



Decision

Matter of: Alpine Companies, Inc.

File: B-416104.2

Date: August 23, 2018

April Cooper, for the protester.

Dean A. Roy, Esq., Julie Cannatti, Esq., and William Edwards, Esq., Department of Housing and Urban Development; Meagan K. Guerzon, Esq., Small Business Administration, for the agencies.

Katherine I. Riback, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision not to set aside a procurement for small businesses is denied where the agency reasonably concluded from its market research that it did not have a reasonable expectation of receiving proposals from two or more small businesses capable of performing all of the required services at a fair market price.

DECISION

Alpine Companies, Inc., an 8(a) woman-owned small business of Alpine, Utah, protests the terms of solicitation No. 86544B-18R-00001, issued by the Department of Housing and Urban Development (HUD) for management and marketing (M&M) services, asset manager services, for HUD's real estate owned properties. Alpine Companies argues that the solicitation should have been set aside for small businesses.¹

¹ Because Alpine Companies proceeded with its protest pro se no protective order was issued in this protest. A full version of the agency report was provided to our Office, while a redacted version of the report was furnished to the protester. We have reviewed the entire unredacted record in camera. As much of the information reviewed by our Office is source selection sensitive and/or proprietary in nature, our discussion of some aspects of the agency's market survey and resulting findings is necessarily general in nature.

We deny the protest.

BACKGROUND

The Federal Housing Administration (FHA), an organization within HUD, administers the single-family mortgage insurance program that insures approved lenders against the risk of loss on mortgages obtained with FHA financing. In the event of a default on an FHA insured loan, the lender acquires title to the property, files a claim for insurance benefits, and conveys the property to HUD. Therefore HUD has a need to manage and sell a sizeable inventory of single-family homes, the disposition and maintenance of which it has procured from M&M contractors since 1999. Combined Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 1; Agency Report (AR), Tab 29, RFP at 157.²

On February 24, 2016, Precision Asset Management Corporation filed a post-award bid protest at the U.S. Court of Federal Claims (COFC) challenging HUD's award of a property management contract to Alpine/First Preston JV II for the services at issue here.³ This procurement, referred to as the 3.7 procurement, covered geographic area 3A, which encompasses the state of Illinois. On November 9, 2017, the COFC granted Precision's protest, and ordered that to secure these services in area 3A after May 31, 2018, the agency must either reopen the procurement, conduct meaningful discussions, and re-evaluate proposals in accordance with its decision, or issue a new solicitation.⁴ Precision Asset Mgmt. Corp. v. United States, 135 Fed. Cl. 342 (2017).

In response to the COFC decision, on February 21, 2018, the agency issued the current solicitation for marketing and selling HUD-owned single-family properties within area 3A. RFP at 149. This solicitation, referred to as the 3.76 solicitation, is a re-procurement of the 3.7 contract. The solicitation was issued on an unrestricted basis and has a 7.5 month base performance period with a 1-year option period.⁵ Id. The RFP also provided for a 45-day transition period. Id. The solicitation contemplated the

² The agency identified Tab 29 as the conformed copy of the solicitation. Page citations to the agency report are to the Bates numbers provided by the agency.

³ Alpine/First Preston JV II is a joint venture between Alpine Companies and First Preston. AR, Tab 27, 3.76 Market Research Report (May 10, 2018) at 137. On August 15, 2012, the Small Business Administration (SBA) approved a mentor-protégé agreement between Alpine Companies and First Preston. SBA Review (Aug. 14, 2018) at 1.

⁴ The requirement in area 3A is currently being performed by Alpine/First Preston JV II under a new, short term sole-source contract. COS/MOL at 2.

⁵ In its questions and answers incorporated into the RFP, the agency stated that this solicitation was issued on an unrestricted basis based on HUD's internal market research. RFP at 332.

award of a requirements contract with fixed-price and cost-reimbursement contract line item numbers (CLINs). Id. at 312. The RFP stated that the agency intended to make award without discussions to the lowest-priced, technically acceptable offeror. Id. at 325. The due date for proposals was originally set for March 21. On March 5, Alpine Companies filed a protest with our Office contesting the agency's decision to issue this solicitation on an unrestricted basis. AR, Tab 8, Protest of Alpine Companies (Mar. 6, 2018). On March 19, HUD informed our Office and Alpine Companies that the agency would take corrective action by conducting additional market research and making a new decision as to whether to issue the solicitation as a small business set-aside. AR, Tab 9, HUD Notice of Corrective Action (Mar. 19, 2018). Alpine Companies withdrew its protest. Alpine Companies Notice of Withdrawal (Mar. 28, 2018).

