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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: FlowSense, LLC

File: B-310904

Date: March 10, 2008

Patrick C. Summers, Mackall Crounse & Moore, PLC, for the protester.
Phillipa L. Anderson, Esq., Department of Veterans Affairs, for the agency.
Peter D. Verchinski, Esq., and John M. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly passed over protester, a service-disabled veteran-owned small business (SDVOSB), in order to award contract to 8(a) firm is denied where agency reasonably determined that neither protester nor other SDVOSBs were viable potential offerors.
 2. Protest that awardee and protester were similarly situated firms, and that agency thus unreasonably determined that awardee could perform the work while protester could not, is denied where agency determined that awardee had capability to perform based on its prior performance of contracts for agency.
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DECISION

FlowSense, LLC, a service-disabled veteran-owned small business (SDVOSB), protests the proposed sole-source award of a contract to Tarraf Construction, Inc. under solicitation No. VA-263-08-RP-0025, a section 8(a) set-aside issued by the Department of Veterans Affairs (VA) for boiler replacement at the VA Medical Center (VAMC) in St. Cloud, Minnesota. FlowSense asserts that VA improperly set the contract aside for an 8(a) sole-source award rather than make award to FlowSense as an SDVOSB.

We deny the protest.

In September 2007, VA conducted market research to determine whether two or more SDVOSB concerns were available to perform the work at issue here. In this regard, the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the Act) establishes priorities for contracting preferences for VA requirements; first

priority goes to SDVOSBs, so the agency must consider those concerns' ability to satisfy a requirement before considering other preferences, such as for section 8(a) concerns. 38 U.S.C. § 8127(i). Based upon a search of VA's Vendor Information Pages (VIP) database, the contracting officer (CO) identified four SDVOSBs (including the protester) that possessed the applicable North American Industry Classification System (NAICS) code and were located in Minnesota; the agency determined that none of these firms was a viable potential competitor. Regarding FlowSense, VA discovered through searches of various databases that the firm had average annual revenue of \$1-2 million and a staff of only 8 employees, and that its largest prior contract was for only \$475,000. The CO concluded that it was doubtful that FlowSense would be able to obtain the necessary bonding for the boiler replacement contract here, since the estimated cost was \$2-3.5 million. Agency Report, exh. 9, at 1. The CO also suspected that, since the protester had 20 NAICS codes listed in the Central Contractor Registration database, the firm may be primarily a broker of services. Given that VA had no other knowledge of FlowSense's capabilities, it concluded that the firm was not a viable potential SDVOSB offeror for purposes of either an SDVOSB set-aside or sole-source award. Id.

The agency subsequently decided to conduct the procurement under the Small Business Administration's (SBA) section 8(a) program. By letter dated September 19, the CO offered the requirement to SBA, recommending a non-competitive award to Tarraf. Noting that Tarraf had successfully completed other projects for the agency, the agency stated that it believed that Tarraf had the capabilities and financial resources to handle a project of this size, and would be able to meet or exceed the timelines set forth in the project specifications. CO's Statement at 3. In this regard, the record shows that Tarraf received at least four other building maintenance contracts from VAMC in the first half of 2007. Protester's Comments, exh. 14, at 7, 11, 19, 21. Approximately 1 month later, SBA accepted the requirement under the 8(a) program. On October 29, the CO issued the RFP with the intent to negotiate with Tarraf on a sole-source basis. Thereafter, FlowSense filed this protest.

FlowSense challenges the agency's decision to set the procurement aside for award under the section 8(a) program. The protester asserts that it is a capable SDVOSB that is qualified to perform the work and that, since the Act gives first priority to SDVOSBs, the agency should have made award to FlowSense rather than to an 8(a) concern.¹

¹ The protester does not challenge the agency's decision not to set this procurement aside for veteran-owned small business concerns, which category is second in priority after SDVOSBs. 38 U.S.C. § 8127(i). Section 8(a) concerns and Historically Underutilized Business Zone (HUBZone) concerns are third in line. Id.

Although agencies need not use any particular methodology in assessing the availability of firms for a set-aside, measures such as prior procurement history, market surveys, and advice from the agency's small business specialist may all constitute adequate grounds for a contracting officer's decision to set aside, or not set aside, a procurement. See American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3. The assessment must be based on sufficient evidence to establish its reasonableness. See Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 5.

As stated above, the agency based its decision here on the information contained largely in the VIP database--the accuracy of which the protester does not challenge--showing that the firm's total annual revenue--\$1-2 million--was substantially below the estimated value of this contract, and that the value of its largest prior contract was only \$475,000; this brought into question the firm's capacity to perform, since the contract here was valued at \$2-3.5 million.² Information such as this, concerning firms' business history, properly may be considered by agencies when making a determination as to whether there are viable potential competitors so as to warrant setting a requirement aside under a small business preference program. See, e.g., MCS Mgmt., Inc., B-285813, B-285882, Oct. 11, 2000, 2000 CPD ¶ 187 (agency reasonably considered annual revenues and size of past contracts when examining whether small businesses were capable of performing contract for a set-aside solicitation). This information led the agency to conclude that "there were no SDVOSB firms, which included FlowSense, with the capabilities and capital to procure the necessary bonding and to perform the work associated with the project." CO's Statement at 2. We find nothing unreasonable in this conclusion.

FlowSense asserts that it was unreasonable for the agency to determine that it was not capable of performing the work while finding that Taraff was capable of performing, since the two firms are similarly situated. In this regard, the protester alleges--and the agency does not dispute--that the two firms had similar staffing, similar annual revenues, and similar potential bonding problems.

² The protester asserts that the CO should also have been aware of its capability to perform from information it provided to the CO via e-mail prior to issuance of the solicitation. However, that e-mail was consistent with the information contained in the database. For example, it noted that "[i]n 2006-2007, [FlowSense] completed and [is] currently involved in multiple mechanical & general renovation projects exceeding \$3.75 million up to date." Protester's Comments, Jan. 9, 2008, exh. 3. This information seems to support the database information showing that the firm's annual revenue was \$1-2 million. In any case, there was no requirement that the agency discount the information in the VIP databases in favor of FlowSense's unsolicited self-serving information.

This argument is without merit. While FlowSense and Tarraf had similar staffing and annual revenue, they were different in that the agency had worked with Tarraf on several occasions and had direct knowledge of Tarraf's capabilities through this past performance. This direct knowledge provided the agency with a reasonable basis for predicting that Tarraf could successfully perform the contract. In contrast, the agency had no such direct knowledge of FlowSense's capabilities; rather, the firm was an unknown entity, so the agency was left to determine the firm's capability from available information. As discussed above, in making this determination, the agency reasonably relied on information indicating that the firm lacked the capacity necessary to perform the contract here. We conclude that the agency reasonably viewed the two firms' capability differently; the agency's decision to proceed with an award to Tarraf did not undermine its prior conclusion that FlowSense was not capable of performing such that an SDVOSB award was required under the Act.³

The protest is denied.

Gary L. Kepplinger
General Counsel

³ We solicited the Small Business Administration's (SBA) comments on this protest, and SBA shares our view that the agency did nothing improper. Specifically, SBA asserts that the agency reasonably determined that FlowSense did not have the capability to perform the contract, and that the agency could rely on its "first-hand experience" of Tarraf in determining that it was capable of performing. SBA Letter to GAO, Jan. 11, 2008.