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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Singleton Enterprises-GMT Mechanical, A Joint Venture

File: B-310552

Date: January 10, 2008

Arthur Wayne Singleton and Gary Michael Thompson for the protester. Tracy Downing, Esq., and Charlma Quarles, Esq., Department of Veterans Affairs; John W. Klein, Esq., and Kenneth W. Dodds, Esq., Small Business Administration, for the agencies.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of agency's rejection of firm's bid as nonresponsive under a solicitation set aside for service-disabled veteran-owned small business concerns (SDVOSBC) is sustained because the matter does not involve the responsiveness of the bid; rather, the protest involves the question of the status of the bidder as an eligible SDVOSBC, a matter within the exclusive authority of the Small Business Administration, not the procuring agency.

DECISION

Singleton Enterprises-GMT Mechanical, A Joint Venture (JV), protests the rejection of its bid as nonresponsive by the Department of Veterans Affairs (VA) under invitation for bids (IFB) No. VA-249-07-IB-0058, for the replacement of the main transformers at the VA Medical Center in Lexington, Kentucky.

We sustain the protest.

The agency issued the IFB on the Federal Business Opportunities website on August 21, 2007, as a total set-aside for service-disabled veteran-owned small business concerns (SDVOSBC). In this regard, the IFB included the clause at Federal Acquisition Regulation (FAR) § 52.219-27, entitled, "Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside," under which a firm must represent at the time it submits its bid that it is an eligible SDVOSBC.

Five firms submitted bids in response to the IFB by the September 25 bid opening date. The contracting officer determined that the two lowest bids were both nonresponsive for reasons not germane to the protest. Singleton-GMT JV's bid was third low. The VA rejected this bid as nonresponsive based on its review of a copy of a Singleton-GMT JV agreement, dated August 13, which was not included in the firm's bid, but was on file with the agency.¹ Agency Report (AR), Tab 4, Singleton-GMT JV Agreement (Aug. 13, 2007). The VA claimed that the Singleton-GMT JV agreement did not comply with the Small Business Administration's (SBA) SDVOSBC regulatory requirement incorporated into this IFB that every JV agreement to perform a contract set aside for SDVOSBCs must contain a provision "[d]esignating an SDVOSBC as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for performance of the SDVO contract."² 13 C.F.R. § 125.15(b)(2)(ii) (2007); FAR § 52.219-27(d). The VA, therefore, rejected Singleton-GMT JV's bid as nonresponsive, and made award to the fourth low bidder, Affiliated Western, Inc. This protest followed.³

At the outset, the agency's determination that the bid of Singleton-GMT JV was nonresponsive was clearly in error. Responsiveness involves whether a bid as submitted represents an offer to perform, without exception, the exact thing called for in the solicitation so that, upon acceptance, the contractor will be bound to perform in accordance with the IFB's material terms and conditions. B-G Mech. Serv., Inc., B-265782, Dec. 27, 1995, 96-1 CPD ¶ 6 at 2. Responsiveness, thus, is determined at the time of bid opening from the face of the bid documents. Id. For such purpose, bid documents include information submitted with a bid or incorporated into the bid by reference. Hewlett-Packard Co., B-184515, Jan. 12, 1976, 76-1 CPD ¶ 18 at 5-6. Here, Singleton-GMT JV's bid took no exception to the IFB requirements, and the August 13 agreement the agency relied on was neither included, nor incorporated by reference, in the bid.

¹ Singleton-GMT JV submitted the JV agreement in connection with the award of two other contracts made by two other VA contracting officers. The protester also argues that its JV agreement in place at the time of the submission of its bid here was dated September 12, not August 13, and that the VA, in this procurement, did not request that it provide its JV agreement. Singleton-GMT JV's Comments at 1.

² The VA claims that the Singleton-GMT JV agreement, dated August 13, did not comply with the SDVOSBC regulatory requirements because it designated the project manager as an employee of the SDVOSBC and/or an employee of a non-SDVOSBC, and because it designated an employee of the SDVOSBC and/or the non-SDVOSBC as the party responsible for contract negotiations. AR at 2.

³ The agency stayed performance of the contract because of this protest.

Moreover, we view the issue of Singleton-GMT JV's eligibility as an SDVOSBC to be a matter of status and, where an agency has a question regarding a bidder's status as an SDVOSBC, the SBA, not the procuring agency, is responsible for determining whether a firm is an eligible SDVOSBC.