HUD subsequently conducted additional market research for this requirement. AR, Tab 27, 3.76 Market Research Report (May 10, 2018). Id. at 136. As stated above, this procurement is a repurchase of the 3.7 contract, the award of which was overturned by the COFC. Id. at 136. Therefore, the agency included in its market research the offerors in the 3.7 competitive range for area 3A. Id. at 137. The contracting officer requested capability statements from offerors in the 3.7 competitive range, except for Alpine/First Preston JV II because it was the incumbent and the agency possessed information regarding the firm. Id. at 136. The agency also considered the capability of Alpine Companies, and another woman-owned small business, but did not request capability statements from them. Id. at 137-138. The agency determined that one small business, Alpine/First Preston JV II, was capable of performing this requirement. Id. at 137. The agency found that no other small business, including Alpine Companies, was capable of performing the requirements of the solicitation. Id. at 138.

As a result of its market research, the contracting officer concluded that the RFP should not be set aside for small businesses because there was insufficient evidence to conclude that two or more small businesses could perform all of the statement of work requirements.⁶ Id. at 141. On May 11, the agency issued amendment No. 6, which provided notice that the solicitation would remain unrestricted and set May 31, as the

⁶ The agency acknowledged that the previous solicitation for these services was set aside for small business, but stated that because the market research was over four years old it was not considered relevant to the current procurement. Id. at 132. Moreover, while market research supporting a small business set-aside also existed for similar services under contract areas 3.75 and 3.9, the agency stated that these procurements were for different geographic areas, and were, therefore, also deemed not relevant to the current procurement. Id. at 131-132. The agency also decided not to issue a sources sought notice on the Federal Business Opportunities (FBO) website due to the COFC order, which required the agency to award the contract and fully transition to a new contractor by May 31. HUD now acknowledges that it will not be able to make the COFC imposed deadline, but states that it is still trying to comply, with the court order. AR, Tab 27, 3.76 Market Research Report (May 10, 2018) at 130.

new due date for proposals. AR, Tab 28, RFP amend. 6. On May 16, Alpine Companies filed this protest with our Office.

DISCUSSION

Alpine Companies complains that the solicitation should have been set aside for small businesses, arguing that if the agency had issued a sources sought notice, rather than emailing specific companies, it would have found that there are numerous small businesses (including itself) that can provide the desired services at fair market prices. The protester further contends that the agency's market research was inadequate because it failed to contact Alpine Companies and subsequently determined Alpine Companies not to be a capable small business concern, based on data that was admittedly over 4 years old. Protester's Supp. Comments at 1. Alpine Companies further states that the agency recently issued an asset manager solicitation in a different region as a small business set-aside indicating that there are more than two small businesses capable of performing that requirement.⁷ Protest at 2. We find the agency's determination not to set the procurement aside for small businesses to be reasonable.

Under Federal Acquisition Regulation (FAR) § 19.502-2(b) (commonly referred to as the "rule of two" requirement), a procurement with an anticipated dollar value of more than \$150,000, must 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 award will be made at a fair market price. FAR § 19.502-2(b); SEK Solutions, LLC, B-406939.2, Feb. 27, 2014, 2014 CPD ¶ 87 at 7; Metasoft, LLC, B-402800, July 23, 2010, 2010 CPD ¶ 170 at 2. An agency must undertake reasonable efforts to ascertain whether it is likely that it will receive offers from at least two responsible small businesses capable of performing the work in question. FAR § 19.202-2; EMMES Corp., B-402245, B-402245.2, Feb. 17, 2010, 2010 CPD ¶ 53 at 5; Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 4. 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. See, e.g., SEK Solutions, LLC, *supra*; EMMES Corp., *supra*. Our Office will review a protest to determine whether a contracting officer has made such efforts. DNO Inc., B-406256, B-406256.2, Mar. 22, 2012, 2012 CPD ¶ 136 at 4.

The agency argues that its market research was sufficient under the circumstances and notes that this solicitation contained a unique requirement, a 45-day transition period. HUD explains that, in an effort to comply with the COFC's order, it abbreviated the transition period in the solicitation to 45 days, while acknowledging that transition periods in asset manager solicitations generally range from 90-120 days. AR, Tab 27, 3.76 Market Research Report (May 10, 2018) at 130. The agency viewed a potential offeror's ability to meet this transition period requirement as "critical" because the

⁷ While we do not address every argument raised by Alpine Companies in its protest, we have reviewed them all and do not find any basis to sustain the protest.

successful contractor would be required to have an office, staffing, and financial backing sufficient to be fully operational in a relatively short time period. Id. at 129-130.

