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Decision

Matter of: KPMG LLP

File: B-420388; B-420388.2

Date: February 16, 2022

Dominique L. Casimir, Esq., Michael J. Montalbano, Esq., and Samarth Barot, Esq., Blank Rome LLP, for the protester.
David A. Evers, Esq., Defense Logistics Agency, for the agency.
Young H. Cho, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision to set aside for service-disabled veteran-owned small business concerns a procurement conducted pursuant to the procedures of Federal Acquisition Regulation subpart 8.4 is denied; the decision to set aside such a procurement is within the discretion of the contracting agency and the protester does not show that the agency abused its discretion.

DECISION

KPMG, LLP, a large business concern of McLean, Virginia, protests the terms of request for quotations (RFQ) No. SP4704-21-Q-0004, issued by the Defense Logistics Agency (DLA) for the establishment of multiple blanket purchase agreements (BPAs) for financial improvement and audit readiness services. KPMG, an incumbent BPA holder, argues that the agency's decision to set aside the solicitation for service-disabled veteran-owned small business (SDVOSB) concerns is unreasonable.

We deny the protest.

BACKGROUND

The RFQ was issued on November 3, 2021, to holders of the General Services Administration's (GSA) Federal Supply Schedule (FSS) contracts for budget and financial management services, under the procedures of Federal Acquisition Regulation (FAR) subpart 8.4, seeking program management, subject matter expertise, and support for DLA-wide stewardship, business process improvement, and audit sustainment initiatives. Contracting Officer's Statement and Memorandum of Law

(COS/MOL) at 5; Agency Report (AR), exh. 13, RFQ at 1, 3.¹ The RFQ was set aside for SDVOSBs meeting the \$22 million small business size standard under the North American Industry Classification System code 541219, other accounting services. RFQ at 3. The RFQ sought to establish multiple fixed-price BPAs with a 5-year ordering period, under which DLA would issue fixed-price task orders with a 1-year base period and up to four 1-year option periods. *Id.*; AR, exh. 27, Performance Work Statement at 2. Award would be made on a best-value tradeoff basis considering the following factors: technical capabilities, management, past performance, and price. RFQ at 73-75.

Prior to issuing the RFQ, the agency conducted market research to inform its acquisition strategy. COS/MOL at 2-5. On March 15, 2021, a sources sought notice was issued on the GSA's e-Buy system to 278 small business vendors with FSS contracts for budget and financial management services, to identify potential small business concerns capable of performing the required services. *Id.* at 2-3; AR, exh. 1, Sources Sought Notice. Nine vendors submitted capability statements in response to the notice. COS/MOL at 3; AR, exh. 29, Sources Sought Responses. The agency reviewed the capability statements and considered past performance information for those firms. See *generally* AR, exh. 6, Sources Sought Assessments. The agency identified four SDVOSB concerns capable of providing the required services. AR, exh. 8, Market Research Report at 5. As a result, the contracting officer concluded that the market research supported a total SDVOSB set-aside. *Id.*

The contracting officer also prepared a memorandum addressing the decision to conduct the procurement under the Federal Supply Schedule, the benefits of utilizing BPAs, and the anticipated risks of an SDVOSB set-aside. AR, exh. 10, Contracting Officer's Memorandum for Record. In this memorandum, the contracting officer noted that GSA had already determined fair and reasonable pricing at the contract level. *Id.* at 1. The contracting officer also stated that the agency intended to compete task orders among BPA holders. *Id.* at 2. Finally, the contracting officer observed that as of September 13, 2021, there were 320 small business vendors, 71 of which were classified as SDVOSB concerns on the schedule for budget and financial management services. *Id.* at 3. The contracting officer further opined that based on the contracting officer's professional knowledge and experience, more responses would be submitted in response to the solicitation than were received following the sources sought notice. *Id.*

The agency submitted to DLA's Small Business Office for concurrence a Small Business Coordination Record, DD Form 2579, summarizing the decision to set aside the procurement for SDVOSB concerns. AR, exh. 12, Small Business Coordination Record. The Small Business Office concurred with this set-aside decision. *Id.* at 2.

¹ All citations to the record are to the consecutive numbering of the pages in the Adobe PDF document provided by the agency.

On December 3, 2021, prior to the closing date and time for receipt of quotations, KPMG filed its protest with our Office. When the solicitation closed on January 6, 2022, the agency received 11 quotations from SDVOSB concerns. Supp. COS/MOL at 1.

