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# Decision

**Matter of:** Veteran Shredding, LLC

**File:** B-417399

**Date:** June 4, 2019

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Joseph A. Whitcomb, Esq., Michael C. Milazzo, Esq., Whitcomb, Selinsky, McAuliffe PC, for the protester.  
Donald C. Mobly, Esq., Natica Chapman Neely, Esq., Department of Veterans Affairs, for the agency.  
Christopher Alwood, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest that agency failed to set aside solicitation for document destruction services for service-disabled veteran-owned small businesses (SDVOSB) is denied where agency reasonably concluded that it was unlikely to receive quotations from two or more SDVOSBs and that award could be made at a fair and reasonable price.

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## DECISION

Veteran Shredding, LLC, of Burnsville, Minnesota, a small business, protests the terms of request for quotations (RFQ) No. 36C26319Q0276, issued by the Department of Veterans Affairs (VA) for document destruction services for the Minneapolis Veteran's Affairs Healthcare System (MVAHCS). Veteran Shredding argues that the contracting officer improperly failed to set aside the RFQ for award to service-disabled veteran-owned small businesses (SDVOSB), and instead designated the RFQ as a small business set-aside.

We deny the protest.

## BACKGROUND

The RFQ at issue here was preceded by an earlier solicitation for document destruction services for the MVAHCS. Specifically, on February 9, 2018, the VA issued RFQ No. 36C26318Q0181 as an SDVOSB set-aside, seeking quotations to provide document destruction services for a 1-year base period and four 1-year option periods at a fixed-price. Memorandum of Law (MOL) at 1-2. The VA received quotations from

five SDVOSBs, the lowest of which was 83 percent higher than the agency's independent government cost estimate (IGCE). Contracting Officer's Statement (COS) at 2. The contracting officer concluded that none of the quoted prices were fair and reasonable, and canceled the RFQ. Id.

Veteran Shredding filed two unsuccessful protests challenging the contracting officer's decision to cancel the solicitation, and prospective set-aside determination for the resolicitation of the requirement.<sup>1</sup> MOL at 3. During the pendency of the protests, the contracting officer conducted market research to assess whether the RFQ could be set aside for veteran-owned small businesses (VOSB) or small business concerns. COS at 2-3. Regarding a VOSB set-aside, the contracting officer concluded that there was not a reasonable expectation that two or more VOSBs would submit quotations and that award could be made at a fair and reasonable price. COS at 2. Regarding a small business set-aside, however, the contracting officer concluded that there was a reasonable expectation that at least two small business concerns would submit quotations and that award could be made at a fair market price. COS at 3.

After resolution of the protests, MVAHCS submitted an updated requirements package and the contracting officer updated the IGCE.<sup>2</sup> Id. The contracting officer found that the five quotations previously received from SDVOSBs still unreasonably exceeded the updated IGCE.<sup>3</sup> COS at 3-4. The contracting officer performed additional market research based on the updated requirements, including publishing a new source-sought notice. Id. The contracting officer received responses to the source-sought notice from two SDVOSB concerns and one small business. Id. The protester did not respond to the sources sought notice. Id. After considering this additional information, the contracting officer decided to set aside the requirement for small business concerns. COS at 5.

On March 1, 2019, the VA issued RFQ No. 36C26319Q0276 as a small business set-aside, once again seeking quotations to provide document destruction services for a 1-year base period and four 1-year option periods at a fixed-price. MOL at 1-2. The VA

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<sup>1</sup> Veteran Shredding filed a protest with our Office challenging the cancellation decision, which we dismissed as untimely. Veteran Shredding, LLC, B-416144, June 4, 2018 (unpublished decision). To the extent the protester objected to the agency's intent to revise its set-aside decision, we dismissed that issue as premature. Id. Veteran Shredding then filed a protest with the U.S. Court of Federal Claims challenging the agency's cancellation decision. The court dismissed the protest on the basis that Veteran Shredding lacked standing to protest the cancellation of the RFQ. Veteran Shredding, LLC v. United States, 140 Fed.Cl. 759, 765 (2018).

<sup>2</sup> The contracting officer increased the IGCE from \$[DELETED] to \$[DELETED]. COS at 2-3.

<sup>3</sup> The quotations received from the cancelled solicitation exceeded the updated IGCE by 26 to 83 percent.

reports that it received four quotations, one from an SDVOSB, one from a VOSB, and two from small businesses.<sup>4</sup> COS at 5. Veteran Shredding did not submit a quotation. Id. Veteran Shredding filed this protest before quotations were due, challenging the terms of the RFQ.

## DISCUSSION

Veteran Shredding argues that the VA was required to set aside the current RFQ for SDVOSBs, rather than for small businesses, because, according to the protester, the VA had a reasonable basis to expect quotations from two or more SDVOSBs and that award could be made at a fair and reasonable price. Veteran Shredding raises multiple arguments in support of its challenge, and, although we do not specifically address all of the protester's arguments, we have fully considered them and find they afford no basis on which to sustain the protest.

Under a provision of the Veterans Benefits, Health Care, and Information Technology Act of 2006, a contracting officer in an acquisition conducted by the VA is required to set aside the procurement for either SDVOSBs or VOSBs where there is "a reasonable expectation that two or more small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities 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). While the requirements of 38 U.S.C. 8127(d) do not dictate the use of any particular methodology in assessing the availability of potential SDVOSB firms, our Office has explained that the assessment must be based on sufficient evidence to establish its reasonableness. Kevcon, Inc., B-406101 et al., Feb. 6, 2012, 2012 CPD ¶ 95 at 3.

