



Decision

Matter of: Tasi, LLC
File: B-418168.2
Date: March 2, 2020

Louis Leon-Guerrero, TASI LLC, for the protester.
Deborah K. Morrell, Esq., Department of Veterans Affairs, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging terms of solicitation seeking termination of preexisting AbilityOne contracts is dismissed because it fails to state a legally cognizable basis for protest; there is no legal support for protester's contention that the Veterans Benefits, Healthcare and Information Technology Act of 2006 (the VBA) requires the Department of Veterans Affairs to terminate preexisting AbilityOne contracts in order to comply with the veteran set-aside requirements of the VBA.

DECISION

Tasi, LLC, of Tucson, Arizona, a service-disabled veteran-owned small business, protests the terms of request for quotations (RFQ) No. 36C24C19Q0045, issued by the Department of Veterans Affairs (VA) for surgical supplies. Tasi argues that the RFQ violates the requirements of the Veterans Benefits, Health Care and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (the VBA), as well as various implementing regulations.

We dismiss the protest.

This acquisition is for the establishment of blanket purchase agreements (BPAs) with vendors for the provision of medical and surgical supplies in connection with the VA's Medical/Surgical Prime Vendor Program. The particular requirements being solicited are disposable medical surgical supplies (apparel/textiles/gloves) to be provided on a nationwide basis. The RFQ solicits prices from interested vendors to provide these types of supplies from their respective catalogs of available products that also align with a list of such products enumerated in the RFQ. RFQ at 5-6. This protest focuses on an amendment issued by the agency in an attempt to clarify its acquisition strategy as it

relates to purchasing the solicited supplies from service-disabled veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSBs) on the one hand, and AbilityOne non-profit entities on the other.¹

By way of background, the VBA requires the VA, whenever it acquires goods or services, to determine whether there is a reasonable expectation that two or more SDVOSBs or VOSBs will submit offers (or in this case, quotations) and that award can be made at fair and reasonable prices. This requirement embodies what is often referred to as the “rule of two,” that is, where the VA determines--typically through performing market research--that there is a reasonable expectation that at least two eligible concerns will submit proposals (or quotations), and that award can be made at a fair and reasonable price, the VA is required to set aside the acquisition for eligible concerns. In addition, the VBA also provides for mandatory use of SDVOSB or VOSB set-asides where the necessary conditions are present, even where other statutes may apply. 38 U.S.C. § 8128(a).

Our Office recently discussed the interplay between the VBA on the one hand, and various other statutes including the JWOD Act on the other hand, as those provisions have been interpreted by the Supreme Court, the Court of Appeals for the Federal Circuit, and our Office. Veterans4You, Inc., B-417340, B-417340.2, June 3, 2019, 2019 CPD ¶ 207. Although our decision focused on the interrelationship between the VBA and the statutory acquisition authority of the Government Publishing Office, we nonetheless pointed out that, as recently interpreted by the Federal Circuit, the provisions of the VBA take precedence over the terms of the JWOD Act. PDS Consultants, Inc. v. United States, 907 F.3d 1345 (Fed.Cir. 2018). In a word, the VA is required to acquire goods or services from eligible SDVOSBs or VOSBs whenever the conditions of the VBA are met, even where there are other mandatory sources of supply, such as AbilityOne nonprofit agencies (NPAs).

With this background, the amendment at issue in the current protest provides as follows:

Offerers may propose supplies from their respective catalogs they wish to provide to the government that fit within the scope of the respective product category, excluding supplies already covered under a current

¹ The Javitz-Wagner-O-Day (JWOD) Act, 41 U.S.C. §§ 8501-8506, includes a mandatory requirement for federal agencies to acquire goods or services from qualified nonprofit agencies for the blind or severely disabled. The AbilityOne program, which is administered by the Committee for Purchase from People Who Are Blind or Severely Disabled, implements the JWOD Act by providing employment opportunities, through the award of federal contracts, for people who are blind or have other severe disabilities. The JWOD Act grants the Committee the exclusive authority to establish and maintain a procurement list of supplies and services provided by qualified non-profit agencies for the blind or disabled under the AbilityOne program. See 41 C.F.R. Chapter 51.

contract with an AbilityOne nonprofit agency (NPA). When the base period of performance on any of those contracts ends or the exercise of an option period is under consideration, the VA will conduct a Rule of Two analysis to determine whether a SDVOSB or VOSB set-aside is appropriate for the new procurement, or whether the procurement may be set-aside for AbilityOne NPAs.

RFQ, Amend. No. 0008, at 2.

