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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: IBV, Ltd.

File: B-311244

Date: February 21, 2008

H. Wendell Gardner for the protester.

Maj. John G. Terra, and Col. Neil S. Whiteman, Department of the Air Force, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Decision to set aside procurement for small business participation instead of service-disabled veteran-owned small business concerns (SDVOSBC) was unobjectionable where, prior to making decision, contracting officer concluded that agency would not receive fair market price in offers from SDVOSBCs and conclusion was confirmed when all SDVOSBC proposals received, including protester's, significantly exceeded agency's estimate and prices proposed by non-SDVOSBCs.

DECISION

IBV, Ltd. protests the Department of the Air Force's decision to issue request for proposals (RFP) No. FA4416-08-R-0003, for collection and removal of solid waste, as a total small business set-aside. IBV, a service-disabled veteran-owned small business concern (SDVOSBC), asserts that the agency should have set aside the procurement for SDVOSBCs or awarded the firm a contract on a sole-source basis.

We deny the protest.

The RFP contemplated the award of a fixed-price contract for non-hazardous waste refuse collection, transportation, and disposal services at Andrews Air Force Base, Maryland, and related sites, for a period of 8 months, with 4 option years. The incumbent contractor is a small business and the contracting officer, with the concurrence of the agency's small business specialist, determined to set the RFP aside for small business concerns. In order to enhance competition, the contracting officer decided not to further restrict the procurement to SDVOSBCs. Based on her knowledge of the market, the contracting officer was concerned that SDVOSBCs

would not provide fair market prices. Contracting Officer's Declaration, ¶ 5. The RFP, as amended, advised prospective offerors that the annual estimated price range for all requirements was \$3-\$8 million. Prior to the closing time for receipt of proposals, IBV filed this protest.

Under the SDVOSBC procurement program, a contracting officer may restrict competition to SDVOSBCs if he or she has a reasonable expectation that not fewer than two such firms will submit offers and that the award can be made at a fair market price. 15 U.S.C. § 657f(b) (Supp. IV 2004); Federal Acquisition Regulation (FAR) § 19.1405(a), (b). Prior to proceeding with a small business set-aside, a procuring agency is required to make reasonable efforts to ascertain whether an SDVOSBC set-aside is appropriate. MCS Portable Restroom Serv., B-299291, Mar. 28, 2007, 2007 CPD ¶ 55 at 5. Although the use of any particular method of assessing the availability of firms for a set-aside is not required, measures such as prior procurement history, market surveys, and advice from the agency's small business specialist may all constitute adequate grounds for a contracting officer's decision to set aside, or not to set aside, a procurement. National Linen Serv., B-285458, Aug. 22, 2000, 2000 CPD ¶ 138 at 2. Generally, our Office regards such a determination as a matter of business judgment that we will not disturb absent a clear showing that it has been abused. Id.

IBV asserts that the contracting officer did not make a reasonable effort to ascertain whether an SDVOSBC set-aside was suitable. This argument is without merit. While the record shows that at least two SDVOSBC firms were available and interested in competing on this requirement, this is only the first of two considerations that go into a set-aside decision. In addition, the contracting officer must have a reasonable expectation that award will be made at a fair market price. 15 U.S.C. § 657f(b); FAR § 19.1405(a), (b). Here, as noted above, the contracting officer did not set the requirement aside because she did not expect to receive fair market prices from SDVOSBCs, and there is nothing in the record to demonstrate that her expectations were unreasonable. In this regard, while IBV disagrees with her decision, it has not provided any evidence that it and at least one other SDVOSBC would or could have provided fair market prices. IBV's mere disagreement with the agency's assessment does not demonstrate that the agency's judgment was unreasonable. Bahan Dennis Inc., B-249496.3, Mar. 3, 1994, 94-1 CPD ¶ 184 at 5.

Moreover, even if we agreed with IBV that the set-aside determination was not adequately supported at the time it was made, we would not object to the determination under the circumstances here. In this regard, while the agency received multiple proposals from SDVOSBCs, the contracting officer's concern that they would not propose fair market pricing was confirmed by the pricing of those proposals; all of the SDVOSBC proposals received were priced at more than double the independent government estimate, and all exceeded the RFP's estimated price range. Further, IBV's price was the highest of all proposals received, including those

of the other SDVOSBCs, and was more than double the prices of the three lowest-priced non-SDVOSBC small business proposals.¹ Agency Report at 30. Under these circumstances, the agency's set-aside decision was reasonable. See The Atlantic Co. of Am., Inc., B-293974, July 1, 2004, 2004 CPD ¶ 182 at 2 (GAO will consider proposals actually received in determining whether set-aside decision was reasonable (HUBZone set-aside)); York Int'l Corp., B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282 at 7 (small business set-aside); Litton Electron Devices, B-225012, Feb. 13, 1987, 87-1 CPD ¶ 164 at 2-3 (small business set-aside).

We reach the same conclusion with regard to IBV's assertion that the agency should have considered awarding it a contract on a sole-source basis. While an agency may make a sole-source award to an SDVOSBC, four conditions must be met: only one SDVOSBC can satisfy the requirement; where, as here, the requirement falls under a nonmanufacturing NAICS code, the anticipated award price will not exceed \$3 million; the SDVOSBC has been determined responsible with respect to performance; and award can be made at a fair and reasonable price. FAR § 19.406. Three of the four provisions are not met here. The record shows that there are multiple SDVOSBCs available to compete; the anticipated award exceeds the \$3 million limit; and, as discussed above, award could not be made to an SDVOSBC at a fair market price. Accordingly, the contracting officer reasonably did not consider IBV for a sole-source award.

In its comments on the agency report, IBV complains that its price was higher than necessary due to RFP requirements and because the agency did not provide certain information. Specifically, IBV notes that there is a potential for an increase of \$160,000 in dump fees before the agency would consider an equitable adjustment; there is no provision for fuel cost increases; offerors were required to purchase \$250,000 in new containers; and there was no disclosure of the frequency of most pickups or the number of trucks and personnel under the current contract. Matters such as this that concern alleged improprieties on the face of a solicitation must be filed prior to the deadline for receipt of offers. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2007). Thus, IBV's protest on these grounds is untimely.

The protest is denied.

Gary L. Kepplinger
General Counsel

¹ IBV proceeded with its protest pro se, and therefore did not have an attorney who could obtain access to nonpublic information pursuant to the terms of a protective order. Accordingly, our discussion of some aspects of the procurement is necessarily general in nature in order to avoid reference to nonpublic information. Our conclusions, however, are based on our review of the entire record, including nonpublic information.