



Decision

Matter of: HealthRev, LLC; DLH Solutions, Inc.

File: B-416595; B-416595.2

Date: October 25, 2018

Richard J. Conway, Esq., Michael J. Slattery, Esq., and Ioana Cristei, Esq., Blank Rome LLP, for the protesters.

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DIGEST

1. Protest that agency unreasonably refused to extend deadline for submitting proposals to allow more time for protester to become a verified service-disabled veteran-owned small business (SDVOSB) is denied where record shows that agency's intention to set acquisition aside for SDVOSBs was publicized well in advance of the solicitation being issued, and the principal cause of the protester being unverified at the time of proposal submission was the protester's failure to seek Small Business Administration and Department of Veterans Affairs approval of a mentor-protégé joint venture in a reasonably diligent manner.

2. Protest that solicitation should not be set aside for SDVOSB participation is denied where record shows that contracting officer had reasonable expectation that proposals would be submitted by at least two SDVOSB concerns, and that award could be made at a fair and reasonable price.

DECISION

HealthRev, LLC, and DLH Solutions, Inc., both of Atlanta, Georgia, protest the terms of request for proposals (RFP) No. VA770-17-R-0274, a service-disabled veteran-owned small business (SDVOSB) set-aside, issued by the Department of Veterans Affairs (VA) for consolidated mail-order pharmacy (CMOP) operations. HealthRev argues that the RFP unreasonably requires submission of proposals by a date that effectively precludes

it from competing for the requirement. DLH argues that the agency unreasonably set aside the requirement for SDVOSBs.¹

We deny the protests.

The RFP contemplates the award of a single contract to provide services in connection with the operation of the agency's seven CMOP facilities, as well as two medications by mail facilities. These nine facilities are located strategically throughout the continental United States, and provide prescription drug and pharmacy-related services to veterans throughout the United States and its territories.

The record shows that the agency began its acquisition planning for this requirement in October 2016, and posted an initial sources-sought notice to the Federal Business Opportunities website (www.fbo.gov) on January 27, 2017. DLH Agency Report (AR), exh. 9.² Based on the responses to that sources-sought notice, the agency concluded that there may be two or more SDVOSB concerns capable of performing the requirements at any particular CMOP site. DLH AR, exh. 11, Market Research Report, Feb. 23, 2017, at 16. The agency therefore initially concluded that it would solicit its requirements using a multiple-award SDVOSB set-aside that contemplated the award of individual contracts for each of the nine locations. Id.

Subsequently, the agency held a "virtual industry day" event in coordination with the agency's Office of Small and Disadvantaged Business Utilization (OSDBU) in an effort to inform potential SDVOSB vendors about the possibility of performing the agency's overall, nation-wide CMOP requirement using joint venture or other teaming arrangements. DLH AR, exh. 13, HealthRev AR, exh. 9, Virtual Industry Day Announcement. Some 74 concerns participated in the virtual industry day event, including both protesters. At that event, presentations were made by representatives of the agency's OSDBU, by the Small Business Administration (SBA), and by the agency's contracting officer. HealthRev AR, exh. 10, DLH AR, exh. 14, Virtual Industry Day Agenda; DLH AR, exh. 15, Virtual Industry Day Presentations.

Based on responses to a second sources-sought notice issued after the virtual industry day event, HealthRev AR, exh. 12, DLH AR, exh. 17, Sources Sought Announcement, June 15, 2017, the agency concluded that there were potentially five SDVOSB businesses that could meet the agency's nation-wide requirements using teaming or other subcontracting arrangements. DLH AR, exh. 18, Market Research Report, July 5, 2017, at 20. The agency also concluded that award could be made at a fair and

¹ Although each protester seeks a remedy that is fundamentally inconsistent with the other protester's requested remedy, we nonetheless resolve both protests in a single decision.

² The agency submitted separate reports for each protest. All references to the agency reports are to the party-specific agency reports.

reasonable price. Id. at 2. The agency therefore determined that it would solicit its requirements using an open-market, single-award, SDVOSB set-aside. Id. at 20. The record shows that the agency received the concurrence of the agency's OSDBU and the SBA concerning its proposed course of action. Id. at 2.

From August 2017 to April 2018, the agency's contracting officer worked to finalize the acquisition package and obtain the necessary approvals. The record shows that, on April 30, 2018, the agency published a pre-solicitation notice on the Federal Business Opportunities website announcing that the agency intended to solicit and award a single indefinite-delivery, indefinite-quantity contract for its nation-wide CMOP requirements, and contemplated issuing the RFP on May 7. HealthRev AR, exh. 13. This pre-solicitation notice advised that the RFP would be issued as an SDVOSB set-aside. Id.