Tasi argues that this amendment demonstrates that the agency improperly is obtaining supplies from AbilityOne NPAs in violation of the requirements of the VBA. Tasi argues that the supplies the VA is obtaining under the current AbilityOne contracts should instead be acquired from SDVOSBs. According to the protester, if the agency were to conduct a “rule of two” analysis for those requirements, it would find that the supplies being provided under the current AbilityOne contracts could be provided by SDVOSBs at fair and reasonable prices. Tasi requests that we recommend that the agency cancel the current RFQ and issue a new solicitation that includes the supplies currently being obtained by the VA using contracts awarded to AbilityOne NPAs.

We dismiss Tasi’s protest. Our Bid Protest Regulations require protesters to set forth a legally sufficient basis for protest, and contemplate that we will dismiss any protest that fails to include such a legally sufficient basis. 4 C.F.R. §§ 21.1(f), 21.5(f). We conclude that Tasi’s protest is legally insufficient.

We are aware of no legal authority that would require the VA to terminate its current, preexisting contracts with the AbilityOne NPAs for the supplies in question in order to conduct a new competition for those same supplies. Tasi’s protest is grounded in the legal requirements of the VBA, but nothing in that Act, or in any of the case law decided in connection with that Act, requires the VA to take such action. The VBA, by its express terms, is confined to situations where the VA is awarding a new contract for future requirements. In contrast, Tasi’s position is grounded in a flawed underlying premise, namely, that the VA may not continue to use its preexisting contracts to meet its requirements, and therefore must fulfill the requirements for which it already has contracts through a new competition. There is no legal support for Tasi’s incorrect premise.

Here, the terms of amendment No. 0008 reflect the VA’s strategy to execute an orderly transition from its current contracts with the AbilityOne NPAs--which are meeting its current requirements--to new contracts for the supplies in question as the demand for those supplies becomes ripe after performance of the contracts already in place. As noted by the VA, it is not using the protested RFQ to solicit any of the supplies that currently are being provided under any of the preexisting AbilityOne NPA contracts. Instead, as performance of those contracts is completed through current base periods (or, alternatively, where the agency will be required to determine whether to exercise an option under one of those contracts), amendment No. 0008 contemplates that the VA will determine whether or not its requirements can be met by SDVOSBs or VOSBs at fair and reasonable prices through market research performed at that time.

Tasi appears to believe that the VA is continuing to place delivery orders under preexisting basic ordering agreements (BOAs) with various AbilityOne NPAs. According to the protester, it would be improper for the VA to place such delivery orders at any point after May 20, 2019, which is the date on which the VA issued a class deviation to the requirements outlined in Federal Acquisition Regulation § 8.002 and Veterans Affairs Acquisition Regulation §§ 808.002 and 808.6 governing the mandatory sources for VA to acquire goods and services. That class deviation requires acquiring activities to apply a rule of two analysis before considering any other source of supply. In support of this contention, Tasi submitted several excel spreadsheets that purport to present details about the alleged BOAs.

Even if Tasi is correct that these BOAs exist, the protester has not presented any evidence to demonstrate that the VA has, in fact, actually placed any delivery orders against those BOAs at any time after the issuance of the VA's class deviation. Absent a timely challenge to a particular delivery order actually issued against one of these alleged BOAs, our Office has no basis to consider Tasi's generalized allegation. Our Office's jurisdiction is confined to reviewing challenges to the terms of a solicitation (or cancellation of a solicitation) or to the award, failure to award, or termination of a contract. 31 U.S.C. § 3551(1). While we appreciate that such contracting actions may not always be publicized, we nonetheless have no basis to consider Tasi's challenge in the absence of any evidence showing that an actual delivery order has been issued against one of the alleged BOAs.²

The protest is dismissed.³

Thomas H. Armstrong
General Counsel

² Nothing in Tasi's protest directly challenges the agency's award of either the underlying AbilityOne contracts referenced in amendment No. 0008 in general, or the underlying alleged BOAs that Tasi claims to have identified. In any event, any such challenge would be untimely at this juncture. 4 C.F.R. § 21.2(a)(2).

³ Finally, Tasi's original protest also argued that the RFQ impermissibly includes a "tiered" award arrangement, whereby the VA will consider awards first to SDVOSBs, next to VOSBs, thereafter to other designated small businesses, and finally to large businesses. RFQ at 36. The VA filed a preliminary request that we dismiss this aspect of Tasi's protest as untimely because it was filed after the initial deadline for submitting quotations, even though the provision at issue was in the original RFQ. We advised the parties that this aspect of Tasi's protest was untimely and not for consideration on the merits. 4 C.F.R. § 21.2(a)(1); Electronic Procurement Docketing System, Docket Entry 11.