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The decision issued on the date below was subject to a GAO Protective Order. No party requested redactions; we are therefore releasing the decision in its entirety.

Decision

Matter of: Crosstown Courier Service, Inc.

File: B-415818

Date: March 27, 2018

Joseph A. Camardo, Jr., Esq., Nancy M. Camardo, Esq., and Justin T. Huffman, Esq., Camardo Law Firm P.C., for the protester.

David W. Altieri, Esq., and Donald C. Mobly, Esq., Department of Veterans Affairs, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency failed to set aside solicitation for pharmacy courier services for service-disabled veteran-owned small businesses (SDVOSB) is denied where agency reasonably determined that it was unlikely to receive quotations from two or more SDVOSBs and that award could be made at a fair and reasonable price.

DECISION

Crosstown Courier Service, Inc., of Springfield, Massachusetts, a small business, protests the terms of request for quotations (RFQ) No. 36C24918Q0161, issued by the Department of Veterans Affairs (VA) for commercial pharmacy courier services for veterans served by the Lexington VA Medical Center (VAMC), Cooper Division and Leestown Division, in Kentucky. Crosstown argues that the contracting officer improperly failed to set aside the RFQ for award to service-disabled veteran-owned small businesses (SDVOSB), and instead designated the RFQ as a small business set-aside.

We deny the protest.

BACKGROUND

The RFQ at issue here was preceded by three earlier solicitations for pharmacy courier services for the Lexington VAMC. The issues raised in the protest make the history of two of the earlier procurement efforts relevant.¹

The VA issued one of the earlier RFQs on September 14, 2017, as an SDVOSB set-aside, seeking quotations to provide services for 1 year for a fixed price. Contracting Officer's Statement at 1. The VA received quotations from four SDVOSBs, the lowest of which was 42 percent higher than the agency's independent government cost estimate (IGCE). Id. The contracting officer concluded that none of the prices obtained were fair and reasonable, and canceled the RFQ. Id. The next RFQ, issued on November 6, was like the previous, but was set aside for competition by veteran-owned small businesses (VOSB). The VA received three quotations from SDVOSBs and one from a VOSB, the lowest of which was 26 percent higher than the IGCE. Id. The contracting officer again concluded that none of the prices obtained were fair and reasonable, and canceled that RFQ. Id.

Following that, the RFQ at issue in this protest was issued on December 19, as a small business set-aside, once again seeking quotations to provide services for 1 year for a fixed price. Id. The VA reports that it has received seven quotations, of which four were from SDVOSBs, one was from a VOSB, and two were from small businesses. Id. Crosstown filed this protest before quotations were due, challenging the terms of the RFQ. Accordingly, the VA has not awarded a contract.

PROTEST

Crosstown argues that the VA had a reasonable basis to expect quotations from two or more SDVOSBs, and therefore the agency should have set aside the current RFQ for SDVOSBs, rather than for small businesses.

Under a provision of the Veterans Benefits, Health Care, and Information Technology Act of 2006, a contracting officer in an acquisition conducted by the VA is required to set aside the procurement for either SDVOSBs or VOSBs where there is "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." 38 U.S.C. § 8127(d). The VA does not dispute that it expected to receive quotations from multiple SDVOSBs, but argues that the contracting officer reasonably expected that none of those quotations would be at a fair and reasonable price. Therefore, the VA argues, the contracting officer's decision to issue the RFQ as a small business set-aside, rather than an SDVOSB or VOSB set-aside, was reasonable and consistent with law and regulation.

¹ The third, and earliest, solicitation was canceled for reasons not relevant here.

In its comments on the agency report, Crosstown disputes the validity of the IGCE, and argues that the contracting officer's reliance on the IGCE was therefore unreasonable.² In particular, Crosstown argues that the cost of paying employees and subcontractors the minimum required under the Service Contract Act (SCA) exceeds the IGCE, which the contracting officer used to determine that SDVOSB prices were not fair and reasonable. As a result, Crosstown argues that the contracting officer lacked a valid basis to conclude that prices quoted by SDVOSBs would not be fair and reasonable because that determination was based on the defective IGCE.

The VA argues that the IGCE was based on the price of the incumbent contract, which was awarded in June 2017 and which required payment of SCA wages. The VA contends that the incumbent contract thus provided a reasonable basis for establishing an IGCE, and that Crosstown has not shown that the incumbent contractor is failing to pay its employees as required by the SCA.³

Notwithstanding the protester's arguments, we see no basis to sustain the protest. With respect to Crosstown's argument that the incumbent contract is priced below the cost of performance (which of course required Crosstown to make assumptions about the manner in which the incumbent is performing), an agency is not prohibited from entering into a contract that is below the cost of performance. Brewer-Taylor Assocs., B-277845, Oct. 30, 1997, 97-2 CPD ¶ 124 at 4. Additionally, Crosstown has not shown that the incumbent is violating the SCA (or more precisely, that the contracting officer was unreasonable in relying on the incumbent's price as reflecting compliance with that term of the contract in developing the IGCE). Accordingly, Crosstown has not provided a basis for our Office to conclude that the IGCE was defective, or that the contracting officer acted unreasonably in using the IGCE to assess whether an SDVOSB (or VOSB) set-aside would reasonably result in fair and reasonable prices.

The protest is denied.

Thomas H. Armstrong
General Counsel

² The VA argues that Crosstown's challenges to the IGCE are untimely because Crosstown's initial protest did not question the legitimacy of the IGCE and its use to determine whether prices were expected to be fair and reasonable; rather, it raised those arguments in its comments on the agency report. Id. at 2-3. Assuming that Crosstown's challenges to the IGCE constitute independent grounds of protest, we nevertheless view them as timely because Crosstown received the VA's explanation of the basis for the IGCE in the agency report, and Crosstown then raised the arguments challenging that basis within 10 days. 4 C.F.R. § 21.2(a)(2).

³ The VA acknowledges that a new wage determination was issued after the incumbent contract was awarded, but points out that the wage rate for courier drivers did not change. Supplemental Agency Report at 3-4.