



Decision

Matter of: Kingdomware Technologies

File: B-405727

Date: December 19, 2011

LaTonya Barton the protester.
Matthew V. Edwards, Esq., Department of Veterans Affairs, for the agency.
Linda C. Glass, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

The Department of Veterans Affairs (VA) improperly used non-mandatory Federal Supply Schedule procedures to procure services, rather than using a set-aside for service-disabled veteran-owned small businesses, where the applicable statute-- Veterans Benefits, Health Care, and Information Technology Act of 2006--and implementing regulations require the VA to use such set-asides where the statutory prerequisites are met.

DECISION

Kingdomware Technologies, of Waldorf, Maryland, a service-disabled veteran-owned small business (SDVOSB) concern, protests the corrective action taken by the Department of Veterans Affairs (VA) in response to the firm's protest of the terms of request for quotations (RFQ) No. VA-261-11-RQ-1514 for subscription and support services at the VA San Francisco Medical Center. The protester asserts that the VA improperly failed to comply with applicable statutes and regulations to determine whether the procurement should be set aside for SDVOSB concerns.

We sustain the protest.

BACKGROUND

The RFQ, issued on September 13, 2011, sought quotations by September 15 for a brand name (LiveProcess Enterprise) subscription and support services for a 1-year term. On September 15, Kingdomware protested to our Office, arguing that the RFQ was improperly restricted to the brand name because the protester provided similar subscription services. The protester also argued that the VA failed to conduct proper

market research, as required by Federal Acquisition Regulation (FAR) § 19.1405 (a), (b), to determine whether the requirement should be set aside for SDVOSBs.

In response to the protest, the agency advised our Office by letter of September 28 that it would take corrective action. Specifically, the VA stated that:

VA has determined that its sole source award to Live Process may not have been in accordance with the Federal Acquisition Regulation and prior GAO case law. VA will undertake corrective action in the instant protest by creating a requirement that is broadly defined and re-solicit it. The new solicitation or request for quote will include a revised statement of work, and other changes deemed appropriate. Also, VA will terminate the sole source award to Live Process. However, VA intends to solicit this requirement under FAR 8.4 which is exempt from FAR 19 requirements (FAR 8.404(a)). The protester improperly cites FAR 19.1405(a) and (b) as authority for a Service Disabled Veteran Owned Small Business Set Aside over a “GSA Schedule opportunity.” In addition, FAR 19.1404(c) excludes Federal Supply Schedule acquisitions from FAR 19.14.

VA’s Motion to Dismiss at 1.

On October 5, the protester objected to the proposed corrective action, arguing that the Veterans Benefits Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the 2006 VA Act) “enjoins the Department to make reasonable efforts to ascertain whether a solicitation can be set aside for service disabled veteran owned small businesses (‘SDVOSB’), without regard to whether or not the SDVOSBs hold a Federal Supply Schedule (‘FSS’) contract.” Protester’s Response to Motion to Dismiss at 1. Kingdomware contends that the VA should conduct market research to determine whether the requirement could be set aside for SDVOSBs or Veteran-Owned Small Business (VOSB) concerns. *Id.* at 5.

On October 12, in light of our recent decision in *Aldevra*, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183, we asked the VA if it intended to revise its proposed corrective action. In that decision we found that the VA improperly used non-mandatory Federal Supply Schedule procedures to procure items without conducting market research to determine if the procurements should be set aside for SDVOSBs in violation of the 2006 VA Act. We noted that the 2006 VA Act in relevant part, 38 U.S.C. § 8127(d), provides as follows:

. . . 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.

The statute also sets out an order of priority for the contracting preferences it establishes, providing that the first priority for contracts awarded pursuant to 38 U.S.C. § 8127(d) shall be given to SDVOSB concerns, followed by VOSBs. 38 U.S.C. § 8127(i).

On October 19, the VA responded that on the day it informed us of its proposed corrective action (September 28) the agency had executed the corrective action due to the expiration of fiscal year 2011 funds. Specifically, the VA states that on that date it canceled the sole source award to LiveProcess and issued a revised solicitation under FSS procedures for procurement of the services on a brand name or equal basis. The VA further states that it received quotations on September 29 and issued a delivery order on September 30. On October 26, the VA submitted its agency report in response to the protest.

DISCUSSION

The VA contends that Kingdomware has not been prejudiced by the agency's corrective action because the protester had the opportunity to submit a quotation in response to the revised FSS solicitation and chose not to do so. Agency Report at 2. The VA also argues that, because the protester did not submit a quotation, it is not an interested party to further challenge the procurement. *Id.* at 3.

As an initial matter, we disagree that Kingdomware is not an interested party to challenge the agency's actions. Under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (2006) and our Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1) (2011), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Here, Kingdomware protested the terms of the RFQ, arguing among other things that the VA had not reasonably determined whether the procurement should be set aside for SDVOSBs. Kingdomware also timely objected to the VA's proposed corrective action, arguing that in accordance with the 2006 VA Act the VA was required to perform market research to determine whether an SDVOSB set-aside was appropriate. Where, as here, the protester is challenging the terms of the solicitation, and the remedy sought is the opportunity to compete under a revised solicitation, the protester is an interested party, even if it did not submit a quotation or offer. See *Courtney Contracting Corp.*, B-242945, June 24, 1991, 91-1 CPD ¶ 593 at 4-5.

We also do not agree with the VA that Kingdomware has not been prejudiced by the agency's actions. As noted above, in *Aldevra*, *supra*, we found that the VA's decision to procure items from the FSS without determining whether the procurement should

be set aside for SDVOSBs violated the 2006 VA Act. We also noted that the VA's regulations implementing the 2006 VA Act provide in relevant part:

(a) the contracting officer shall set aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that:

(1) Offers will be received from two or more eligible SDVOSB concerns and;

(2) Award will be made at a reasonable price.

VA Acquisition Regulation, 48 C.F.R. § 819.7005(a) (2010). Here, as in Aldevra, the VA has not conducted market research to determine if there are two or more eligible SDVOSBs capable of performing the agency's requirements.¹

In sum, consistent with our decision in Aldvera, we conclude that the 2006 VA Act requires that the agency make a determination whether an acquisition should be set aside for SDVOSB concerns prior to conducting a procurement using FSS procedures.

RECOMMENDATION

We recommend that the agency conduct reasonable market research regarding its requirements. If as a result of this research the VA determines that there are two or more SDVOSB concerns capable of performing the requirement, the agency should cancel the award and re-solicit its requirement as a set aside for SDVOSBs. 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 claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. Id. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel

¹ Although the VA contends that Kingdomware has not proven that there are two or more SDVOSBs that can perform the requirements, the agency does not assert that there are not two or more eligible SDVOSBs that could perform.