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Decision

Matter of: CDS Services, Inc.

File: B-418376.2

Date: June 4, 2020

Alan Grayson, Esq., Law Office of Alan Grayson, for the protester.
Deborah K. Morrell, Esq., Department of Veterans Affairs, for the agency.
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DIGEST

Protest that agency improperly withdrew a service-disabled veteran-owned small business set-aside determination is denied, where the agency withdrew the determination because the protester, the only competitor, submitted a price that the agency concluded was not fair and reasonable based on a government estimate that was reasonably supported by the record, and where there is no evidence of bad faith by the agency.

DECISION

CDS Services, Inc., of Murrieta, California, a small business, protests the rejection of its quotation and the withdrawal of the agency's decision to set aside the procurement for service-disabled veteran-owned small businesses (SDVOSB) under request for quotations (RFQ) No. 36C25620Q0069, issued by the Department of Veterans Affairs (VA). The agency issued the RFQ for pest control services for four VA outpatient clinics in Mississippi and Florida. CDS argues that the VA unreasonably rejected its quotation on the basis that its price was not fair and reasonable, and failed to award it a contract as provided by applicable regulations.

We deny the protest.

BACKGROUND

The RFQ, issued November 27, 2019, sought quotations from SDVOSBs to provide commercial pest control services for a base year and four option years. The VA received one quotation, from CDS, doing business as Legion Pest Management. Contracting Officer's Statement (COS) at 1. The VA evaluated CDS's quotation as

unacceptable and canceled the RFQ. After informing CDS of the cancellation, the VA provided the firm a debriefing in which it explained that, even if CDS's quotation had been acceptable, its price was not fair and reasonable. *Id.* at 3. CDS filed a protest with our Office challenging the VA's actions, and the VA announced that it would take corrective action. The January 24, 2020, corrective action announcement indicated that the VA would review the requirement, reissue the solicitation, and negotiate with CDS to enable it to submit a technically acceptable quotation. Our Office dismissed the protest as academic based on the announced corrective action. *CDS Servs., Inc.*, B-418376, Jan. 27, 2020 (unpublished decision).

As anticipated by the corrective action, CDS submitted a revised quotation that included a lower price of \$1.2 million.¹ Agency Report (AR), Tab 7a, CDS Revised Quotation Excerpt, at 5. The VA also obtained a quotation from the incumbent contractor, prepared an agency estimate, and compared CDS's revised quotation to the estimate.² On March 3, the VA notified CDS that it had concluded that the price was not fair and reasonable. As a result, the agency decided to continue with its plan to cancel the RFQ and resolicit the requirement as a small business set-aside. This protest followed.

DISCUSSION

CDS argues that the VA improperly failed to award it the contract, in violation of Federal Acquisition Regulation (FAR) 19.1405(c) and Department of Veterans Affairs Acquisition Regulation (VAAR) 819.7005, because the agency unreasonably determined that the firm's most recent quotation did not offer a fair and reasonable price. Protest at 4-5. CDS contends that the VA's decision relied on an unreasonable government estimate, and that the VA should have awarded the contract to CDS. *Id.* The VA counters that it prepared a reasonable price estimate that had a factual basis,³ that the protester's final quotation exceeded the estimate, and that the agency was required by its regulations to withdraw the set-aside determination. As explained below, based on our review of the record, CDS has failed to show that the VA's estimate lacked a reasonable basis, or that the agency violated applicable regulations.

¹ Prices specified in this decision have been rounded.

² The VA explains that the incumbent contract was awarded under an SDVOSB set-aside and, while the incumbent is now ineligible to compete as an SDVOSB, it remains a small business. Memorandum of Law (MOL) at 3 n.1.

