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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: In and Out Valet Co.

File: B-311141

Date: April 3, 2008

James T. Tramonte for the protester.

Jose H. Lopez, Esq., and Kate Gorney, Esq., Department of Veterans Affairs, for the agency.

Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The Department of Veterans Affairs has statutory authority to make a sole-source award to a service-disabled veteran-owned small business (SDVOSB) concern where the anticipated award price exceeds the simplified acquisition threshold but does not exceed \$5 million, the SDVOSB is determined to be a responsible source, and the contracting officer has determined that award can be made at a fair and reasonable price.

DECISION

In and Out Valet Co., a service-disabled veteran-owned small business (SDVOSB), concern protests the Department of Veterans Affairs (VA) decision to make a sole-source award to Veterans Parking Management, LLC (VPM), also an SDVOSB, for valet parking services at the Pittsburgh VA Medical Center under request for proposals (RFP) No. VA244-08-RP-0090.

We deny the protest.

BACKGROUND

On May 3, 2007, the VA issued a competitive SDVOSB set-aside solicitation (RFP No. 244-07-RP-0010). Four offerors responded to the solicitation. VPM submitted the lowest-priced, most highly rated technical proposal and was awarded a contract on June 15 for a contract period of June 18 to January 31, 2008. In and Out protested VPM's eligibility as a small business concern to the Small Business Administration (SBA). On August 6, the SBA made a formal determination that VPM was other than

a small business. As a result, the agency terminated VPM's contract and issued a noncompetitive RFP to In and Out which was ranked second technically under the original competition. Award was made to In and Out on October 1 for the remainder of VPM's contract – i.e., for the period of October 15 through January 31, 2008.¹

On October 4, VPM was re-certified as a small business concern by the SBA. Around October 14, the agency hired the former project manager for VPM under a temporary appointment to assist with the transition from performance by VPM to In and Out. When the temporary appointment expired, the former project manager was hired for a completely different and unrelated position.

The contracting officer (CO) states that she decided on December 13, to award a sole-source contract for the new work to VPM because the VA has statutory authority to make sole-source awards to SDVOSB concerns. The CO states that her determination was based on the following: VPM was re-certified by the SBA as a small business, VPM was registered as an SDVOSB, VPM provided excellent services under the previous contract prior to the termination, and there were serious performance issues with In and Out. The RFP was issued to VPM on a sole-source basis on December 21, 2007, and on January 16, 2008 the contract was awarded to VPM for a 1 year period. On January 25, In and Out filed this protest with our Office.

DISCUSSION

The protester essentially objects to the sole-source award to VPM primarily because VPM had been previously determined by the SBA to be other than a small business concern.² The protester argues that the agency erred in contracting with VPM on a sole-source basis without taking into consideration the favorable performance it provided on the incumbent contract. The protester also points to the VA's hiring of VPM's former project manager to assist with the performance transition from VPM to In and Out, and maintains that this employee contributed to the protester's

¹ The agency reports that the relatively short duration of the initial contract was because a new parking garage was under construction and the opening of the new garage was expected to change the scope of the valet contract. The agency states that it intended to issue a new solicitation incorporating the revised scope of effort prior to expiration of the current contract.

² The Small Business Act, 15 U.S.C. § 637(b)(6), gives the SBA, not our Office, the conclusive authority to determine matters of small business size status for federal procurements. We therefore will not review a protester's challenge to another company's size status, nor will we review a decision by the SBA that a company is, or is not, a small business for purposes of federal procurements. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1) (2007); Randolph Eng'g Sunglasses, B-280270, Aug. 10, 1998, 98-2 CPD ¶ 39 at 3.

performance problems and influenced the agency's decision to contract with VPM on a sole-source basis.

The agency asserts that it was within its authority to award the contract to VPM on a sole-source basis. We agree.

The VA's statutory authority to make sole-source awards to SDVOSBs is set forth at 38 U.S.C. § 8127, Pub. L. No. 109-461, 120 Stat. 3431, 3432 (2006). This authority allows the VA to award to an SDVOSB on a sole-source basis when:

- (1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;
- (2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403) but will not exceed \$5,000,000; and
- (3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

As explained above, VPM was re-certified as a small business concern by the SBA on October 4, 2007. Agency Report (AR) Tab 4, SBA Size Determination. In addition, the agency reports that VPM is currently registered as an SDVOSB. AR, Tab 8, Sole Source Justification, at 3. In accordance with the statute, the CO determined that VPM was a responsible source, that the anticipated award price plus options was more than the simplified acquisition threshold but less than \$5,000,000, and that award would be made at a fair and reasonable price. AR, Tab 1, CO's Statement at 2 and 3. Moreover, the agency disagrees with In and Out's favorable assessment of its past performance; in fact, the CO's decision to use this authority was also based expressly on the fact that the agency was not satisfied with the protester's performance. Id.

Based on our review, we think the record shows that in making her decision to award a sole-source contract to VPM, the CO's decision was in accord with the statute authorizing the award of sole-source contracts to SDVOSBs. Despite In and Out's desire to compete for this contract—given its similar status as an SDVOSB—we see no requirement, under this statute and under these circumstances, for even a limited competition.

Lastly, there is no evidence that the agency's hiring of VPM's former project manager to assist in the transfer of performance between VPM and In and Out had any bearing on the VA's decision to award to VPM. As previously stated, the former project manager was hired by the VA in October 2007 under a temporary appointment. When that appointment expired in December 2007, the employee was hired in an

unrelated position and was not a member of the agency's facilities management team at the time of award.³ The CO states that this employee had no involvement in her decision to award a sole-source contract to VPM. AR, Tab 1, CO's Statement at 4. Other than the protester's speculation, we see nothing in the record to support an allegation that VPM's former employee influenced the award decision here.

The protest is denied.

Gary L. Kepplinger
General Counsel

³ The protester speculates that the former VPM employee may have contributed to the protester's performance issues and that once this employee was transferred there were no additional performance problems. The record does not support these assertions. The record contains numerous documented incidences of inadequate performance by the protester, including an incident reported to the CO on February 1, 2008, long after the former VPM employee had been transferred to an unrelated position within the VA. AR, Tab 10, Report to CO from Chief of Police.