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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Aldevra; Kingdomware Technologies

File: B-406950; B-407129; B-407172; B-407207; B-407210; B-407235;
B-407236; B-407237

Date: October 9, 2012

Rodney Marshall for Aldevra; and LaTonya Barton for Kingdomware Technologies, the protesters.

Dennis Foley, Esq., Candice M. Cornish, Esq., and Kevin L. Pearson, Esq., Department of Veterans Affairs, for the agency.

Jacqueline Maeder, Esq., Paula A. Williams, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The Veterans Benefits, Health Care, and Information Technology Act of 2006 requires the Department of Veterans Affairs to determine whether two or more service-disabled veteran-owned small business concerns can meet its requirements at a reasonable price before proceeding with Federal Supply Schedule acquisitions.

DECISION

Aldevra, of Portage, Michigan, a service-disabled veteran-owned small business (SDVOSB) concern, protests the terms of solicitation Nos. VA246-12-Q-3077, VA247-12-Q-0986, 565-12-3-5090-0018, 565-12-3-1020-0102, and FedBid Buy Nos. 393886 and 383489, issued by the Department of Veterans Affairs (VA) for miscellaneous kitchen equipment for VA Medical and Health Care Centers at various locations throughout the United States. Aldevra also protests the VA's award of a contract to Glaser Direct, Inc., under solicitation No. 512-12-3-4894-0128, for an ice machine and dispenser.¹

¹ While Aldevra initially filed a timely protest of the terms of solicitation No. 512-12-3-4894-0128, the agency subsequently proceeded with award to Glaser Direct notwithstanding the protest.

Kingdomware Technologies, of Waldorf, Maryland, an SDVOSB concern, protests the VA's award of contract No. VA24612F4632 to Live Process, Inc. for computer software and training.² Both protesters assert that the agency improperly failed to comply with the requirements of the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the VA Act), and its implementing regulations, to determine whether these procurements should be set aside for SDVOSB (or veteran-owned small business (VOSB)) concerns.

We sustain the protests.

The procurements are being conducted or were conducted pursuant to General Services Administration Federal Supply Schedule (FSS) procedures and implementing regulations, set forth at Federal Acquisition Regulation subpart 8.4. In accordance with those regulations, the solicitations were issued on an unrestricted basis to vendors holding FSS contracts.

Aldevra asserts that the VA acted improperly by using FSS procedures without first conducting market research to determine whether the procurements should be set aside for SDVOSB (or VOSB) concerns. Aldevra maintains that if the agency had conducted market research, it would have found that at least two SDVOSBs could meet the requirements at a reasonable price. Kingdomware, which believes that VA market research indicates that SDVOSB concerns could perform the work required under the solicitation, asserts that the agency improperly failed to set the solicitation aside for SDVOSB concerns as required under the VA Act. The agency advises that, in fact, it does not conduct market research to determine whether two or more SDVOSB (or VOSB) concerns could meet the requirements at a reasonable price when it has determined to conduct a procurement using the FSS procedures. Agency E-Mail, June 12, 2012.

Previously, we sustained protests filed by Aldevra against VA procurements being conducted pursuant to FSS procedures in which, like here, it appeared that the agency failed to comply with the requirements of the VA Act and its implementing regulations. Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112; Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183. The issue raised and the agency's arguments in those Aldevra protests are the same as the issue and the arguments presented here.

² Kingdomware learned of the VA's recent award to Live Process shortly after it was published in the Federal Procurement Data System; Kingdomware protested within 10 days after learning of the procurement. The VA has not argued that Kingdomware's protest was untimely, and we cannot conclude from the protest, on its face, that it was filed untimely.

For the same reasons that we discussed at length in our recent decisions, we reject the VA's arguments in the current protests. Here, it appears that the VA has not conducted market research to determine if there are two or more eligible SDVOSB (or VOSB) concerns capable of performing the agency's requirements. Consistent with our recent decisions, we conclude that the 2006 VA Act requires that the agency make a determination whether these acquisitions should be set aside for SDVOSB (or VOSB) concerns prior to conducting the procurements using FSS procedures, and requires that the procurement be set aside for SDVOSB (or VOSB) concerns where the agency determined that two or more SDVOSB (or VOSB) concerns could perform the requirements at a reasonable price. We therefore sustain Aldevra's and Kingdomware's protests.

RECOMMENDATION

Regarding the Aldevra protests (other than Aldevra's protest under solicitation No. 512-12-3-4894-0128, which resulted in an award to Glaser Direct), we recommend that the agency conduct reasonable market research regarding its requirements under these solicitations. If it determines that there is a reasonable expectation that two or more SDVOSB (or VOSB) concerns can meet the agency's requirements at a reasonable price, we recommend that the agency cancel the solicitations and re-solicit its requirements as SDVOSB (or VOSB) set-asides.

Regarding Kingdomware's and Aldevra's protests of VA's award of contracts, we recommend that the agency determine whether there is a reasonable expectation that two or more SDVOSB (or VOSB) concerns can meet the agency's requirements at a reasonable price, and, if it so determines, the agency should set the procurements aside for SDVOSB (or VOSB) concerns. In the event that a contractor other than the current awardees is then in line for award under the resulting SDVOSB (or VOSB) set-asides, the contracts should be terminated for convenience if feasible. We also recommend that the agency reimburse the protesters the costs of filing and pursuing the protests. 4 C.F.R. 21.8(d)(1) (2012). Aldevra's and Kingdomware's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

Lynn H. Gibson
General Counsel