³ The agency explains that in preparing the estimate, it attempted to contact three firms by telephone, one of which--the incumbent contractor, Hill Country Pest Control--responded with a quotation for 1 year of service at a total price of \$164,000. AR, Tab 5a, Memorandum from VA Assistant Chief, Environmental Management Service, Mar. 13, 2020, at 1. The memorandum also listed total prices paid by the VA for similar pest control services in its facilities in Shreveport, Louisiana (\$490,000), New Orleans, Louisiana (\$380,000), Houston, Texas (\$730,000), and the incumbent contract for these services in Biloxi, Mississippi (\$540,000). *Id.*

CDS argues that the VA used a defective government estimate to assess whether its price was fair and reasonable. The firm contends that the VA improperly used a quotation from the incumbent, which was neither independent of the incumbent's influence nor a true estimate. Protester's Comments at 5. The protester asserts that by asking the incumbent contractor to provide a nonbinding price quotation for only one year of service (based on the scope of its incumbent contract), the agency did not obtain a quotation it could reasonably extend to five years, or a quotation that reasonably captured the expanded scope of work in the current RFQ. *Id.* In addition, CDS contends that the quotation should not be viewed as reliable because it was significantly lower than the amount the incumbent has been paid in the past. *Id.*

Finally, CDS argues that since the incumbent's quotation is virtually identical to the VA's new estimate, it does not appear that other contracts were used to prepare the estimate, as the VA claims.⁴ In any event, CDS argues that the prices for services at Shreveport, New Orleans, and Houston are not meaningful because the RFQ here imposes distinct requirements from those contracts. The contractor must obtain pesticide handling and application licensing in two states rather than just a single state, and the RFQ here requires the use of specialized bedbug detection canines and heat treatments that were not required (or were expressly prohibited) under the other contracts. *Id.* at 6, 9-10. CDS further argues that the VA's calculations show at least one instance where the agency pays a higher per-square-foot price than CDS quoted under this RFQ. Thus, CDS contends that the VA's argument that its price is not fair and reasonable is undercut by prices it is paying elsewhere. *Id.* at 8.

The VA responds that it developed its estimate--\$164,000 for a base year and each of four option years (or \$820,000 total)--by using its authority to "select whatever price analysis techniques will ensure a fair and reasonable price." AR, Tab 5, Independent Government Cost Estimate, at 1; MOL at 3 (quoting *Nomura Enters., Inc.*, B-271215, May 24, 1996, 96-1 CPD ¶ 253 at 2). The VA also explains that the contracting officer's representative developed the estimate by considering pest control services at three other VA facilities in the same region, which includes the New Orleans, Shreveport, and Little Rock VA medical centers. MOL at 3. The agency report also included a quotation by the incumbent contractor for one year of service "based on the current scope of work for the hospital." AR, Tab 5b, Letter Quotation from Hill Vice President to VA, at 1.

The contracting officer explains that, after comparing the agency's price estimate and the protester's revised price, he concluded that CDS's price was "still well above the funds available for the project," and that its price was not fair and reasonable. COS at 3. The contracting officer states further that the protester's price was compared "to other contractors[]" pricing by square footage at other locations, on other contracts, for the same services." *Id.* In addition, the VA submitted a spreadsheet as an attachment

⁴ CDS notes that the government estimate calculation lists the base period as 9 months (January 1 to September 30), rather than a year. However, the estimate states that it is based on a 12-month base period (and uses the same price for each of the four option years). AR, Tab 5, Independent Government Cost Estimate, at 1.

to the contracting officer's statement to show a calculation of per-square-foot costs for pest control contracts in New Orleans, Shreveport, and Little Rock. COS, exh. 2b, Biloxi Square Foot Pricing Spreadsheet, at 1-2. Those calculations yield the following prices per square foot: \$0.24 (for New Orleans), \$0.29 (for Little Rock), and \$0.74 (for Shreveport). Supp. COS, exh. 2b, Revised Biloxi Square Foot Pricing Spreadsheet, at 1-2.

The VA defends its conclusions by pointing out that CDS's initial quotation was over [DELETED] percent higher than the agency's estimate, and that after negotiations, it "was only [DELETED] lower than its initial exorbitant quot[ation]." MOL at 4. As a result, CDS's revised final price of \$1.2 million was "still significantly higher than the government estimate of \$819,682.50." *Id.* at 5. In addition, the VA emphasizes that CDS's price exceeds the agency's available funds for this effort; the agency's contract funding document "show[ed] funds of \$16[3],936.50 available for the base year."⁵ *Id.* at 6. The contracting officer's statement explained that the agency's estimate translated to a price of \$0.45 per square foot, whereas CDS's final price translated to \$0.65 per square foot. Supp. COS, exh. 2b, Revised Biloxi Square Foot Pricing Spreadsheet, at 1-2.