DISCUSSION

KPMG challenges the agency's decision to set aside the procurement for SDVOSB concerns.² KPMG argues that the agency's market research was flawed because the agency's sources sought notice did not accurately reflect the complexities of the agency's requirements. Protest at 21-24; Comments & Supp. Protest at 11-12. KPMG also argues that the agency failed to assess here, in a procurement contemplating multiple awards, whether there was a sufficient number of SDVOSB concerns with the cumulative capacity to support all of the program requirements. Protest at 25; Comments & Supp. Protest at 6-9; Supp. Comments at 6-8. Finally, KPMG argues that the agency failed to analyze whether DLA could make awards to SDVOSB concerns at fair market prices. Comments & Supp. Protest at 4-6; Supp. Comments at 2-4.

DLA maintains that its set-aside decision was reasonable and supported by its market research. The agency argues that based on its market research, it had a reasonable expectation that it would receive quotations from at least two responsible SDVOSB concerns, at a fair market price. COS/MOL at 6-9; Supp. COS/MOL at 3-4. In this regard, the agency explains that unlike previous procurements, where an award was made to a single contractor for the required services, DLA contemplated establishing BPAs with multiple vendors and competing each task among the BPA holders. Additional government oversight would be provided to ensure integration of efforts from multiple contractors. COS/MOL at 6-7. DLA further explains that the solicitation does not contemplate acquiring all the required services solely from the BPA holders. COS/MOL at 7 n.2; Supp. COS/MOL at 3. DLA contends that KPMG's arguments are based on an erroneous legal standard and amount to no more than disagreement with the agency's judgment. Supp. COS/MOL at 3-4. The agency also asserts that since 11 SDVOSB concerns submitted quotations by the deadline for receipt of quotations, its expectation was realized. *Id.* at 3.

The FAR provides that although the preference programs of FAR part 19, small business programs, are generally not applicable to procurements under the FSS procedures of FAR subpart 8.4, an agency may, in its discretion, set aside orders or BPAs for any of the small business concerns identified in FAR part 19. FAR § 8.405-5(a)(1); *InfoReliance Corp.*, B-413298, Sept. 19, 2016, 2016 CPD ¶ 263 at 3. Because a decision whether to set aside a procurement is a matter of business judgment within the contracting officer's discretion, our review is limited to determining

² In filing and pursuing this protest, KPMG has made arguments that are in addition to, or variations of, those discussed below. While we do not address every issue raised, we have considered all of the protester's arguments and we find that none furnishes a basis on which to sustain the protest.

whether that official abused his or her discretion. *Ranger American of Puerto Rico, Inc.*, B-418616, July 2, 2020, 2020 CPD ¶ 226 at 4-5.

On this record, we find the agency's decision to set aside the procurement for SDVOSBs unobjectionable. The record provides adequate support for the reasonableness of the conclusion that SDVOSB competition could be expected here, resulting in award being made at a reasonable price.

KPMG's argument that the agency's set-aside decision was unreasonable because it was premised on an inaccurate sources sought notice is without merit. The legal standard for our review of such a decision requires business judgment about a reasonable likelihood of small business competition, and thus recognizes that a contracting officer may set aside a solicitation even where a skeptical competitor can identify contrasting information that could arguably justify rejecting the set-aside and holding a full and open competition instead. See, e.g., *Community Surgical Supply of Toms River, Inc.*, B-416365.2, Jan. 28, 2019, 2019 CPD ¶ 72 at 5-6; *Encompass Grp., LLC*, B-296602, B-296617, Aug. 10, 2005, 2005 CPD ¶ 159 at 4. No particular method of assessing the availability of capable SDVOSB concerns is required. *CRAssociates, Inc.*, B-418799, Sept. 10, 2020, 2021 CPD ¶ 91 at 4. Contracting officers may consider procurement history, market surveys, advice from the agency's small business specialist, technical personnel, and information concerning prospective offerors' business history, capability, or capacity may all provide an adequate basis for a decision to set aside, or not set aside, a requirement for SDVOSB concerns. *Crosstown Courier Serv., Inc.*, B-410936, Mar. 12, 2015, 2015 CPD ¶ 107 at 4; *FlowSense, LLC*, B-310904, Mar. 10, 2008, 2008 CPD ¶ 56 at 3.

Here, KPMG identifies differences between the description of the work provided in the sources sought notice and the precise requirements of the RFQ. Underlying KPMG's argument is its belief that there are no SDVOSB concerns that are capable of performing the requirements of the solicitation. See, e.g., Comments & Supp. Protest at 3. However, in making set-aside decisions, agencies need not make actual determinations of responsibility or decisions tantamount to determinations of responsibility; 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. *Ranger American of Puerto Rico, Inc.*, *supra*; *Planet Depos, LLC*, B-411142, May 26, 2015, 2015 CPD ¶ 165 at 3. On this record, KPMG's argument provides no basis to sustain the protest.

