



Decision

Matter of: Kingdomware Technologies

File: B-406507

Date: May 30, 2012

LaTonya Barton, Kingdomware Technologies, for the protester.
Dennis Foley, Esq., Department of Veterans Affairs, for the agency.
Cherie J. Owen, Esq., Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of
the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The Department of Veterans Affairs improperly used non-mandatory Federal Supply Schedule procedures to procure services, rather than using a set-aside for service-disabled veteran-owned small business (SDVOSB) concerns, and improperly awarding a contract to a non-SDVOSB concern.

DECISION

Kingdomware Technologies of Waldorf, Maryland, a service-disabled veteran-owned small business (SDVOSB) concern, protests the Department of Veterans Affairs (VA) award of contract No. VA-245-12-F-0622 to Everbridge, Inc. to provide employee emergency notification services.¹ Kingdomware asserts that the agency 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, with regard to setting aside procurements for SDVOSB (or veteran-owned small business (VOSB)) concerns.

We sustain the protest.

This procurement was conducted pursuant to General Services Administration Federal Supply Schedule (FSS) procedures, set forth at Federal Acquisition

¹ The protester contends that no solicitation number was issued because the agency did not advertise the requirement prior to making the award. Protest at 4. The agency has not disputed this assertion.

Regulation (FAR) subpart 8.4. Kingdomware asserts that the VA acted improperly by using non-mandatory FSS procedures and awarding a contract to a non-SDVOSB company, rather than setting aside the procurement for SDVOSB concerns. Kingdomware further asserts that the agency's own market research established that there were "at least 20 SDVOSB [concerns]" (including Kingdomware) that hold FSS contracts for the acquired services; yet, the agency awarded the contract to a non-SDVOSB concern.

The VA has responded to Kingdomware's protest by repeating arguments it has previously made in connection with a prior protest regarding SDVOSB concerns. See Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112. In that decision we sustained a protest challenging the VA's actions with regard to an FSS procurement in which, as here, the protester asserted that the agency failed to comply with the requirements of the VA Act and its implementing regulations.

Specifically, in Aldevra, we noted that the VA Act provides that:

. . . 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.

38 U.S.C. § 8127(d) (2006).

There, as here, the VA argued that, notwithstanding the VA Act, the agency need not consider SDVOSB and VOSB set-asides prior to determining whether to purchase goods or services through the FSS program. We disagreed on the basis that the plain language of the VA Act mandates that the VA "shall" conduct its procurements, including FSS acquisitions, using an SDVOSB set-aside when there is a reasonable expectation that two or more SDVOSB concerns can meet its requirements at a reasonable price. Aldevra, supra, at 5.

Here, the VA asserts that it "finds no legal question at issue in this protest other than [Kingdomware's] contention that VA is required to perform market research and conduct SDVOSB set-asides . . . prior to considering use of the FSS." Agency Report, Apr. 12, 2012, at 2. As it has previously, the VA maintains that FSS acquisitions "[are not] impacted by VA's SDVOSB/VOSB authority." Id. Further, the VA does not dispute Kingdomware's assertion that the VA, in fact, conducted market research in connection with this procurement and found that there were at least 20 SDVOSBs that could perform the requirements at issue. Rather, the VA asserts that

“it is irrelevant whether VA conducted market research to determine whether two or more small businesses of any type were capable of bidding on the requirement” maintaining that SDVOSB set-asides are discretionary under any FSS acquisition. Id.

For the same reasons we discussed at length in Aldevra, we reject the VA’s arguments. In addition, it appears that, here, the agency conducted market research prior to the acquisition and found that at least 20 SDVOSB concerns were capable of meeting the requirements at issue. Specifically, in an email to Kingdomware dated March 12, 2012, the agency stated the FSS schedule under which this procurement was conducted “includes 541 vendors,” and acknowledged that “20 of those are SDVOSBs.” Protest, Tab 4, Email from Contract Specialist to Kingdomware, Mar. 12, 2012.

Consistent with our decision in Aldevra, supra, we conclude that the VA Act required the agency to consider whether this acquisition should have been set aside for SDVOSB (or VOSB) concerns. Further, on the record presented, it appears that such set-aside should have occurred. Accordingly, we sustain Kingdomware’s protest.

RECOMMENDATION

We recommend that the agency confirm the market research it previously conducted. In the event such research confirms that two or more SDVOSB concerns are able to meet the requirements at a reasonable price, we recommend that the agency cancel the contract to Everbridge and re-solicit the requirement as an SDVOSB set-aside. We also recommend that the agency reimburse the protester the costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2011). Kingdomware’s certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel