



Decision

Matter of: Legatus6, LLC

File: B-405618; B-405620; B-405621; B-405622; B-405624; B-405626; B-405627;
B-405760; B-405763; B-405767

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DIGEST

Protests maintaining that solicitations should be set aside for service-disabled veteran-owned small businesses (SDVOSBs) are denied where record shows that, on the basis of adequate market research, the agency concluded that it did not have a reasonable expectation of receiving proposals from at least two SDVOSBs at fair and reasonable prices.

DECISION

Legatus6, LLC, of Fairfax, Virginia, protests the terms of several solicitations issued by the Veterans Administration (VA) for the design and installation of solar energy photovoltaic projects at various locations throughout the United States.¹ Legatus6 maintains that the VA improperly intends to conduct these acquisitions using the General Services Administration’s Federal Supply Schedule (FSS) rather than

¹ The solicitations are: VA-701-11-RQ-0374 (B-405618, Mather, California); VA-701-11-RQ-0105 (B-405620, Palo Alto, California); VA-701-11-RQ-0364 (B-405621, Jackson, Mississippi); VA-701-11-RQ-0352 (B-405622, Little Rock, Arkansas); VA-701-11-RQ-0107 (B-405624, San Antonio, Texas); VA-701-11-RQ-0362 (B-405626, Pineville, Louisiana); VA-701-11-RQ-0363 (B-405627, Shreveport, Louisiana); VA-701-11-RQ-0126 (B-405760, Kerrville, Texas); VA-701-11-RQ-0399 (B-405763, Gainesville, Florida); and VA-701-11-RQ-0355 (B-405767, San Francisco, California).

conducting them as acquisitions set aside for service-disabled, veteran-owned small businesses (SDVOSB). The protester asserts that the agency failed to conduct adequate market research in connection with its decisions not to set the acquisitions aside for SDVOSBs as required by the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the 2006 VA Act).

We deny the protests.

By way of background, our Office recently sustained a protest in which we interpreted the provisions of the 2006 VA Act and its implementing regulations. As is pertinent here, the VA Act requires that the agency set aside acquisitions for SDVOSBs where it has a reasonable expectation that it will receive offers from at least two SDVOSBs and award will be made at a fair and reasonable price.² Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183. We found that the VA had erred in soliciting its requirements using the FSS without first determining whether its acquisitions should be set aside for SDVOSBs.

The decision in Aldevra, supra, involved two acquisitions. In the first acquisition, the VA conceded that there were at least two SDVOSBs capable of meeting its requirements; we found that the terms of the 2006 VA Act required the VA to set that acquisition aside for SDVOSBs. Id. at 3. In the second acquisition, the agency had not conducted market research to determine whether there was a reasonable expectation of receiving offers from at least two SDVOSBs capable of meeting its requirements. We found that the 2006 VA Act required the agency to conduct market research to determine whether there were at least two SDVOSBs capable of meeting its requirements. Id. at 3-4.

PROTEST

The current protests are distinguishable in that, in each of these protested acquisitions, the VA has conducted market research and concluded that there is not a reasonable expectation of receiving proposals from at least two qualified SDVOSBs and that it will not be able to make award at a fair and reasonable price to such a concern. Consequently, the agency has determined to meet its requirements using the FSS. The sole issue in these cases relates to the adequacy of the VA's market research.

Legatus6 asserts that, in each of these procurements, the VA either failed to perform adequate market research or reached unreasonable conclusions based on the information that was revealed by the agency's market research. The protester principally maintains that, viewing the VA's market research information for all 10 of

² The VA Act, and our decision in Aldevra, supra., apply as well to set asides for veteran owned small businesses. 38 U.S.C. § § 8127-8128.

the acquisitions as a whole, the agency should have concluded that there were at least two SDVOSBs capable of meeting its requirements for the vast majority of the requirements being solicited.

ANALYSIS

We have held that the requirements of the 2006 VA Act do not dictate the use of any particular methodology in assessing the availability of SDVOSB firms 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. FlowSense, LLC, B-310904, Mar. 10, 2008, 2008 CPD ¶ 56 at 3.

We conclude that the VA's market research here was adequate for purposes of reaching each of its decisions not to set aside these acquisitions for exclusive SDVOSB participation. First, we find the protester's broad assertion--that the VA was required somehow to consider the results of its market research in the aggregate--to be without merit. The agency's decision in each of the acquisitions considered facts and circumstances unique to each project (including, for example, the value and size of the project, and the identity, capability and capacity of the firms expressing interest in each project), and those facts and circumstances could only be meaningful when viewed individually rather than in the aggregate. Simply stated, the fact that, in the aggregate, the VA's research shows that there may be two or more SDVOSBs that have expressed an interest in performing one or another of the agency's projects does not show that the VA's individual decision in any particular acquisition was unreasonable.

The record in each acquisition also shows that the VA performed adequate market research in order to determine whether there were two or more SDVOSBs that could perform each project at a fair and reasonable price. For each of the projects, the agency issued a sources sought notification through FedBizOpps inviting firms to express an interest in the project and requesting basic information relating to the firm's capabilities and capacity, as well as information about its business type (e.g., large business, small business, SDVOSB, etc.). The VA also issued a request for information (RFI) to all FSS schedule holders requesting similar information. The VA then used the information obtained from these two sources and cross-checked the responding vendors in the VA's "VIP" database.³ Finally, the VA used pricing information obtained from several recent set-aside procurements to compare the

³ Pursuant to 38 U.S.C. § 8127(f) (2006), the VA is required to maintain a database comprised of small business concerns owned by veterans, as well as the veteran owners of such businesses. That database is named the VIP database. 38 C.F.R. § 74.1 (2010).

prices potentially available from SDVOSBs in order to determine whether, if it were to set aside the acquisitions, it could reasonably expect to make award at a fair and reasonable price.

