EVEN IN SET-ASIDES, PRICE MUST BE REASONABLE

A recent Court of Federal Claims ("COFC") decision on a Service Disabled Veteran Owned Small Business ("SDVOSB") set-aside for shredding services, emphasizes that all awards, even those set aside and in compliance with the Rule of 2, must be made at a reasonable price. *Land Shark Shredding, LLC v. United States, No.* (Fed. Cl. No. 19-508C*)* Oct. 9, 2019. The issue in the protest was whether a Contracting Officer had properly canceled and resolicited when she deemed all SDVOSB offerors had submitted prices that were not fair and reasonable.

The solicitation involved shredding and destruction services for the White River Junction Veterans Administration Medical Center in Vermont. Market research indicated that there were two SDVOSB vendors that could provide the services, although the contracting officer did not know if prices would be fair and reasonable because of the location of the vendors. The contracting officer issued the solicitation as an SDVOSB set aside, and stated in the acquisition summary that "a fair and reasonable determination would be made prior to award."

Only two quotes were received, and the contracting officer decided to cancel the solicitation because:

(1) Both prices were significantly higher than the incumbent's prices
(2) Both prices were significantly higher than historical prices
(3) Both prices were significantly higher than the independent Government Cost Estimate ("IGCE")

Later, the Contracting Officer re-examined the basis of the cancellation and determined that the IGCE was flawed, and reassessed the prices. Based on this re-examination, the CO determined again that prices were not fair and reasonable based on historical prices and prices paid at other VA medical centers. The CO also determined that the pricing exceeded the available funding for this procurement. Loan Shark protested the cancellation, arguing that the Rule of 2 (i.e. that two responsible bidders had submitted bids) made it unreasonable for the agency to evaluate price reasonableness.

The court found that Land Shark lacked standing because its bid exceeded the amount in the agency budget for this contract—and therefore did not have a substantial chance of receiving award. Also, the Court held that Land Shark had failed to state a claim because, even in a set-aside, the Rule of 2 is not incompatible with a price reasonableness analysis prior to making award. The Court dismissed the protest.

Takeaway. The Federal Acquisition Regulation ("FAR") is quite clear on the need for a Contracting Officer to make a price reasonableness analysis *prior* to making award.

- FAR 13.106-3(a) states that "before making award [in a simplified acquisition] the contracting officer must determine that the proposed price is fair and reasonable."
- FAR 14.408-2(a) states that in (sealed bid procurements) "the contracting officer shall determine…that the prices offered are reasonable before awarding the contract."

- FAR 15.402(a) states that (in negotiated procurement) the contracting officer shall "purchase supplies and services from responsible sources at fair and reasonable prices."
- FAR 15.404-1(a)(1) states that (in negotiated procurement) as part of the agency's proposal analysis, "the contracting officer is responsible for evaluating the reasonableness of the offered prices."

There simply is no basis for making a contract or task order award at an unreasonable price, even in a set-aside procurement.