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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: DAV Prime, Inc.

File: B-311420

Date: May 1, 2008

Brian Finley for the protester.

Elin M. Dugan, Esq., Department of Agriculture, Forest Service, for the agency.

Cherie J. Owen, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO participated in the preparation of the decision.

DIGEST

Protest that agency failed to restrict its solicitation to service-disabled veteran-owned small business concerns (SDVOSBCs) is dismissed because the law providing for SDVOSBC set-asides is permissive, not mandatory, and does not require an agency to set aside contracts for SDVOSBCs.

DECISION

DAV Prime, Inc., a service-disabled veteran-owned small business concern (SDVOSBC) protests the terms of solicitation No. AG-024B-S-07-0005, issued by the Department of Agriculture, U.S. Forest Service, for portable latrines. DAV argues that this work should have been reserved for SDVOSB companies. It contends a set-aside is required because the agency has violated the Small Business Act, as amended by § 36 of the Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651, 2662 (2003), 15 U.S.C. § 657f (Supp. IV 2004), by failing to meet its stated goal of awarding 3 percent of its annual contracts to SDVOSBCs, and by failing to conduct a market survey to determine whether an SDVOSBC set-aside is appropriate. Protest at 2; Response to Motion to Dismiss at 1.

We dismiss the protest because it does not establish a valid basis for challenging the agency's action.

Section 36 of the Veterans Benefits Act of 2003 provides:

In accordance with this section, a contracting officer may award contracts on the basis of competition restricted to [SDVOSBCs] if the contracting officer has a reasonable expectation that not less

than 2 [SDVOSBCs] will submit offers and that the award can be made at a fair market price.

15 U.S.C. § 657f(b).

In our view, the language of the Act is clearly discretionary. As such, it permits, but does not require, a contracting officer to restrict competition to SDVOSBCs if certain conditions are satisfied.

With regard to the protester's argument that our holding in MCS Portable Restroom Serv., B-299291, Mar. 28, 2007, 2007 CPD ¶ 55, requires a different result, the protester's reliance on that case is misplaced. MCS stands for the proposition that, although a contracting officer is not required to undertake the analysis set forth in the Act, if he or she does conduct such an analysis, his or her analysis must be reasonable.

In MCS, the contracting officer conducted a market survey to determine whether the criteria of the Act were met. Id. at 1. After searching the CCR database for the proper NAICS code and locating 28 SDVOSBCs that potentially could perform the work, the agency sent e-mails to these firms and received responses from two SDVOSBCs, (MCS and a Florida-based company). Id. Two months later, the agency posted a "sources sought" notice on FedBizOps and only one SDVOSBC (MCS) responded. Id. After considering this market research, the contracting officer concluded that she did not have a reasonable expectation of receiving two or more bids from SDVOSBCs. Id. Therefore, the solicitation was posted as a small business set-aside. Id.

MCS protested the contracting officer's conclusion, arguing that it was not reasonable, given the results of the contracting officer's market research. Id. at 2. The Small Business Administration (SBA) agreed that the contracting officer's analysis of the market research was not reasonable. Id. at 3. The SBA noted that the agency's disregard of the Florida SDVOSBC's expression of interest (which was based upon the assumption that the firm was no longer interested because it did not also respond to the "sources sought" notice) was unreasonable because the firm may not have seen the notice or it may have believed a response was unnecessary given that it had already expressed interest. Id. at 3. After considering the results of the contracting officer's market research and the SBA's opinion, we held that the contracting officer's assessment of the criteria set forth in the Act was not reasonable and we sustained the MCS protest. Id. at 4.

Here, unlike the case cited by the protester, DAV does not claim that the agency undertook the analysis outlined in the Act and reached an unreasonable conclusion. Rather, protester argues that the agency violated the Act simply because it failed to conduct a market survey. Response to Motion to Dismiss at 1. This argument is not supported by the plain language of the statute, nor is it supported by our holding in MCS.

Our holding here also requires us to clarify our recent decision in IBV, Ltd., B-311244, Feb. 21, 2008, 2008 CPD ¶ 47. In that decision we cited MCS for the proposition that “[p]rior to proceeding with a small business set-aside, a procuring agency is required to make reasonable efforts to ascertain whether an SBVOSBC set-aside is appropriate,” which, upon further reflection, we think overstates both the holding in MCS and the requirements of the Act. Though our decision in IBV remains unchanged, we think a proper explanation of the Act and the MCS decision is that there is no requirement to set-aside a procurement for SDVOSBCs. That said, when an agency undertakes an SDVOSBC set-aside analysis, the conclusions it draws from the analysis must be reasonable.

As a result, we think DAV’s protest does not include sufficient information to establish the likelihood that the agency in this case violated applicable procurement laws or regulations. The protest therefore is dismissed without further action. See Bid Protest Regulations, 4 C.F.R. § 21.5(f) (2007).

The protest is dismissed.

Gary L. Kepplinger
General Counsel