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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Kevcon, Inc.  
**File:** B-406101; B-406101.2; B-406101.3  
**Date:** February 6, 2012

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William L. Bruckner, Esq., Bruckner & Walker, LLP, for the protester.  
Shaquana L. Cooper, Esq., Department of Veterans Affairs, for the agency.  
Gary R. Allen, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

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### DIGEST

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

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### DECISION

Kevcon, Inc., of Escondido, California, protests the terms of request for proposals (RFP) No. VA-101-11-RP-0182, issued by the Department of Veteran Affairs (VA) for construction services at the Tahoma National Cemetery in Kent, Washington. Kevcon, a service-disabled veteran-owned small business (SDVOSB), contends that the VA failed to perform sufficient market research to ascertain the interest and capability of SDVOSBs to perform the requirement.

We deny the protest.

The RFP, issued on October 18, 2011, as a small business set-aside, provided for the award of a fixed-price contract for various construction services at the Tahoma National Cemetery. Among other things, the contractor will provide services supporting demolition, removal of debris, and erosion control, and provide labor and materials for the construction of roadways, bridges, columbaria, crypts, cremains, memorial walls, landscaping, irrigation, and utilities. RFP at 4. The RFP identified North American Industry Classification System (NAICS) code 237990, "Other Heavy and Civil Engineering Construction," as being applicable to this procurement. Id.

Prior to issuing the RFP, the VA conducted market research. On August 9, the VA posted a sources sought notice on the Federal Business Opportunities (FedBizOpps) website inviting interested parties to provide their qualifications to demonstrate their ability to perform the work. Contracting Officer's Statement at 1; Agency Report (AR), Tab 2, Sources Sought Notice. The notice identified NAICS code 237990 as applicable to the procurement and stated that the purpose of the notice was to identify small, bondable and experienced businesses, such as SDVOSBs, that would be capable of meeting the requirement. AR, Tab 2, Sources Sought Notice, at 1. Interested firms were requested to provide information, such as the company's name, business status, bonding capacity and construction experience with projects similar in size, scope and dollar amount, by August 23. Id. at 1-2.

In addition to its sources sought notice, the VA also posted notice of its requirement on its Office Construction and Facilities Management "Construction Contract Forecast Summary" web page, and sent e-mails to approximately 250 SDVOSB concerns conducting business in Washington, Oregon and/or Idaho, and that were registered in the agency's vendor information pages, [www.vetbiz.gov](http://www.vetbiz.gov). See Contracting Officer's Statement at 1-2, 4; AR, Tab 5, Construction Contract Forecast Information Page, Aug. 25, 2011.

The agency received seven responses, including Kevcon's, to the sources sought notice, only three of which were SDVOSBs. Contracting Officer's Statement at 2-3; AR, Tab 6, Sources Sought Analysis. The VA determined that only one of these three SDVOSB firms--Kevcon--was capable of meeting the requirements. Based upon the information gathered, the contracting officer determined that there was not a reasonable expectation of receiving offers from two or more SDVOSBs capable of performing the stated requirements, but decided that the procurement could properly be set aside for small businesses. The agency's Office of Small Disadvantaged Business Utilization (OSDBU) representative concurred with the contracting officer's decision. AR, Tab 7, Review for the Small Business Program and Contract Bundling, Sept. 2, 2011.

On October 3, the VA posted a presolicitation notice on FedBizOpps, announcing that the procurement would be set aside for small businesses. AR, Tab 9, Presolicitation Notice. Kevcon complained to the VA, identifying two other SDVOSBs (not the firms that responded to the sources sought notice) that Kevcon represented were interested in submitting offers for this requirement. Kevcon requested that the procurement be set aside for SDVOSBs. Although neither company had expressed any interest or otherwise communicated with the agency, the VA conducted further market research with respect to these two companies, including reviewing the companies' verified registration status on the Vetbiz website and the firms' Dun & Bradstreet filings. Contracting Officer's Statement at 5; AR, Tab 12, Additional Market Research. From this review, the VA determined that

neither of the firms identified by Kevcon could satisfy the agency's requirements. Contracting Officer's Statement at 5.

