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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Metro Home Medical Supply, Inc.

File: B-297262

Date: December 8, 2005

Cheryl Anderson-Small for the protester.
Merilee D. Rosenberg, Esq., and Philip Kauffman, Esq., Department of Veterans Affairs, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest objecting to agency's failure to make award to protester, an Historically Underutilized Business Zone small business, on a sole-source basis is denied where prerequisites for a sole-source award, set forth in Federal Acquisition Regulation § 19.1306, were not met.

DECISION

Metro Home Medical Supply, Inc., a certified Historically Underutilized Business Zone (HUBZone) small business, protests the decision of the Department of Veterans Affairs (VA) to procure supplies and services for beneficiaries of the John D. Dingell VA Medical Center (VAMC) in Detroit under request for proposals (RFP) No. 583-00035-06, rather than through award of a contract to Metro on a sole-source basis.

We deny the protest.

The RFP, which was issued on July 15, 2005, sought home oxygen supplies and services for patients of seven VA medical centers and health care systems located in Veterans Integrated Service Network 11, one of which was the John D. Dingell VAMC. The solicitation contemplated the award of one or more fixed-price requirements contracts for a base period of 1 year and four 1-year options. The RFP, as amended, provided for award on the basis of the following cascaded preferences:

- for the John D. Dingell VAMC and three of the other facilities, if technically acceptable, competitive

proposals were received from two or more HUBZone small businesses, award would be made to a HUBZone small business;

- for the remaining three facilities and for any of the above facilities not resulting in award to a HUBZone small business, if technically acceptable, competitive offers were received from two or more small businesses, award would be made to a small business; and
- in the event that award was not made pursuant to either of the above procedures, award would be made on the basis of full and open competition.

On September 20, 3 days prior to the closing date for receipt of proposals, Metro protested to our Office, arguing that supplies and services for the John D. Dingell VAMC should be removed from the cascaded award process and a contract for them awarded to it on a sole-source basis under Federal Acquisition Regulation (FAR) § 19.1306. (Except in this limited sense, the protester did not challenge the lawfulness of the cascade approach.) The protester asserted that the VA has not complied with the goals for contracting to HUBZone small businesses that it has set for itself pursuant to the requirements of 15 U.S.C. § 644(g)(2) (2000), and that to remedy the noncompliance, the agency should award it (i.e., Metro) a sole-source contract.¹

The VA responds that it could not award a sole-source contract to Metro because the requirements of FAR § 19.1306 were not satisfied.² As relevant

¹ 15 U.S.C. § 644(g)(2) provides in relevant part as follows:

The head of each Federal agency shall . . . establish goals for the participation by small business concerns, by small business concerns owned and controlled by service-disabled veterans, by qualified HUBZone small business concerns, by small business concerns owned and controlled by socially and economically disadvantaged individuals, and by small business concerns owned and controlled by women in procurement contracts of such agency.

² In its comments on the agency report, the protester complains that the report was submitted to our Office 2 days late. To the extent that the protester suggests that due to the report's lateness, we should ignore its contents, we will consider a late report provided that its lateness did not prejudice the protester. General Elec. Co.,
(continued...)

here, this section provides that a contracting officer may award a contract to a HUBZone small business concern on a sole-source basis without considering small business set-asides, provided that:

- (1) Only one HUBZone small business concern can satisfy the requirement;
- (2) The anticipated price of the contract, including options, will not exceed \$5 million for a requirement within the North American Industry Classification System (NAICS) codes for manufacturing, or \$3 million for a requirement within any other NAICS code;
- (3) The requirement is not currently being performed by a non-HUBZone small business concern;
- (4) The value of the acquisition exceeds the simplified acquisition threshold;
- (5) The HUBZone small business concern has been determined to be a responsible contractor with respect to performance; and
- (6) Award can be made at a fair and reasonable price.

FAR § 19.306(a).

The contracting officer observes that neither the requirement that only one HUBZone small business concern be capable of satisfying the requirement nor the requirement that the anticipated price of the contract, including options, not exceed \$3 million (the applicable limit) was met here. In the former connection, the contracting officer notes that both Metro and another HUBZone small business, Eagle Home Medical Corp., expressed interest in competing for the Dingell VAMC requirements; in the latter connection, he notes that the government's estimated price for the services for that location was in excess of \$3 million. The protester has not sought to rebut the

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B-228191, Dec. 14, 1987, 87-2 CPD ¶ 585 at 2-3; see also Military Agency Servs. Pty., Ltd., B-290414 et al., Aug. 1, 2002, 2002 CPD ¶ 130 at 9. Here, there is no evidence that the protester, which was given the full period allowed under our Regulations to comment on the report, was prejudiced by the agency's late submission. See Cajar Def. Support Co., B-237426, Feb. 18, 1990, 90-1 CPD ¶ 286 at 6-7.

agency's position, which we find to be persuasive.³ In this regard, we sought comments on the protest from the Small Business Administration (SBA). In its comments, SBA agreed that the requirement at issue may not be the subject of a sole-source award to a HUBZone small business because the prerequisites for consideration of such a sole-source contract are not present. SBA Comments at 1-2. Moreover, as SBA also noted, the language of FAR § 19.306(a) is discretionary in any event; neither the statutory provisions relating to the HUBZone program nor the implementing regulations require the contracting officer to award a sole-source contract even where the prerequisites for such an award are met. Id. at 2.

Further, with regard to the protester's argument that the VA should award it a sole-source contract to remedy the agency's alleged failure to meet its annual goals for contracting to HUBZone small businesses, there is no legal basis for such a contention. As SBA points out, "Neither the statutory HUBZone provisions, the statutory goaling provisions, nor the implementing regulations contain an exception to the prerequisites for sole source HUBZone contract awards based on an agency's goaling performance. See 15 U.S.C. §§ 644(g)-(h), 657a(b)(2); FAR § 19.1306(a); 13 C.F.R. § 126.612." SBA Comments at 2.

The protest is denied.

Anthony H. Gamboa
General Counsel

³ In responding to the agency report, the protester raised a new argument, i.e., that the Dingell VAMC should be removed from the cascaded set-aside and designated as an "unencumbered" HUBZone set-aside. This would mean that, if the contracting officer receives only one acceptable offer from a qualified HUBZone small business in response to a set-aside, the contracting officer is to make award to that concern. FAR § 19.1305(d). We will not consider this argument because it pertains to the terms of the RFP, but was not raised prior to the closing date for receipt of proposals, and thus is untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2005).