Here, in making his set-aside decision, the contracting officer considered the five quotations the agency received from SDVOSBs in response to the cancelled procurement for the identical requirement that is the subject of the current procurement, and concluded that the prices were unreasonable, even in comparison to the updated IGCE. COS at 3-4. In this regard, as noted above, the VA published a sources-sought notice for this procurement. COS at 4. Only one SDVOSB, which had not previously submitted a quotation in response to the cancelled solicitation, expressed interest. Id. The contracting officer, however, did not expect this interested SDVOSB to submit a quotation with fair and reasonable pricing based on the contracting officer's knowledge of that vendor's unreasonably high prices in response to other solicitations for similar shredding services in Minnesota and North Dakota. COS at 4-5. Therefore, the VA argues, the contracting officer's decision to issue the RFQ as a small business set-aside, rather than an SDVOSB set-aside, was reasonable and consistent with law and regulation. We agree.

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<sup>4</sup> The four quotations submitted included total prices of \$[DELETED], \$[DELETED], \$[DELETED], and \$[DELETED]. COS at 5.

Veteran Shredding challenges the contracting officer's conclusion that there was no expectation that the agency would receive fair and reasonable pricing in connection with an SDVOSB set-aside. According to the protester, the contracting officer should have deemed the pricing from the cancelled procurement to have been per se fair and reasonable because the prices were based on competition, as opposed to comparing these prices with an IGCE. Comments at 8-9. In support of this position, the protester points to Federal Acquisition Regulation (FAR) sections 13.106-3(a) and 15.404-1(b)(2), both of which generally indicate that adequate price competition can be used to establish fair and reasonable pricing when assessing the reasonableness of prices received in response to a competition. In the alternative, Veteran Shredding disputes the validity of the IGCE used by the agency to deem the pricing from the cancelled solicitation unreasonable. In this regard, the protester notes that the agency's IGCE was based on historical pricing data, which was allegedly more than seven years old. Comments at 14.

Regarding the protester's first argument, Veteran Shredding has failed to demonstrate how the analysis required by 38 U.S.C. § 8127(d) dictates the use of provisions from sections 13.106 or 15.404 of the FAR. Neither 38 U.S.C. § 8127(d) nor its implementing regulations<sup>5</sup> require the contracting officer to utilize a specific type of analysis to decide whether the agency can reasonably expect to make an award to an SDVOSB at a fair and reasonable price. By their terms, sections 13.106 and 15.404 of the FAR apply where an agency is evaluating proposed prices received in response to a competition. See FAR § 13.106-3(a) (“[b]efore making award, the contracting officer must determine that the proposed price is fair and reasonable”) and FAR § 15.404-1(b) (“[p]rice analysis is the process of examining and evaluating a proposed price”). They are not mandated where, as in this case, an agency is conducting market research to assess the propriety of a set-aside decision.<sup>6</sup>

Moreover, it defies logic that an agency would be limited to utilizing pricing from a competition that was cancelled because all the prices were found to be unreasonably high as the yardstick for reasonableness.<sup>7</sup> Rather, under such circumstances a contracting officer has the discretion to reasonably utilize other price analysis techniques such as consideration of an IGCE when making a set-aside decision. In this

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<sup>5</sup> VA Acquisition Regulation (VAAR) §§ 819.7004 to 819.7006.

<sup>6</sup> This is not to say that the price evaluation techniques identified in these provisions cannot be used when an agency is assessing whether it expects to receive reasonable prices in response to a potential set-aside. We only reject the protester's contention that the agency was bound to follow these provisions in this case.

<sup>7</sup> To the extent the protester believes that the prices received in response to the cancelled solicitation were in fact reasonable and that cancellation was therefore improper, as noted above, the protester failed to timely raise this challenge with our Office. Veteran Shredding, LLC, B-416144, supra. Accordingly, the protester cannot now use this protest as vehicle to challenge the agency's conclusions in that regard.

regard, we have specifically found that an agency can reasonably decide not to set aside an RFQ for SDVOSBs where, as here, prices from a previously cancelled SDVOSB set-aside RFQ for the same requirement were significantly higher than the government's IGCE. See, e.g., Crosstown Courier Service, Inc., B-415818, March 27, 2018, 2018 CPD ¶ 129. Accordingly, the agency did not act contrary to sections 13.106-3(a)(1) or 15.404 of the FAR when it used an IGCE to assess price reasonableness as part of its set-aside decision.

Turning to the protester's alternative argument, that the IGCE was unreliable, Veteran Shredding notes that the IGCE was based on historical pricing information from the award of the incumbent contract in 2011. Veteran Shredding, however, has not explained how this historical pricing, even if set in 2011, does not provide a valid basis for comparison with the current requirement. Moreover, the record demonstrates that the protester's assertion regarding the basis of the IGCE is incorrect. The IGCE was not based only on prior contract pricing from 2011. The agency also considered published prices from the General Services Administration federal supply schedule, as well as informal vendor quotations when it developed the IGCE. COS attach. 2 at 44. As a consequence, Veteran Shredding has not provided a basis for our Office to conclude that the IGCE was defective or that the contracting officer acted unreasonably in using the IGCE to inform his set-aside decision.

The protest is denied.

Thomas H. Armstrong  
General Counsel