8. With regard to the decision to limit the VIP database research to firms registered in Wisconsin, DLA points out that the procurement involved a "small dollar value" and a near-immediate delivery schedule. AR, at 6; Supp. AR at 6-7. Finally, in response to AeroSage's allegation regarding the contracting officer's decision

that the VA Act's Rule of Two had not been met, DLA states that because of the firms' common ownership, the contracting officer did not view them to be independent. AR at 5; Supp. AR at 4. Thus, she was concerned that since the only two SDVOSBs that were identified as being reasonably likely to submit quotations were under common ownership, there was not adequate price competition, and, therefore, there was not a reasonable expectation that award could be made at a fair and reasonable price. See AR, Tab 12 Mem. for Rec., at 1.

After considering DLA's response to the protest, our Office solicited the views of VA and SBA. In response, VA commented that DLA adhered to the market research requirements of the VAAR by reviewing the VIP database to identify whether there were two SDVOSBs or VOSBs capable of meeting the requirement that were likely to submit a quotation at a fair and reasonable price.³ VA Comments at 1. On this basis, VA requested that our Office deny the protest. Id.

SBA commented on DLA's market research as follows:

[T]he agency limited its search to verified SDVOSBs that had Wisconsin included in their service area list. We believe it was reasonable for the contracting officer to posit that a firm whose service area did not include Wisconsin would not be expected to submit an offer for a purchase at this dollar level of approximately \$10,000.

³ VA cites VAAR § 810.001-70 as establishing the relevant market research procedure. VAAR § 810.001-70 is contained in a July 25, 2016, VAAR class deviation that VA's Acting Deputy Senior Procurement Executive issued to implement changes to the VAAR that were necessitated by the Supreme Court's decision in Kingdomware Technologies v. United States, 136 S. Ct. 1969, 195 L. Ed. 2d 334 (2016). The class deviation states that it is applicable to all VA procurements, including those conducted on behalf of VA by other government entities. See Class Deviation--Implementation of the Veterans First Contracting Program as a Result of the U.S. Supreme Court Decision (July 25, 2016), <https://www.va.gov/oal/business/pps/deviations.asp> (last visited May 1, 2017). VAAR § 810.001-70 states as follows:

When performing market research, contracting officers shall . . . search the VIP database by applicable [NAICS] codes to determine if two or more [SDVOSBs and VOSBs], in the appropriate NAICS code, are listed as verified in the VIP database. The contracting officer will determine if identified SDVOSBs or VOSBs are capable of performing the work and likely to submit an offer/quote at a fair and reasonable price that offers best value to the Government. If so, the contracting officer shall set-aside the requirement in the contracting order of priority

Id. at 16.

SBA Comments at 1. With regard to the contracting officer's conclusion that due to common ownership, AeroSage and SageCare did not meet the VA Act's Rule of Two requirements, the SBA commented as follows:

[D]uring a typical Rule of Two determination, an agency determines whether there is a reasonable expectation that the contract will be awarded at a fair market price. Agencies can rely on the expectation of price competition to satisfy the fair-market-price requirement. Expecting only co-owned firms to submit offers, however, would not reasonably support an expectation of price competition. . . . Given these facts, we do not find it unreasonable for the agency to determine that it lacked a reasonable expectation of receiving offers from two or more SDVOSBs and award would be made a fair and reasonable price.

Id. at 2 (internal citations omitted). For the reasons that follow, we agree with DLA, VA, and SBA that AeroSage's protest should be denied.

We first address the allegation regarding the sufficiency of DLA's market research. Our Office has established that the determination of whether there is a reasonable expectation of receiving offers from two or more SDVOSBs that are capable of performing the required work is a matter of informed business judgment within the contracting officer's discretion that we will not disturb absent a showing that it was unreasonable. See In and Out Valet Co., B-411019, Apr. 15, 2015, 2015 CPD ¶ 128 at 3; Crosstown Courier Serv., Inc., B-410936, March 12, 2015, 2015 CPD ¶ 107 at 4. The requirements of the VA Act do not dictate the use of any particular methodology in assessing the availability of SDVOSBs to perform a requirement; measures such as prior procurement history, market surveys, advice from the agency's small business specialist, and information concerning prospective offerors' business history and capability or capacity may all provide a reasonable basis for a decision to set aside, or not set aside, a requirement for SDVOSBs. See In and Out Valet Co., supra; Crosstown Courier Serv., Inc., B-410936, supra. Further, we have found that the circumstances of a procurement may support an agency's decision to reasonably focus its market research on the geographic area in which performance is to occur. See In and Out Valet Co., supra; Crosstown Courier Serv., Inc., B-410936, supra; Crosstown Courier Serv., Inc., B-407404, Nov. 30, 2012, 2012 CPD ¶ 333 at 3.

Here, the record reflects that DLA was faced with an urgent, but low-dollar requirement for fuel. See AR, Tab 12, Mem. for Rec., at 1. The record further reflects that VA needed to take delivery of the fuel at a site in Milwaukee, Wisconsin. Id. Given these circumstances, we find it reasonable that DLA decided to focus its market research on fuel vendors that had indicated they serviced the geographic area of Wisconsin. See In and Out Valet Co., supra; Crosstown Courier Serv., Inc., B-410936, supra. Given the discretion afforded to contracting officers with regard to market research, AeroSage's arguments to the contrary provide no basis to question DLA's actions.

We similarly see no basis to question the contracting officer's conclusion that due to AeroSage's and SageCare's common ownership, the VA Act's Rule of Two had not

been met. As shown above, the VA Act's Rule of Two has two prongs. First, there must be a reasonable expectation that at least two SDVOSBs will submit an offer (or, in the case here, a quotation). Second, there must be a reasonable expectation that award will be made at a fair and reasonable price. Here, the record shows that through reasonable market research, the contracting officer identified only two SDVOSBs that she reasonably expected to submit a quotation in response to the solicitation. See AR, Tab 12, Mem. for Rec., at 1. The record further shows that she documented concern that due to their common ownership (and the fact that the principal and negotiator for both firms is the same individual), these two firms essentially would be competing against each other. See id. Thus, she decided that adequate price competition would not occur and, therefore, there was not a reasonable expectation that award could be made at a fair and reasonable price. See AR, Tab 12 Mem. for Rec., at 1. The record supports the contracting officer's finding regarding the common ownership of AeroSage and SageCare. See AR, Tab 10, SBA Size Determination No. 3-2017-010; Comments at 2. Under these circumstances, we will not question her judgment that the dual requirements of the VA Act's Rule of Two were not met.

The protest is denied.⁴

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General Counsel

⁴ AeroSage raises various other arguments regarding DLA's decision not to conduct the procurement as an SDVOSB set-aside. We have considered all of these arguments, and we conclude, based on the record, that none furnishes a basis on which to sustain the protest.