Due to this unique requirement and the fact that this is a reprourement of the 3.7 procurement, the agency states that it reasonably considered in its market research only the offerors in the 3.7 competitive range for area 3A, and requested capability statements from all of those firms, except for Alpine/First Preston JV II, the incumbent for which it possessed information. Further, HUD considered two additional woman-owned small businesses, Alpine Companies and another firm. Regarding the protester's point that the agency set aside a solicitation for the same services in a different region, the agency responds that the other solicitation is not relevant for resolving this protest because the 3.75 asset manager requirement in the other solicitation encompassed different geographic areas. COS/MOL at 4. The agency further states that the HUD's Office of Small and Disadvantaged Business Utilization concurred with the contracting's officer's determination to issue this solicitation as unrestricted. COS/MOL at 10 citing AR, Tab 27, 3.76 Market Research Report (May 10, 2018) at 129.

Our review of the record shows that HUD, as part of its market research, considered the offerors in the 3.7 competitive range for area 3A, as well as Alpine Companies and another woman-owned small business, in considering whether it could reasonably expect to receive proposals from two or more small businesses that could provide all of the requirements of the solicitation. While Alpine Companies disagrees with the scope of the agency's market research and the agency's decision not to issue a sources sought notice on the FBO website, we find reasonable the agency's actions as our Office has previously found that no particular method of assessing the availability of capable small businesses is required. See, e.g., SEK Solutions, LLC, supra; EMMES Corp., supra. Regarding the protester's allegation that HUD previously issued an asset manager solicitation in a different geographic region as a small business set aside, Alpine Companies failed to explain how the market research related to that region is relevant to the agency's current market research in area 3A. In this regard, the protester has failed to identify any small business that was considered small at the time the agency completed its market research that the agency's market research in area 3A overlooked. Accordingly, we find that the scope of the agency's market research was reasonable.

Alpine Companies next challenges the agency's findings with regard to its capability. As stated above, based on its market research, the agency concluded that only one small business, Alpine/First Preston JV II, was capable of performing this requirement. Thus, the agency determined that the RFP should not be set aside for small businesses because there was no evidence that two or more small businesses could perform all of the statement of work requirements. Alpine Companies argues that the agency failed to properly consider its capabilities because it relied on outdated information in researching its conclusion and ignored the fact that in 2017 HUD awarded Alpine Companies a large contract, as a prime contractor. Comments at 4.

The agency responds that Alpine Companies' 2017 contract concerned property management services--such as maintenance and preservation, property inspection, physically securing properties, and performing cosmetic enhancements and repairs--while the 3.76 requirement, at issue here, primarily requires contractors to market and sell properties and is not similar to the 2017 contract requirements. Supp. AR at 2. Additionally, HUD argues that even if the agency had determined that Alpine Companies was a capable small business offeror, such that Alpine Companies and Alpine/First Preston JV II were both capable small businesses, the rule of two requirements would still not have been met because the two companies share common ownership and the agency did not find any additional capable small businesses. COS/MOL at 8; AR, Tab 27, 3.76 Market Research Report (May 10, 2018) at 138. Consequently, the agency argues, there was no expectation that an award would be made at a fair market price.⁸ Id.

After considering HUD's response, our Office solicited the views of the Small Business Administration (SBA). The SBA reviewed the entire record in camera and questioned the reasonableness of HUD's determination regarding the capability of Alpine Companies, but ultimately concluded that expecting only commonly owned firms to submit offerors, would not reasonably support an expectation of price competition. In sum, the SBA concluded that it did not "find it unreasonable for the agency to determine that it lacked a reasonable expectation of receiving offers from two or more small businesses and that award would be made at a fair market price." SBA Review (Aug. 14, 2018) at 4-5.

Based on the record here, we agree with HUD and the SBA. Our Office has previously found reasonable an agency's determination that companies with common ownership and knowledge of each other's pricing cannot be expected to submit independent prices so that award can be made at a fair and reasonable price. AeroSage LLC, B-414314, B-414314.2, May 5, 2017, 2017 CPD ¶ 137; recon. denied, AeroSage LLC--Recon., B-414314.3, July 24, 2017, 2017 CPD ¶ 232. Under these similar circumstances, we will not question the contracting officer's judgment that the agency did not have a reasonable expectation that it would receive two or more offers from at least two responsible small businesses capable of performing the work in question at a fair market price.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁸ We understand that this argument was redacted from the protester's copy of the agency report. AR, Tab 27, 3.76 Market Research Report-Redacted (May 10, 2018) at 138; COS/MOL at 8. As stated above, due to the fact that the protester chose to proceed with its protest pro se, it did not have access to the entire agency report.