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Decision

Matter of: ViroMed Laboratories

File: B-298931

Date: December 20, 2006

Thomas A. Schmutz, Esq., and Jennifer A. Bowen, Esq., Morgan, Lewis & Bockius LLP, for the protester.

Maj. ChristinaLynn E. McCoy, Department of the Army, and Laura Mann Eyester, Esq., Small Business Administration, for the agencies.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency failed to conduct adequate market research to determine appropriateness of small business set-aside by failing to verify the representations of small business offerors regarding their capabilities is denied; in the absence of evidence that small business sources had misrepresented their capabilities, it was reasonable for the contracting officer to rely upon these representations in making set-aside determination.

DECISION

ViroMed Laboratories protests the decision by the Department of the Army to set aside for small business competition request for proposals (RFP) No. W81K04-06-R-0014, for Human Immunodeficiency Virus Type 1 (HIV-1) testing and reporting services. The protester contends that the contracting officer failed to make reasonable efforts to determine whether fair market price offers from two or more responsible small business concerns would be received.

We deny the protest.

BACKGROUND

The RFP, which was issued on August 29, 2006, contemplated the award of a fixed-price indefinite-delivery/indefinite-quantity contract. The contract was to cover a 1-year base, and four 1-year option, periods.

Prior to issuing the solicitation, the contracting officer posted a “sources sought” notice on the FedBizOpps website. The notice furnished a comprehensive listing of the test procedures to be performed, estimated quantities, data management requirements, and contractor accreditation requirements. Thirteen businesses responded to the sources sought notice; 11 of the 13 firms furnished capability information, and of these 11, 9 were small businesses. The notice invited sources with the skills and capabilities to perform the stated requirement to furnish information regarding their capabilities. The contracting officer reviewed the responses received and conducted additional research through the Central Contractor Registration System and the Dynamic Small Business Search (DSBS) System. In addition, she contacted the companies that had responded and queried them regarding their capability to perform the information technology (IT) portion of the requirement. Based on the information that she gathered, the contracting officer concluded that there were at least three small businesses capable of performing the RFP’s requirements. The contracting officer further concluded that since her research showed that HIV testing was offered and sold competitively in substantial quantities in the commercial marketplace, there was a reasonable expectation of award at a fair market price. Accordingly, the contracting officer concluded that the requirement should be set aside for small business competition.

The contracting officer conducted further market research at the time she completed DD Form 2519, Small Business Coordination Record. The research consisted of searching the DSBS system using the NAICS code assigned to the solicitation and the keyword “HIV.” The search yielded three small businesses, one of which was considered to be a possible additional source.¹

The agency held a pre-proposal conference on September 11, 2006. Representatives from the protester, which is the incumbent contractor and a large business, and five small businesses attended. Three of the small businesses were firms that had submitted responses to the sources sought notice.

On September 12, ViroMed filed an agency-level protest objecting to the agency decision to set aside the acquisition for small business competition. By decision dated September 21, the contracting officer denied the protest. On October 3, prior to the closing date set for receipt of proposals, ViroMed protested to our Office.

¹ One of the other two firms was a firm that had responded to the sources sought notice (and thus had already been counted as a potential source), while the other was a supplier of test products, rather than a laboratory, and thus was not considered to be a potential source.

DISCUSSION

Under Federal Acquisition Regulation (FAR) § 19.502-2(b), a procurement with an anticipated dollar value of more than \$100,000, such as the one here, 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 that award will be made at a fair market price. The use of any particular method of assessing the availability of small businesses is not required so long as the agency undertakes reasonable efforts to locate responsible small business competitors. National Linen Serv., B-285458, Aug. 22, 2000, 2000 CPD ¶ 138 at 2. 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. SAB Co., B-283883, Jan. 20, 2000, 2000 CPD ¶ 58 at 1-2; PR Newswire, B-279216, Apr. 23, 1998, 98-1 CPD ¶ 118 at 2. Because a decision whether to set aside a procurement is a matter of business judgment within the contracting officer's discretion, our review generally is limited to ascertaining whether that official abused his or her discretion. Admiral Towing and Barge Co., B-291849, B-291849.2, Mar. 6, 2003, 2003 CPD ¶ 164 at 3-4; PR Newswire, supra, at 2. We will not question a small business set-aside 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. National Linen Serv., supra, at 2.

The protester argues that the market research conducted by the contracting officer here was inadequate to support her conclusion that offers from at least two responsible small business concerns could reasonably be expected. ViroMed maintains in this regard that at a minimum, adequate market research required the contracting officer to determine whether each small business that responded to the sources sought notice had (1) appropriately equipped facilities, (2) an adequate number of personnel, (3) the capability to process up to 8,000 HIV tests per day, and (4) the ability to secure the required IT capability. The protester contends that rather than verifying the accuracy of sources' claims regarding their capabilities, the contracting officer simply accepted their self-serving assertions, which was insufficient.

While acknowledging that agencies are not required to make determinations regarding the responsibility of prospective sources in deciding whether to set aside an acquisition, Protester's Comments, Nov. 13, 2006, at 3, the protester in essence argues that the agency should have made determinations tantamount to affirmative determinations of responsibility with regard to the prospective sources here. In making set-aside decisions, agencies need not make either actual determinations of responsibility or decisions tantamount to determinations of responsibility, however; rather, they need only make an informed business judgment that there is a reasonable expectation of receiving acceptably priced offers from small business

concerns that are capable of performing the contract. SAB Co., supra, at 3-4; PR Newswire, supra, at 3.

The market research performed by the contracting officer here clearly permitted her to make an informed business judgment that offers from multiple small businesses with the capability to perform the required volume of tests and to secure the required IT capability could reasonably be expected.² Regarding the protester's assertion that the contracting officer should not have accepted the "self-serving" claims of prospective offerors regarding their capabilities without verification, in the absence of evidence of misrepresentation, we do not think that such a level of scrutiny was required.

The protest is denied.

Gary L. Kepplinger
General Counsel

² In a December 4, 2006 report on the protest, the Small Business Administration opined that the contracting officer's market research was adequate and supported her determination to set the acquisition aside for small business competition.