



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Information Ventures, Inc.

File: B-400604

Date: December 22, 2008

Bruce H. Kleinstein, Esq., for the protester.
Richard G. Bergeron, Esq., Department of Health and Human Services, for the agency.
Paula A. Williams, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision not to set aside procurement for small businesses is denied where agency's market research demonstrated that agency was not likely to receive proposals from at least two small businesses capable of performing the required services.

DECISION

Information Ventures, Inc. (IVI), a small business concern in Philadelphia, Pennsylvania, protests the Department of Health and Human Services' (HHS), National Institute of Allergy and Infectious Diseases' (NIAID) decision not to set aside for small businesses its requirement for public liaison support services.¹

We deny the protest.

On April 16, 2008, NIAID posted a "sources sought" notice on the Federal Business Opportunities (FedBizOpps) website for a contractor to provide the NIAID's Office of Communications and Government Relations with comprehensive communications and public liaison support. The notice requested capability statements from

¹ NIAID conducts and supports research in infectious, immunologic, and allergic diseases which has led to new therapies, vaccines, and diagnostic tests. NIAID's research has been at the forefront of the nation's biodefense and global health initiatives.

interested small businesses which included references for similar work performed or currently being performed, the dollar value of that work, and which demonstrated the firm's ability to perform the following services: strategic planning; media outreach and assessment of needs; inquiry response; web-based communications; writing support; materials development and graphics support; exhibit support; conference management; database development and maintenance; mailings; video/audiotape; other historical archiving; and the administration and management of the contract. Agency Report (AR) exh. 3, Sources Sought Notice.

Twenty-six small businesses, including IVI, submitted capability statements in response to the "sources sought" notice. These capability statements were reviewed by the agency and, in consultation with the project officer, the contracting officer determined that none of the firms had demonstrated the capability and experience to successfully perform all areas of the required services.² More specifically, the agency found that several of the small businesses failed to demonstrate in their capability statements an understanding of the required services; while other firms failed to demonstrate relevant experience in one or more of the identified requirements. For example, the agency found that IVI's capability statement did not demonstrate that the firm had relevant experience in the area of media outreach and assessment of needs. AR exh. 6, Agency's Evaluation Comments, at 4.

The contracting officer conducted additional market research by reviewing the acquisition history for these services. Specifically, he considered the responses the agency received to the prior procurement, noting that one small business offeror was no longer small and that the other had not submitted a technically acceptable proposal. In addition, the contracting officer reviewed the history of similar procurements within HHS and found that those resulting in awards to small businesses were smaller in scope than the current requirements. Contracting Officer's Statement at 1-2. The contracting officer therefore concluded that there were no small businesses potentially capable of performing the current requirements.

Based on the information gathered, the contracting officer determined that there was not a reasonable expectation of receiving offers from two or more small business concerns capable of performing the stated requirements and decided that the procurement should be competed on an unrestricted basis. *Id.* at 2. The agency's small business specialist and the Small Business Administration's (SBA) Procurement Center Representative (PCR) both concurred with the contracting

² The protester was not represented by counsel who could obtain access to nonpublic information pursuant to the terms of a protective order. Accordingly, our discussion of some aspects of the procurement is necessarily general; our conclusions, however, are based on our review of the entire record, including nonpublic information.

officer's conclusion that it was appropriate to issue the solicitation on an unrestricted basis. AR exh. 7, SBA Review Form. The agency subsequently posted a presolicitation synopsis on FedBizOpps announcing that the procurement would be competed on an unrestricted basis. Id. exh. 8, Presolicitation Notice.

IVI contends that the agency improperly failed to set aside this procurement for small businesses, alleging that the agency's market research was flawed and does not support the determination to issue the solicitation on an unrestricted basis. Acquisitions with an anticipated dollar value of more than \$100,000, such as the one here, must be set aside for small businesses if the agency makes two determinations, only the first of which is at issue here: that there is a reasonable expectation that offers will be received from two or more responsible small business concerns, and that award will be made at a fair market price. Federal Acquisition Regulation § 19.502-2(b); American Artisan Prods., Inc., B-292380, July 30, 2003, 2003 CPD ¶ 132 at 5-6.

The determination as to whether there is a reasonable expectation of receiving offers from two or more small businesses that are capable of performing the required work is a matter of business judgment within the contracting officer's discretion that we will not disturb absent a showing that it was unreasonable. ViroMed Labs., B-298931, Dec. 20, 2006, 2007 CPD ¶ 4 at 3-4; Information Ventures, Inc., B-279924, Aug. 7, 1998, 98-2 CPD ¶ 37 at 3. While the use of any particular method of assessing the availability of capable small businesses is not required, an analysis of factors such as the prior procurement history, the recommendations of appropriate small business specialists, and market surveys that include responses to sources sought announcements, may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement. Quality Hotel Westshore; Quality Inn Busch Gardens, B-290046, May 31, 2002, 2002 CPD ¶ 91 at 3-4.

Here, IVI alleges that the agency's market research is flawed in a number of ways. For instance, the protester contends that the capability statements were evaluated by the agency "as if they were proposals," Protest at 2; that the agency unreasonably evaluated the small businesses' ability to "perform each and every task" listed in the sources sought notice; and that the agency used undisclosed needs contained in the prior contract to evaluate the capability statements received. Protester's Comments at 6-9. These arguments do not provide a basis to sustain the protest. Rather, the record establishes that the agency did in fact conduct adequate market research to determine whether it was reasonable to set aside the acquisition for small business concerns.

As discussed above, the agency's determination was based on its review of the information provided by small business concerns in their responses to the "sources sought" notice and review of the procurement history for these or similar services. Moreover, the record confirms that the agency's small business specialist and the SBA's PCR were integrated in the contracting officer's decision-making process and they both concurred with his business judgment that the requirement should be

competed on an unrestricted basis. While the protester argues that this determination was unreasonably based on a flawed research analysis, the protester has produced no credible evidence to support any of its allegations.

As a specific example, the protester argues that it was not reasonable for the agency to consider during its review whether the small business respondents had experience providing similar services. In this regard, the protester argues that the small business firms could have supplemented their experience with consultants, or other vendors.³ Protester's Comments at 7. While we agree with the protester that small businesses might be able to supplement their experience with consultants--and, in fact, a prior small business vendor providing these services might have done exactly that--we will not conclude that the agency violated a procurement law or regulation--the standard we must apply to sustain this challenge--in performing this review. In short, we are not prepared to conclude that it was improper for the agency to assess whether the small business respondents had experience similar to the required services here, and we note for the record, the agency's SBA representatives were unwilling to do so as well.

We find IVI's arguments reflect nothing more than its disagreement with the agency's judgment regarding the viability of a set-aside, and do not establish a basis for our Office to question the agency's determination. Information Ventures, Inc., B-279924, supra, at 5.

The protest is denied.

Gary L. Kepplinger
General Counsel

³ In support of this contention, the protester points out several instances where the previous vendor providing these services relied, at least in part, on outside consultants. Protester's Comments at 7-8.