

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Estrategy Inc.

File: B-406466; B-406467

Date: May 4, 2012

Joyce L. Tong, Esq., William Weisberg, Esq., and Liana Yung, Esq., Bryan Cave LLP, for the protester.

Paul Petraborg, Esq., Department of Veterans Affairs, for the agency.

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DIGEST

1. Agency properly cancelled solicitation where the agency could not determine that any of the offerors' proposed prices, which significantly exceeded the government estimate, were fair and reasonable.
 2. Protests of the terms of a solicitation generally must be filed prior to the time set for receipt of proposals.
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DECISION

Estrategy Inc., of North Kansas City, Missouri, protests the decision by the Department of Veterans Affairs (VA) to cancel request for proposals (RFP) No. VA-255-12-R-0205 and resolicit for transportation services for the 26th Annual National Veterans Golden Age Games (NVGAG). The protester contends that the agency lacked a reasonable basis for canceling the solicitation.

We deny the protest in part and dismiss it in part.

On December 28, 2011, the VA issued VA-255-12-R-0205, as a service-disabled veteran-owned small business (SDVOSB) set-aside seeking proposals to provide transportation services for the 26th Annual NVGAG, which are scheduled to take place in St. Louis, Missouri from May 30, 2012 to June 6, 2012.¹ Prior to issuing the

¹ The NVGAG is the premier senior adaptive rehabilitation program in the United States, and is the only national multi-event sports and recreational seniors'

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solicitation, the contracting officer (CO) conducted market research to determine whether the procurement should be set aside. This research included searches of the Vebiz database, central contractor registration (CCR), the SBA Dynamic Small Business Search, and a general internet search. CO Statement at 1. The CO's research revealed that there were two SDVOSB firms that could be expected to submit proposals, one of which was the incumbent, Estrategy. Based on the results of the CO's market research, the procurement was set aside for SDVOSBs. Id. The due date for receipt of proposals was set as January 31, 2012. Id. at 2.

Only one offeror, Estrategy, submitted a proposal. Id. at 2. Estrategy's proposed price of \$525,000 was \$200,000 higher than the independent government estimate, and \$135,000 higher than the cost of the contract awarded the year before. AR, Tab 6, Contracting Officer's Memorandum to the File, at 1-2.

After receiving Estrategy's proposal, the CO compared the offered price with the costs for similar transportation contracts for the previous four years. The CO noted that Estrategy's price was 32 percent higher than the prior year's contract, which involved the same transportation volume as the solicitation at issue here. AR, Tab 6, Contracting Officer's Memorandum to the File, at 1-2. The CO also noted that the prior year's contract was performed in Hawaii, which has a higher cost of living, higher transportation costs, higher fuel costs, and a higher Service Contract Act wage rate than the location of this year's games. Id. at 2. The CO found that under the 2011 contract, any successful offeror would likely have been required to subcontract with the companies on the island where the games were located, while under this year's solicitation, the location--St. Louis--is centrally located in the middle of the continental United States and would have a potentially larger pool of companies with which to subcontract. Id.

Because of the unique location of the 2011 games, the CO noted that an examination of the costs for similar services prior to 2011 would be more representative with regard to a determination of reasonable costs. Accordingly, the CO also considered the prices paid for similar services in 2010, which he adjusted for inflation using the Bureau of Labor Statistics' consumer price index inflation calculator. Id. The price of the 2010 contract was \$313,000, which the CO determined was comparable to a price of \$325,357.45 in 2012 prices. Id.

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competition program designed to improve the quality of life for all older veterans, including those with a wide range of abilities and disabilities. The NVGAG is one of the most progressive and adaptive rehabilitative senior sports programs in the world, and serve as a qualifying event for competition in the National Senior Games in a number of competitive events. Contracting Officer's (CO) Statement at 1.

After performing this analysis, the CO determined that adequate price competition did not exist and that award could not be made at a reasonable price. Therefore, the CO determined that the solicitation should be canceled and reissued to allow for greater price competition. Id.

In reissuing the requirement, the CO considered whether to set aside the procurement for veteran owned small businesses (VOSBs). AR, Tab 6, CO's Memorandum to the File, at 2. The CO performed a search of the Vetbiz database and concluded that there were no VOSBs under the relevant NAICS code doing business in Missouri. Id. Therefore, the CO determined that the solicitation should be reissued as a total small business set aside. Id.

On February 22, 2012, the contracting officer canceled solicitation No. VA-255-12-R-0205 and resolicited the requirement as a total small business set aside under solicitation No. VA-255-12-R-0494. CO Statement at 2. This protest followed.

DISCUSSION

The protester contends that the agency's decision to cancel VA-255-12-R-0205 was unreasonable. Specifically, the protester identified the following four grounds of protest: (1) the VA unreasonably determined that Estrategy's price was not fair market value; (2) Estrategy's high price was caused by a latent ambiguity in the terms of the solicitation; (3) the VA's market survey with regard to the reasonable costs of transportation services was flawed; and (4) the cancellation of VA-255-12-R-0205 was a de facto cost/price realism analysis that was arbitrary and capricious. Protest at 3-4.

