



GAO

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Planet Depos LLC

File: B-411142

Date: May 26, 2015

Robert J. Symon, Esq., Aron C. Beezley, Esq., and Lisa A. Markman, Esq., Bradley Arant Boult Cummings LLP, for the protester.

Ronald Perlman, Esq., Holland & Knight, LLP, for Neal R. Gross & Company, the intervenor.

Patricia S. Grady, Esq., and William J. Erle, Esq., Department of the Treasury, for the agency.

Young S. Lee, Esq., and Nora K. Adkins, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision to set aside an acquisition for historically underutilized business zone (HUBZone) small businesses is denied where the record shows that the agency reasonably expected that at least two HUBZone small businesses would compete for the award and that award would be made at a fair and reasonable price.

DECISION

Planet Depos LLC, of Washington, D.C., a small business, protests the decision of the Department of the Treasury, Office of the Comptroller of the Currency (OCC) to issue request for proposals (RFP) No. CC-15-HQ-R-0005, for court reporting and stenotype services, as a set-aside for HUBZone small business concerns.

We deny the protest.

BACKGROUND

The OCC's Chief Counsel Information System Group requires support for the agency's court reporting and stenotype services. Neal R. Gross & Company, a HUBZone small business, is the incumbent contractor. At issue here, is the follow-on procurement to Neal R. Gross's expiring contract.

In preparation for the current procurement, an OCC contract specialist conducted market research to determine whether two or more HUBZone small businesses would be likely to submit proposals in response to the solicitation.¹ Agency Report (AR), Tab 2, Market Research Report Mems., (Oct. 10, 2014), at 1-3; (Dec. 15, 2014), at 1-3; Tab 3, Market Research, at 1-11. The contract specialist reviewed information available from the agency's prior procurement for these services, the General Services Administration's (GSA) Federal Supply Schedule (FSS), the System for Award Management (SAM), the internet, and the Small Business Administration's (SBA) dynamic small business system. AR, Tab 3, Market Research, at 1-11. The market research resulted in the identification of six HUBZone small businesses, including the incumbent contractor. AR, Tab 2, Market Research Report Mem., (Oct. 10, 2014), at 2. The contracting specialist contacted each of the six HUBZone small businesses; five confirmed that they would be interested in submitting a proposal in response to the RFP. CO Statement at 2; AR, Tab 2, Market Research Mem., (Dec. 15, 2014), at 2.

Based on the results of the agency's market research, which was presented to and approved by an acquisition review board (ARB), the agency decided to release the current RFP as a HUBZone small business set-aside. AR, Tab 5, ARB Approval, at 3-4. On February 2, 2015, the agency issued the RFP under the commercial item procedures of Federal Acquisition Regulation (FAR) Part 12. In response, the OCC received three proposals.² CO Statement at 3. Planet Depos did not submit a response to the solicitation but filed its protest prior to the closing date for receipt of proposals.

DISCUSSION

Planet Depos, which is not a HUBZone small business, argues that the OCC's decision to set aside the procurement exclusively for HUBZone small businesses was unreasonable. The protester alleges that the agency could not have expected to receive offers from at least two or more HUBZone small businesses, and the agency cannot expect to make an award at a fair market price, because only one of

¹ The contract specialist's market research focused first on determining whether HUBZone small businesses could fulfill the requirement because the expiring contract was awarded to a HUBZone small business under a RFP that had been set-aside for HUBZone small businesses. Contracting Officer (CO) Statement at 1. The agency received three offers from HUBZone small businesses in response to the prior solicitation. Id.

² An initial technical evaluation of the offers received concluded that all three proposals meet the RFP's requirements. Id.

the five companies identified in the OCC's market research is actually capable of performing the requirement.