In each case, after analyzing the information obtained, the agency concluded that there were not at least two SDVOSBs capable of performing the project at a fair and reasonable price. We have reviewed the agency's determinations and conclude that, on the basis of our review, they were reasonable. We discuss two of the projects for illustrative purposes.

The Mather, California Project

Regarding its Mather, California project, the VA received responses from six purported SDVOSBs in response to its sources sought notification published in FedBizOpps. Of the six respondents, two were not listed in the VIP database (and therefore would have been ineligible for award); two were deemed not capable of performing the requirement because they had not performed a project of similar size and scope; and one was deemed not capable because it was a consulting firm with no solar power system construction or installation experience. Thus, of the six respondents only one (the protester) was found capable of performing the requirement and otherwise eligible. Agency Report (AR), B-405618, exh. 2.

In response to its RFI to FSS schedule holders, the VA received responses from three SDVOSBs. Of these three, two were deemed not capable of performing the requirement. The third concern, while deemed capable, responded to the RFI, but not the FedBizOpps sources sought notification. Agency Report (AR) B-405618, exh. 2.

The record also shows that the agency considered pricing information obtained from another recent open market solicitation for a solar power project at Grand Junction, Colorado, that had been set aside for small businesses. Of the firms that responded to that solicitation, three were SDVOSBs. Among these three SDVOSB vendors, the price submitted by one was determined fair and reasonable, but the prices submitted by the other two were not considered fair and reasonable because they were 24 percent and 28 percent higher respectively. Contracting Officer's Statement, B-405618, at 3-4. The VA concluded from this information that it was not likely to receive fair and reasonable prices from at least two SDVOSBs for this requirement were it to set it aside.

On the basis of this market research, the VA concluded that it had no reasonable expectation of receiving offers from at least two SDVOSBs at fair and reasonable prices in an open market acquisition, and also that there was only one eligible,

capable, FSS vendor⁴ for the requirement; it therefore solicited the requirement through the FSS on an unrestricted basis.

On the record before us, we have no basis to object to the agency's conclusion that there was no reasonable expectation of receiving offers from at least two SDVOSBs at fair and reasonable prices for the Mather, California project.

The Kerrville, Texas Project

Similarly, in considering the availability of SDVOSBs for its Kerrville, Texas project, the record shows that, in response to its sources sought notice in FedBizOpps, the agency received responses from five purported SDVOSBs. Of the five respondents, only one (the protester) was listed in the VIP database and, therefore, the other four respondents would have been ineligible for award.

In response to the agency RFI to FSS schedule holders, the agency received two responses from SDVOSBs.⁵ Of these two concerns, one was found capable of meeting the agency's requirements. The other was described by the agency as only "potentially capable," because the respondent lacked direct experience with the design and installation of a solar power system and would need an acceptable subcontractor to perform the requirement. AR, B-405760, exh. 2 at 7. While this second firm's response to the RFI made reference to a subcontractor, the subcontractor's experience was limited to much smaller projects (between 18 and 211 kilowatts). In contrast, the Kerrville, Texas, project is for installation of a system projected to be between 800 kilowatts and one megawatt. *Id.* By way of comparison, the agency determined that another prospective firm responding to the sources sought notification was not capable of performing the Kerrville project because its largest prior project was only 240 kilowatts, and the firm therefore lacked experience on projects of similar scope. AR, B-405760, exh. 2, chart.

In addition, the VA considered the pricing information from the Grand Junction, Colorado project (discussed above in connection with the Mather, California project), as well as pricing information from another recent project in Martinez, Virginia. Of significance, the agency's comparison shows that, based on pricing

⁴ The record is silent on the reason that the FSS SDVOSB vendor elected to respond to the FSS RFI but not the sources sought notice for the potential open market acquisition reserved for SDVOSBs. We will not speculate on the question, but note that the agency was not required to issue its acquisition as an open market SDVOSB set-aside in the hopes that the FSS vendor might elect to participate in the acquisition.

⁵ As with the Mather, California project, the FSS vendors here elected not to respond to the agency's open market sources sought notification.

information obtained from one of the protester's previous projects listed in its response to the agency's sources sought notice, the protester's price was approximately 19 percent higher than the price obtained from the winning contractor on the Martinez, Virginia project. Contracting Officer's Statement, B-405760, at 4. The VA therefore concluded with respect to this project that, although the protester might be capable of performing the requirement, it would not likely propose a fair and reasonable price; the protester has not responded to the agency's showing.

On the basis of this information, the VA concluded that it did not have a reasonable expectation of receiving at least two SDVOSB offers at a fair and reasonable price using an open market solicitation; it therefore decided to solicit its requirement using an unrestricted FSS solicitation.

As with the adequacy of the VA's research on the Mather, California project, we have no basis to object to the agency's conclusion that there was not a reasonable expectation of receiving offers from at least two SDVOSBs at fair and reasonable prices for this requirement.

The protests are denied.

Lynn H. Gibson
General Counsel