Because the agency determined that it did not have a reasonable expectation that it would receive offers from two or more SDVOSBs capable of performing the stated requirements, it informed Kevcon that the agency would not set aside the RFP for SDVOSBs. This protest followed.

## DISCUSSION

Kevcon makes numerous arguments challenging the VA's determination that the agency did not have a reasonable expectation that it would receive offers from two or more SDVOSBs capable of performing the stated requirements. We have considered all of the protester's arguments, although we only address the primary ones, and find that none provide a basis to object to the VA's decision to set aside the RFP for small businesses.

Under the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. § 8127, and the VA's implementing regulations, VA Acquisition Regulation (VAAR) §§ 819.7004, 819.7705, the VA is required to set aside acquisitions for SDVOSBs whenever it determines that there is a reasonable expectation that offers will be received from at least two SDVOSB firms and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d); VAAR § 819.7005. The determination as to whether there is a reasonable expectation of receiving offers from two or more SDVOSB firms 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. Buy Rite Transport, B-403729, B-403768, Oct. 15, 2010, 2010 CPD ¶ 245 at 3. While the use of a particular method of assessing the availability of capable SDVOSB firms is not required, an analysis of factors such as the recommendations of appropriate small business specialists, market surveys that include responses to sources sought announcements, and prior procurement history, may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement. FlowSense, LLC, B-310904, Mar. 10, 2008, 2008 CPD ¶ 56 at 3. The assessment must be based on sufficient evidence to establish its reasonableness. See Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 5.

Kevcon complains that the VA's market research was flawed, because the agency's emails to SDVOSBs to determine whether any were interested in performing this work was limited to firms conducting business in Washington, Oregon and/or Idaho. Kevcon contends, given the size of this procurement, that SDVOSBs outside this geographic area would be interested in this procurement. Comments at 4. There is no merit to this complaint. Although it is true that the VA emailed approximately 250 SDVOSBs within this tri-state area, this additional research followed the agency's

earlier posting of the requirement, without any geographic limitations, on FedBizOpps. As noted above, the agency only received expressions of interest from three SDVOSBs, only one of which (Kevcon) was capable of performing the work.<sup>1</sup>

Although Kevcon has identified numerous SDVOSBs that it believes may be interested in performing this work, it has not demonstrated that the VA's posting of a sources sought notice on FedBizOpps and other market research was inadequate. Also, apart from the two other SDVOSBs that Kevcon earlier identified to the agency (and which the VA found incapable of performing the work), Kevcon has not identified any SDVOSBs interested in performing this work.

With respect to the two SDVOSBs that responded to the sources sought notice and the other two SDVOSBs identified by Kevcon as interested in the procurement, Kevcon does not specifically argue that the agency unreasonably found that these firms could not perform this work. Rather, Kevcon complains that the agency's judgment as to the capability of these firms to perform this work was essentially a responsibility determination. See Comments at 5-6. Although Kevcon suggests that the VA used an overly stringent standard in finding that these firms could not perform this work, it does not identify any specific part of the agency's analysis that was unreasonable. Contrary to Kevcon's arguments, the record shows that the VA's judgment as to the capability of these firms was part of an informed business judgment that there was not a reasonable expectation of receiving offers from two or more SDVOSBs capable of performing the contract.<sup>2</sup>

The protests are denied.

Lynn H. Gibson  
General Counsel

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<sup>1</sup> In its first supplemental protest, Kevcon argued that the VA amended the RFP to allow entities in the Joint Venture Mentor/Protégé program to compete and that this required the VA to conduct new market research. Supp. Protest at 2. Because Kevcon did not address the VA's response to this argument, we consider this protest ground to be abandoned. Cedar Elec., Inc., B-402284.2, Mar. 19, 2010, 2010 CPD ¶ 79 at 3 n.4. In any event, the record shows this argument to be without merit.

<sup>2</sup> In its second supplemental protest, Kevcon provided another list of SDVOSBs that Kevcon claims may be interested. 2<sup>nd</sup> Supp. Protest, attach. B. Kevcon does not represent that any of the firms listed are capable of performing the requirement, nor does it assert that any of these firms contacted the VA to express interest in performing the work.