Under FAR § 19.502-2(b), a procurement with an anticipated dollar value of more than \$150,000, such as the one here, shall be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at fair market prices.³ No particular method of assessing the availability of capable small businesses is required; rather, the assessment must be based on sufficient facts so as to establish its reasonableness. Mountain West Helicopters, LLC; Trans Aero, Ltd., B-408150, B-408150.2, July 1, 2013 CPD ¶ 152 at 3. The decision whether to set aside a procurement may be based on an analysis of factors such as the prior procurement history, the recommendations of appropriate small business specialists, and market surveys that include responses to sources sought announcements. Commonwealth Home Health Care, Inc., B-400163, July 24, 2008, 2008 CPD ¶ 140 at 3. In making set-aside decisions, agencies need not make actual determinations of responsibility; rather, they need only make an informed business judgement that there is a reasonable expectation of receiving acceptably priced offers from small business concerns that are capable of performing the contract. Ceradyne, Inc., B-402281, Feb. 17, 2010, 2010 CPD ¶ 70 at 4.

Because a decision whether to set aside a procurement is a matter of business judgement within the contracting officer's discretion, our review generally is limited to ascertaining whether that official abused his or her discretion. Information Ventures, Inc., B-400604, Dec. 22, 2008, 2008 CPD ¶ 232 at 3. We will not question an agency's small business determination where the record shows that the evidence before the contracting officer was adequate to support the reasonableness of the conclusion that small business competition reasonably could be expected. Commonwealth Home Health Care, Inc., *supra*.

Here, the agency's set-aside determination is unobjectionable. The record demonstrates that the agency conducted ample market research in connection with its decision to set aside the acquisition for HUBZone small businesses. In this regard, the agency reviewed information from the prior procurement, which was set

³ The applicable regulations further require that the contracting officer shall first consider a set-aside under the 8(a) business development, HUBZone, service-disabled veteran-owned small business concern, or women-owned small business programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a), HUBZone, service disabled veteran owned small business, or woman owned small business programs. 13 C.F.R. § 125.2(f)(2); FAR § 19.203; see also FAR § 19.1395(a), (b) (contracting officer may set the procurement aside for HUBZone small businesses).

aside for HUBZone small businesses, the GSA FSS, SAM, the SBA's dynamic small business system, conducted additional internet research, and made phone calls to potential offerors. We find that the record before the contracting officer contained evidence that was adequate to support the reasonableness of the conclusion that HUBZone small business competition reasonably could be expected and see no basis to sustain Planet Depos' protest that the agency improperly set aside the procurement. Commonwealth Home Health Care, Inc., *supra*.

While the protester alleges that only one of the five HUBZone small businesses is capable of performing the solicitation requirements, the market research conducted by the agency indicates otherwise. AR, Tab 2, Market Research Report Mem., (Dec. 15, 2014), at 1-3; Tab 3, Market Research, at 1-11. The agency directly contacted each of the six companies initially identified in the OCC's market research to determine their interest in the requirement; five responded affirmatively. CO Statement at 1-2. Three of the five subsequently submitted offerors in response to the solicitation. The agency's initial technical evaluation concluded that all three met the RFP's requirements.⁴ *Id.* at 3. As such, we find that the record does not support Planet Depos' allegations challenging the technical capability of the firms that were identified in the agency's market research. Emax Financial & Real Estate Advisory Servs., LLC, B-408260, July 2, 2013, 2013 CPD ¶ 180; citing York Int'l Corp., B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282 at 7 (receipt of offers from small businesses supports an agency's determination to set aside a procurement for small businesses.)

Finally, Planet Depos asserts that the agency did not analyze whether the HUBZone small businesses could offer fair market prices. In response the agency argues that it had a reasonable expectation of fair market prices because its market research concluded that five HUBZone small businesses had interest in competing for the requirement. AR at 2-3; CO Statement at 3. We agree with the agency that it was reasonable for the OCC to anticipate adequate price competition, and that, as a result of that price competition, award would be made at a fair market price under the set-aside procurement. Walden Security, B-407022, B-407022.2, Oct. 10, 2012, 2012 CPD ¶ 291 at 7. (A contracting officer may reasonably rely on an expectation that there will be adequate price competition to conclude that the competition will result in a fair market price). Moreover, the agency's assumption of adequate price

⁴ Moreover, Planet Depos' own protest concedes that two of the HUBZone concerns identify themselves under the North American Industry Classification System (NAICS) code required by the RFP. Comments at 2.

competition appears to be validated by the fact that it received offers from three small businesses that have initially been determined to meet the requirements of the RFP.

The protest is denied.

Susan A. Poling
General Counsel