On May 25, 2018, the agency issued the RFP, which had an originally-scheduled deadline for the submission of proposals of June 22. DLH AR, exh. 3, HealthRev AR, exh. 3. That deadline was subsequently extended to July 23 by solicitation amendment. DLH AR, exh. 5, HealthRev AR, exh. 5. By the deadline for submitting proposals, the agency received thirteen proposals, including one submitted by HealthRev, which is a joint venture comprised of a verified SDVOSB concern named e-Revs Supply Chain LLC, and DLH, a large business and the current incumbent for the agency's CMOP requirements.

PROTESTS

HealthRev, while not challenging the agency's decision to set aside the acquisition for SDVOSBs, protests the agency's refusal to extend the deadline for submitting proposals, maintaining that the agency did not allow an adequate amount of time for it to become a verified SDVOSB joint venture. In contrast, DLH argues that the agency has unreasonably set aside the acquisition for award to an SDVOSB, maintaining that there is no basis for the agency to have concluded that there were at least two SDVOSBs that can perform the requirement at a fair and reasonable price. We discuss both protests in detail below.

HealthRev Protest

As noted, HealthRev is a joint venture comprised of a verified SDVOSB called e-Revs Supply Chain LLC and DLH, a large business. The joint venture applied for recognition as a qualifying mentor-protégé joint venture under the SBA's Mentor-Protégé program on June 6, and received the SBA's approval of the joint venture on July 13. HealthRev Protest at 9. At the time it submitted its protest to our Office, the agency reports that HealthRev had not yet applied for verification of its joint venture by the VA.

HealthRev argues that the agency unreasonably has declined to extend the deadline for submitting proposals. In this connection, the RFP requires prospective offerors to be verified SDVOSBs in the agency's Vendor Information Pages (VIP) database as of the time proposals are due. RFP at 89-90, RFP amend. No. 1 at 1. HealthRev maintains

that the RFP was issued on May 25, 2018, and this was the first time the firm knew that the agency was going to solicit its requirements as a total SDVOSB set-aside. HealthRev also points out that the agency's website for obtaining verification of a firm's status as an eligible SDVOSB was not available for a period of time from May 21 to June 22, and again from June 29 to July 3. According to the protester, because there was no way to become verified in the agency's VIP database during those periods of time, it is unreasonable for the agency not to extend the deadline for submitting proposals in order to allow it to become verified in the agency's VIP database before the deadline for proposal submission.

We find no merit to HealthRev's protest. The VA is required by statute, 38 U.S.C. § 8127(d), to set aside all acquisitions for SDVOSBs in the following circumstances:

. . . 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.³

See also Kingdomware Technologies v. United States, 136 S. Ct. 1969, 195 L. Ed. 2d 334 (2016); Aldevra, B-405271, B-405271.2, Oct. 11, 2011, 2011 CPD ¶ 183.

Accordingly, the starting point for our analysis is the overarching statutory dictate that the VA is required to set aside all acquisitions for SDVOSBs where there is a reasonable expectation on the part of the contracting officer that the agency will receive at least two proposals from SDVOSBs, and that award can be made at a fair and reasonable price.

As noted, the agency began its market research for the current requirement in October, 2016. Of significance for our purposes is the fact that the agency conducted its virtual industry day in June, 2017, and both E-Revs Supply Chain LLC and DLH participated in that event.⁴ The entire purpose of the industry day event was to present information from the VA about the agency's anticipated acquisition of its CMOP requirements as a single SDVOSB contract award, and to present detailed information from the SBA about

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 veteran owned small businesses. 38 U.S.C. § 8127(i).

⁴ A review of the pre-registration list of vendors participating in the virtual industry day event shows that E-Rev's listing actually made reference to the existence of a mentor-protégé relationship between E-Revs and another concern, although the mentor concern is not identified in the listing by name. HealthRevs AR, exh. 11, Pre-Registration List, at 2.

establishing teaming and other types of relationships, and obtaining approval of mentor-protégé relationships. DLH AR, exh. 15, Virtual Industry Day Presentation at 12, 28, 31-46. The record therefore establishes that--realistically--both firms knew no later than June, 2017 of the agency's intent to pursue an SDVOSB set aside acquisition, provided the agency could identify at least two SDVOSB firms capable of meeting the agency's requirements, and that award could be made at a fair and reasonable price.