A procuring agency has broad authority to cancel a solicitation issued under negotiated procedures and need only establish a reasonable basis for cancellation. Trade Links General Trading & Contracting, WLL, B-405182, Sept. 1, 2011 CPD ¶ 165 at 2; Bahan Dennis Inc., B-249496.3, Mar. 3, 1994, 94-1 CPD ¶ 184 at 3. If an agency cannot purchase at a fair and reasonable price, as required by the FAR, then cancellation is warranted. Id.; see FAR § 15.402 (price must be fair and reasonable). A determination of price reasonableness is a matter of agency discretion, involving the exercise of business judgment, which our Office will not question unless it is shown to be unreasonable. Selecta Corp., B-252182, May 26, 1993, 93-1 CPD ¶ 421 at 2; Sletager, Inc., B-240789.6, Oct. 11, 1991, 91-2 CPD ¶ 328 at 2. In determining price reasonableness, an agency may consider a number of factors, including prior contract history and the government estimate. Trade Links General Trading & Contracting, WLL, *supra*; Vitronics, Inc., B-237249, Jan. 16, 1990, 90-1 CPD ¶ 57 at 2; see FAR § 15.404-1(b). In this regard, we have found cancellations proper where the protester's price exceeded the government estimate by as little as 7.2 percent. Nutech Laundry & Textiles, Inc., B-291739, Feb. 10, 2003, 2003 CPD ¶ 34 at 4 (citing Building Maint. Specialists, Inc., B-186441, Sept. 10, 1976, 76-2 CPD ¶ 233 at 4).

Here, the contemporaneous documentation reflects the CO's performance of an in-depth analysis regarding the proposed price. More specifically, the CO considered both the government estimate and the agency's prior contracting history, which included consideration of the price paid under the 2011 contract as well as the prices for prior contracts adjusted for inflation. Further, the contracting officer considered other factors that could affect the price of the services being procured, such as the location of the games and local prices for gasoline and driving services. As a result of his analysis, the contracting officer concluded that adequate price competition did not exist and that award could not be made at a reasonable price.² Based on our review of the record, we conclude that the agency's determination in this regard was reasonable, and the protester's assertions to the contrary are without merit.³

The protester also contends that VA-255-12-R-0205 contained a latent ambiguity, which caused the protester to price its proposal higher than the agency's estimates. Protest at 4. Specifically, the protester contends that it was competitively prejudiced during the agency's evaluation of prices because the solicitation "contained a latent, i.e., non-obvious, ambiguity" because it did not specify the appropriate passenger wait time per pick-up, which creates ambiguity as to how many vehicles are necessary. Protest at 4.

The agency argues, and we agree that, to the extent any ambiguity existed with regard to the appropriate passenger wait time per pick-up, it was patent, rather than latent. That is, an offeror could observe from the face of the RFP that no passenger wait times were specified in the solicitation.⁴ Patent ambiguities must be protested prior to the due date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1); see Associated Fabricators & Constructors, Inc., B-405872, Dec. 14, 2011 CPD ¶ 279 at 1-2. Because Estrategy did not protest the alleged ambiguity prior to the due date for receipt of proposals, its challenge to the terms of VA-255-12-R-0205 is untimely.

² Estrategy also contends that the agency should have initiated discussions with the firm to resolve its concerns over Estrategy's high price. Comments at 4. However, there are no statutory or regulatory criteria specifying when an agency should, or should not, initiate discussions prior to canceling a solicitation, and an agency's decision not to initiate discussions is a matter that we will not generally review. Booz Allen Hamilton Inc., B-405993, B-405993.2, Jan. 19, 2012, 2012 CPD ¶ 30 at 13.

³ In this regard, we have considered and rejected the protester's assertion that the VA's cancellation of VA-255-12-R-0205 constituted an improper cost/price realism analysis.

⁴ The agency also notes that the 2011 contract for similar services similarly did not contain passenger wait times, but the protester successfully bid, won, and performed the 2011 contract. CO Statement at 3.

Finally, in its comments on the agency report, filed on April 16, the protester challenges the agency's failure to set aside VA-255-12-R-0494 for Veteran Owned Small Businesses. Comments at 1. Protests of the terms of a solicitation, including protests of an agency's failure to set aside a requirement, must be raised prior to the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1). Thus, in order to be timely, this protest ground should have been filed prior to March 9, the time set for receipt of proposals.⁵ This protest ground is dismissed as untimely.

The protest is denied in part and dismissed in part.

Lynn H. Gibson
General Counsel

⁵ Although the initial protest requested, as an alternative remedy, that the agency "modify the solicitation as a veteran only set aside," Protest at 7, the protester did not raise as a protest ground the agency's failure to set aside the procurement for veteran owned small businesses. To the extent that the protester believes that it raised this issue in its initial protest, the issue is dismissed for failure to state a valid basis of protest. Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f) (2011), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Id.