We also find without merit KPMG's argument that the agency failed to assess whether there was a sufficient number of SDVOSB concerns that have the cumulative capacity to support all the program requirements in light of the agency's intent to make multiple awards. KPMG relies on *Dakota Systems, Inc.*, B-246697, Mar. 27, 1992, 92-1 CPD ¶ 312, to support its argument; however, we find this reliance misplaced. The protester in *Dakota Systems* challenged the agency decision not to set aside a procurement for a multiple-award FSS contract. The agency conceded that it did not conduct a "Rule of Two" analysis required under FAR section 19.502-2 but argued that the "Rule of Two"

did not apply to a procurement contemplating multiple awards or one issued under the FSS.³ *Dakota Systems, Inc.*, *supra* at 2. One reason offered by the agency for not setting aside the procurement concerned the appropriateness of a set-aside for the specific services sought. *Id.* at 3. In addressing the agency's argument, our decision noted, in passing, that even if two small business concerns could supply services at a reasonable price under a multiple-award FSS contract, "we do not believe FAR § 19.502-2 would require limitation to small businesses unless the eligible firms had sufficient cumulative capacity (responsibility) to compete for and provide the anticipated volume of required services and supplies." *Id.* at 4. However, we sustained the protest because the record showed that the agency did not undertake reasonable efforts to ascertain whether the rule of two was satisfied. *Id.*

We disagree with the protester's assertion that under *Dakota Systems*, an agency is required to consider the cumulative capacity of prospective vendors or offerors prior to making a discretionary set-aside decision in a procurement contemplating multiple awards. As we have stated above, agencies need not make either actual determinations of responsibility or decisions tantamount to determinations of responsibility in determining whether to set aside a procurement. *See, e.g., Analytical Graphics, Inc.*, B-413385, Oct. 17, 2016, 2016 CPD ¶ 293 at 7; *Ceradyne, Inc.*, B-402281, Feb. 17, 2010, 2010 CPD ¶ 70 at 4. Rather, agencies need only make an informed business judgment that there are small businesses that are capable of performing and can reasonably be expected to submit offers. *ViroMed Labs.*, B-298931, Dec. 20, 2006, 2007 CPD ¶ 4 at 3-4. In this regard, we note that the protester raises numerous objections to the agency's assessment of the capability statements received in response to the sources sought notice. *See, e.g., Comments & Supp. Protest* at 10-11, 13-15. While KPMG may disagree with the agency's conclusions, under the applicable standards for making a set-aside determination, we find the protester has provided no basis to question the agency's judgment here.

Finally, we agree with the agency that it was reasonable for DLA to anticipate adequate price competition, and that, as a result of that price competition, award would be made at a fair market price under a set-aside procurement. *See Planet Depos LLC, supra* at 4; *Walden Security*, B-407022, B-407022.2, Oct. 10, 2012, 2012 CPD ¶ 291 at 7. As observed by the contracting officer, GSA has already found that the submitted prices are fair and reasonable. Moreover, the agency intends to establish multiple BPAs and

³ The "Rule of Two" describes a long-standing regulatory policy intended to implement provisions in the Small Business Act, 15 U.S.C. § 644(a), requiring that small businesses receive a "fair proportion of the total purchases and contracts for property and services for the Government." Federal Acquisition Regulation (FAR) "Rule of Two"; Requirements for Setting Aside Acquisitions for Small Business, 49 Fed. Reg. 40,135, 40,135 (Oct. 12, 1984). Accordingly, the "Rule of Two" requires agencies to set aside for small business participation an acquisition valued at over \$150,000 if there is a reasonable expectation of receiving fair market offers from at least two responsible small business concerns. FAR 19.502-2(b).

the task orders to be issued will be completed among the BPA holders. The agency thus has a reasonable basis to anticipate price competition, resulting in fair market prices for the task orders. See, e.g., *Six3 Sys., Inc.*, B-404885.2, Oct. 20, 2011, 2011 CPD ¶ 223 at 6. The agency's assumption of adequate price competition also appears to be validated by the fact that it received quotations from 11 SDVOSB concerns. *Planet Depos, LLC, supra.*

In short, we conclude that the contracting officer reasonably exercised his business judgment to set aside this procurement for SDVOSBs. Although the protester disagrees with the contracting officer's judgment, KPMG's disagreement in this regard does not show that the agency abused its discretion. See, e.g., *Foxhole Tech., Inc.*, B-419577, May 12, 2021, 2021 CPD ¶ 202 at 3; *Ranger American of Puerto Rico, Inc., supra* at 7; *York Int'l Corp.*, B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282 at 7 (receipt of offers from small businesses supports an agency's determination to set aside a procurement for small businesses).

The protest is denied.

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General Counsel