Against this background, the record shows that the VA published a pre-solicitation notice on April 30 announcing its intended acquisition of the CMOP requirement using a single indefinite-delivery, indefinite-quantity contract award, and that the agency's acquisition would be set aside for SDVOSBs.⁵ Notwithstanding all of the agency's clear information relating to the fact that it intended to set aside the requirement for SDVOSB participation, the protester took no action to establish its joint venture or seek SBA's approval of that joint venture until June 6, well after the agency announced its intention to acquire the CMOP requirement using an SDVOSB set-aside, and also after the agency issued its RFP. The protester has offered no explanation for why it waited more than a month after the agency announced its solicitation to establish its joint venture and seek the SBA's approval of the arrangement. Further, the unavailability of the agency's website for applying for certification of the joint venture's status as an SDVOSB concern during portions May and June could not have been the cause of HealthRev being unable to apply for verification of its joint venture by VA, since the joint venture was not even approved by the SBA until July 13, well after the website was again available.

In the final analysis, the record shows that the paramount cause of HealthRev being unqualified to offer on the agency's requirement was the firm's failure to diligently pursue the SBA's approval, and the VA's verification, of the joint venture. Given the VA's overarching statutory mandate to use SDVOSB set-asides to meet its requirements where the necessary conditions are present, and given the agency's consistent expression of its intent to set this acquisition aside for SDVOSB participation, there was no reasonable basis for HealthRev to have delayed establishing its joint venture. Moreover, given the amount of time the agency has spent effectively publicizing its intentions, we have no basis to find that the agency is acting unreasonably in refusing to extend the deadline for submitting proposals in order to

⁵ HealthRev suggests that the agency's April 30 pre-solicitation notice made no reference to the fact that the agency intended to acquire the CMOP requirement using an SDVOSB set-aside. This is simply not borne out by the facts. An examination of the agency's original Federal Business Opportunities notice shows that the pre-solicitation notice identified the requirement as set aside for SDVOSBs. See https://www.fbo.gov/index.php?s=opportunity&mode=form&tab=core&id=52267a4475b9010731cbacd3e4c16b87&_cvview=0 (last visited on October 25, 2018).

accommodate HealthRev's interest in establishing the qualification of its joint venture for purposes of submitting a proposal. We therefore deny HealthRev's protest.⁶

DLH Protest

DLH argues that the agency acted unreasonably in setting the acquisition aside for SDVOSB concerns. DLH essentially makes two arguments, first that the agency had no reasonable expectation of receiving proposals from at least two SDVOSBs; and second, that even if the agency does receive proposals from at least two SDVOSBs, those proposals will not be at fair and reasonable prices, such that the agency can make award based on those proposals.

We have no basis to object to the agency's decision to set the acquisition aside for SDVOSBs. As noted, the VA is under a statutory mandate to set aside all acquisitions where the agency's market research leads it to conclude that there is a reasonable expectation that there are at least two SDVOSB concerns capable of meeting the agency's requirements, and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127. Here, the VA's market research led it to conclude that there were at least five viable SDVOSB concerns that could potentially meet the agency's requirements, and that there would be adequate competition, such that the agency could make award at a fair and reasonable price. DLH AR, exh. 18, Market Research Report, July 5, 2017. The record also shows that the response to the agency's solicitation bore out the agency's expectations; thirteen proposals were submitted in response to the solicitation (and the agency advises that, of those 13 proposals, at least 11 were submitted by verified SDVOSB concerns).

DLH's protest essentially amounts to speculation concerning the viability of the five firms identified by the agency as potential SDVOSB offerors, along with speculation concerning whether the agency would receive proposals that would allow it to make award at a fair and reasonable price. However, DLH's speculation is directly inconsistent with its actions, since DLH, in conjunction with E-Revs, actually submitted a proposal that the firm obviously believes will meet the agency's requirements at a fair and reasonable price.

Moreover, inasmuch as DLH has no idea which firms actually submitted proposals, or whether their proposed prices are fair and reasonable, its allegations amount to no more than speculation. Under the circumstances, there is no basis for our Office to object to the agency's decision to set aside the acquisition. The statute requires only a reasonable expectation--not absolute certainty--that proposals will be submitted by at

⁶ As a final matter, HealthRev challenged the adequacy of information available to offerors to prepare their proposals relating to one of the agency's CMOP locations. However, since HealthRev is not an SDVOSB joint venture that is eligible to compete for the agency's requirements, it is not an interested party to challenge any of the solicitation's remaining terms or conditions. 4 C.F.R. § 21.0(a)(1).

least two SDVOSB concerns, and that award can be made at a fair and reasonable price. Here, as noted, the agency's expectations appear to have been more than adequately borne out by the competitive response to the RFP. We therefore have no basis to object to the agency's decision to set aside the acquisition. Accordingly, we deny DLH's protest.

The protests are denied.

Thomas H. Armstrong
General Counsel