In 2003, Congress created, by amending the Small Business Act, a procurement program for small business concerns owned and controlled by service-disabled veterans, that is, SDVOSBCs. Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651, 2662 (2003), 15 U.S.C. § 657f (Supp. V 2005). The Small Business Act basically defines an SDVOSBC as a small business concern that is (1) at least 51 percent owned by one or more service-disabled veterans, and (2) managed and controlled by one or more service-disabled veterans, or spouse or permanent caregiver of a service-disabled veteran with a permanent and severe disability. 15 U.S.C. § 632(q)(2) (2000). The SBA has issued regulations implementing the SDVOSBC program, including one establishing criteria whereby a joint venture that includes a partner that is not an SDVOSBC, but is otherwise a small business concern, could qualify as an SDVOSBC. 13 C.F.R. § 125.15(b); see also FAR § 19.1403(c).

As required by the Small Business Act, as amended by the Veterans Benefits Act, 15 U.S.C. §§ 637(m)(5), 657f(d), the SBA also has established procedures for interested parties to challenge a firm's size or status as a qualified SDVOSBC. 13 C.F.R. §§ 125.24-125.28. Accordingly, we requested the views of the SBA in this matter. The SBA asserts that questions concerning SDVOSBC status, including whether an SDVOSBC joint venture meets the minimum SBA requirements for such arrangements, are not for resolution by the procuring agency, but by the SBA. We are required to give deference to an agency's reasonable interpretation of its regulations, and because the SBA is the agency responsible for promulgating the regulations regarding the SDVOSBC program, we give its interpretation of its regulations great weight. Catapult Tech., Ltd., B-294936, B-294936.2, Jan. 13, 2005, 2005 CPD ¶ 14 at 6.

For competitive set-asides, "[a]ny interested party [to include contracting officers] may protest the apparent successful offeror's SDVOSBC status."⁴ 13 C.F.R. § 125.24(b). While the SBA notes that its regulations do not explicitly address protests concerning the eligibility of SDVOSBC joint ventures, we agree with the SBA that such challenges essentially concern the "status" of an SDVOSBC and that

⁴ Challenges to SDVOSBC "status" will be decided by the SBA Associate Administrator for Government Contracting. 13 C.F.R. § 125.25(e). Size status challenges of SDVOSBCs are considered under the SBA's size protest provisions by the Government Contracting Area Office serving the geographical area where the headquarters of the protested firm is located. 13 C.F.R. § 125.25(a); 13 C.F.R. § 121.1003.

such status challenges are for consideration by the SBA and not the procuring agency.⁵ See PPG-CMS-PSI JV, B-298239, B-298239.2, July 19, 2006, 2006 CPD ¶ 111 at 5.

In addition, FAR § 19.307(a) provides, “[f]or service-disabled veteran-owned small business set-asides, any interested party [to include contracting officers] may protest the apparently successful offeror’s [SDVOSBC] status” and FAR § 19.307(h) provides, “[a]ll questions about service-disabled veteran-owned small business size or status must be referred to the SBA for resolution.” The VA focuses on the word “may” in FAR § 19.307(a) and argues that this leaves it to the procuring agency’s discretion whether to consult the SBA before rejecting the bid of a JV under an SDVOSBC set-aside on the basis that the JV is not compliant with applicable SBA regulations. This argument is unavailing for two reasons. First, the “may” language in FAR § 19.307(a) is clearly intended to convey that interested parties (including contracting officers) have the right, but are obviously not required, to challenge the apparent winner’s SDVOSBC status. Second, the VA ignores the mandatory “must” language in FAR § 19.307(h), which states that all questions concerning SDVOSBC status must be referred to the SBA for resolution.

We sustain the protest. Since the VA questions whether Singleton-GMT JV is an eligible SDVOSBC, we recommend that the agency forward this matter to the SBA for its consideration. If the SBA concludes that the protester is eligible for award as an SDVOSBC, we further recommend that the VA award the contract to the protester, if otherwise eligible. We also recommend that the agency reimburse the protester for the costs of filing and pursuing its protest. Singleton-GMT JV’s certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1) (2007).

The protest is sustained.

Gary L. Kepplinger
General Counsel

⁵ The SBA reports that it has considered challenges concerning the propriety of an SDVOSBC joint venture agreement.