There are two regulations that are relevant to this dispute. The first is FAR 19.1405(c), which provides:

(c) If the contracting officer receives only one acceptable offer from a service-disabled veteran-owned small business concern in response to a set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from service-disabled veteran-owned small business concerns, the service-disabled veteran-owned set-aside shall be withdrawn and the requirement, if still valid, set aside for small business concerns, as appropriate (see 19.203).

The second regulation, VAAR 819.7005(c), provides:

(c) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible SDVOSB concern in response to a SDVOSB set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from eligible SDVOSB concerns, the set-aside shall be withdrawn and the requirement, if still valid, set aside for VOSB competition, if appropriate.

In the course of this protest, neither party disputes that if the VA validly determined that CDS's revised price quotation was not fair and reasonable, the agency was required to withdraw the set-aside. If the pricing was fair and reasonable, then the VA "should"

⁵ We have corrected an apparent typo to conform to the amount shown on the actual funding document. See AR Tab 4, VA Form 2237 (Request, Turn-In, and Receipt for Property or Services), at 1.

have awarded the contract to CDS. FAR 19.1405(c); *see also* VAAR 819.7005(c). Thus, the issue is whether the VA had a reasonable basis for the estimate it used to find that CDS's price was not fair and reasonable.

In the context of a small business set-aside, a determination of price reasonableness is within the discretion of the contracting agency, and we will not disturb such a determination unless it is unreasonable. *Camden Shipping Corp.*, B-406171, B-406323, Feb. 27, 2012, 2012 CPD ¶ 76 at 9. Similarly, where a protester challenged an agency's decision to accept a price as fair, our Office explained that we would defer to the agency's judgment unless the decision was not reasonably based or there was a showing that agency officials engaged in bad faith. *Blue Dot Energy Co.*, B-253390, Sept. 7, 1993, 93-2 CPD ¶ 145 at 7, *recon. denied*, *Blue Dot Energy Co.--Recon.*, B-253390.2, Nov. 4, 1993, 93-2 CPD ¶ 267 (citing *Cherokee Enters., Inc.*, *supra*).

In reviewing an agency's decision about whether a price is fair and reasonable, we have expressly identified previous procurements, and the price in a bid from an ineligible firm (such as a large business), as providing appropriate support for the agency's judgment. *See Vitronics, Inc.*, B-237249, Jan. 16, 1990, 90-1 CPD ¶ 57 at 2 ("[i]n making the determination, the contracting officer may consider such factors as the government estimate, the procurement history for the supplies or services in question, current market conditions, and the price offered by an otherwise ineligible large business bidder"); *Interstate Commerce Comm'n--Request for Recon.*, B-237249.2, Apr. 16, 1990, 90-1 CPD ¶ 391 at 3-4 (small business offer was improperly rejected as not offering a fair and reasonable price even though the price exceeded price quoted by an ineligible firm by 6 percent).

Our review of the record shows that the VA had a reasonable basis for the government estimate used here to reject CDS's price. As our decisions have recognized, it is proper to consider a bid from a competitor in assessing whether the price quoted by a small business is fair and reasonable. The contemporaneous record shows that the VA used the incumbent's quotation to formulate a government estimate for providing five years of pest control services under the RFP. It then compared CDS's revised quotation of \$1.2 million for those services to the estimate of \$860,000. In light of the significantly higher price in CDS's revised quotation, the VA concluded that CDS's price was not fair and reasonable. CDS has not shown the estimate was based in bad faith and its disagreement is not sufficient to show that the agency lacked a reasonable basis for its estimate. The record shows that the VA properly compared CDS's revised price to both the estimate and the incumbent's price, and reasonably determined that CDS's pricing was "well above" the agency's estimate. Based on this analysis, the agency reasonably concluded that CDS, as the only competitor, did not offer a fair and reasonable price. As provided by the applicable regulations, the VA was then required to withdraw the SDVOSB set-aside and properly did so.

The protest is denied.

Thomas H. Armstrong
General Counsel