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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Crosstown Courier Service, Inc.

File: B-406336

Date: April 23, 2012

Christopher J. Noyes, Crosstown Courier Service, Inc., for the protester.
Kate Gorney, Esq., and Dennis Foley, Esq., Department of Veterans Affairs, for the agency.
Jacqueline Maeder, Esq., Scott H. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that Department of Veterans Affairs improperly set aside a Federal Supply Schedule task order acquisition for service-disabled veteran-owned small businesses is denied where record shows that agency's actions were an unobjectionable exercise of its authority to acquire goods and services using "other than competitive procedures" pursuant to 38 U.S.C. § 8127(b).

DECISION

Crosstown Courier Service, Inc., of Chicopee, Massachusetts, a service-disabled veteran-owned small business (SDVOSB) concern, protests the proposed issuance of a task order to Medical Logistic Solutions, Inc. (MLS), of Centennial, Colorado (which also is an SDVOSB concern), under MLS's Federal Supply Schedule contract pursuant to request for quotations (RFQ) No. VA261-12-Q-0379, issued by the Department of Veterans Affairs (VA) for courier services to transport biological samples from three community-based outpatient clinics (OPCs) to the VA Medical Center in Sacramento, California. Crosstown asserts that the agency improperly failed to comply with the requirements of the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the VA Act), and its implementing regulations.

We deny the protest.

BACKGROUND

On December 29 and 30, 2011, the agency posted a synopsis/solicitation on FedBizOpps for courier services to transport biological samples from the Yuba City and the McClellan OPCs to the VA Medical Center in Sacramento and a second synopsis/solicitation notice for courier services to transport biological samples from the Martinez OPC to the VA Medical Center in Sacramento. Agency Report (AR) at 2. Both solicitations were canceled on January 3, 2012, and the agency noted in its cancellation that the requirement was available through a General Services Administration (GSA) Federal Supply Schedule (FSS). Id.

That same day, the VA posted a sources sought notice on GSA's eBuy website seeking interested FSS vendors to perform the courier services listed under the two canceled solicitations. AR at 2. One interested FSS vendor, MLS, responded to the sources sought notice. AR at 2. The VA decided to conduct the acquisition as an FSS SDVOSB set-aside and posted the RFQ on the GSA eBuy website on January 12 with a closing date of January 17. The agency received one quote--from MLS--in response to the RFQ. Id. MLS's quote was for $9,990.[1] Based on this quote, VA intends to issue a task order to MLS under its FSS contract.[2]

DISCUSSION

Crosstown argues that the agency improperly issued the solicitation under the FSS (and intends to award a task order to an FSS vendor) rather than as an open market acquisition reserved for SDVOSBs. Crosstown maintains that the agency erred in not first conducting market research to determine whether there were two or more SDVOSB (or veteran owned small business (VSOB)) concerns that could meet the agency's requirement at a fair and reasonable price that offers best value to the government. Crosstown contends that, had the agency conducted adequate market research, it would have found at least two SDVOSB concerns that could meet the agency's requirements. In support of its position, Crosstown directs our attention to 38 U.S.C. § 8127(d), which embodies the market research and "rule of two" set-aside requirements relied upon by Crosstown. Crosstown further asserts that, inasmuch as the VA received only one quote under its FSS solicitation, its proposed issuance of a task order to MLS amounts to an improper sole source

[1] MLS's quotation was stated in the form of a weekly total price of $270, and the period of performance specified in the RFQ was from the date of award through September 30, 2012. We calculated MLS's total price for purposes of this decision by multiplying its proposed weekly charge by 37 weeks, the amount of time between the RFQ's closing date of January 17, and September 30.

[2] Crosstown's protest was filed prior to the deadline for quotations. Crosstown also objects to any proposed award to MLS.

contract award, and the agency has no assurance that it will make the award at a fair and reasonable price, or that the award will represent the best value to the agency, as required by 38 U.S.C. § 8127(d).

The VA responds by repeating arguments it has made to our Office in answer to prior protests filed by another SDVOSB concern, Aldevra. Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183; Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112. In essence, the VA argues that the VA Act presents no bar to the agency's ability to proceed directly to the FSS to purchase goods or services listed on that schedule without regard to the SDVOSB status of the vendor. We have addressed these arguments and found them to be without merit. Id. Nonetheless, we conclude that Crosstown cannot claim a prejudicial violation of statute or regulation, as it appears that VA has statutory authority for its actions here, despite the agency's failure to claim during the protest that it acted using this authority.

As an initial matter, we point out that nothing in the statutory authority relied on by Crosstown, 38 U.S.C. § 8127(d), requires the VA to conduct its market research exclusively on the open market, as opposed to among FSS vendors. The statute provides:

> Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the [VA] shall award contracts on the basis of competition restricted to . . . [VOSBs or SDVOSBs] if the contracting officer has a reasonable expectation that two or more . . . [VOSBs or SDVOSBs] 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). Thus, the agency's initial decision to conduct market research confined to FSS vendors was not, in and of itself, objectionable, to the extent that the VA sought to determine whether there were two or more SDVOSB (or VOSB) FSS vendors capable of meeting its requirement.[3]

As noted, however, the agency received an expression of interest from only one concern. Accordingly, the agency had no reasonable expectation of receiving proposals or quotes from at least two FSS SDVOSB (or VOSB) vendors, nor was

[3] We recognize that VA's original GSA eBuy sources sought notice was not confined to expressions of interest from SDVOSB or VOSB concerns, and that it arguably cast a wider net for information than would be needed to satisfy an inquiry regarding whether or not there were two or more FSS SDVOSB or VOSB vendors capable of meeting the agency's requirement. Nonetheless, the agency's actions were not prejudicial to any potential SDVOSB or VOSB FSS vendors since, as noted, the agency ultimately set the acquisition aside for SDVOSBs under the FSS.

there a basis for the agency to conclude from its market research that it would be able to make award at a fair and reasonable price. It follows that the agency could not properly set aside this acquisition under the FSS pursuant to the authority provided by 38 U.S.C. § 8127(d).[4]

Even though we conclude that the agency could not have set aside the acquisition under the FSS using the authority under 38 U.S.C. § 8127(d), the VA Act permits the agency properly to have confined its acquisition to MLS. Rather than the provision at 38 U.S.C. § 8127(d), the provision at 38 U.S.C. § 8127(b) is pertinent here and it provides:

> (b) Use of noncompetitive procedures for certain small contracts.--For purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a . . . [SDVOSB or VOSB] for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41), a contracting officer of the Department may use procedures other than competitive procedures.

As noted above, the value of the requirement at issue here is $9,990, which is well below the simplified acquisition threshold. The VA therefore has authority to use "other than competitive procedures" to award to SDVOSB (or VOSB) vendors, which is what it has done here.

We conclude that the agency's acquisition here amounted to the solicitation and award of a requirement using "other than competitive procedures" as authorized by 38 U.S.C. § 8127(b). Moreover, under 38 U.S.C. §8127(b), there is no requirement for the VA to conduct market research of any sort, so long as the value of the procurement is below the simplified acquisition threshold and award is made to an SDVOSB (or VOSB).

The protest is denied.

Lynn H. Gibson
General Counsel

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[4] The agency asserts that this was what it describes as a "discretionary" set aside pursuant to an interim rule that authorizes small business set asides on FSS orders at the discretion of the contracting agency. 76 Fed. Reg. 68032-01 (Nov. 2, 2011). The agency's reliance on this interim rule is misplaced since the interim rule implements section 1331 of the Small Business Jobs Act of 2010, 15 U.S.C. § 644(r), not the VA Act.