



Decision

Matter of: FPM Remediations, Inc.

File: B-401017.2

Date: April 16, 2009

Traeger Machetanz, Esq., and Jonathan A. DeMella, Esq., Oles Morrison Rinker & Baker LLP, for the protester.

Thomas J. Kelleher Jr., Esq., and Douglas P. Hibshman, Esq., Smith Currie & Hancock LLP, for Zapata, Inc; Pamela J. Mazza, Esq., Jonathan T. Williams, Esq., Isaias Alba IV, Esq., and Steven J. Koprince, Esq., PilieroMazza PLLC, for LATA-Matrix Environmental and Munitions Services, LLC; William H. Gammon, Esq., Nelson Mullins Riley & Scarborough LLP, for Advent Environmental, Inc.; William T. Welch, Esq., and Douglas W. Callabresi, Esq., General Counsel PC, for Earth Resources Technology, Inc., the intervenors.

Madeline L. Shay, Esq., Army Corps of Engineers; and Laura M. Eyester, Esq., Small Business Administration, for the agencies.

Paula A. Williams, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly failed to consider protester for award of a small business contract is dismissed where the solicitation anticipated awards in multiple small business subcategories, and additional awards for up to three remaining small businesses, and where the protester initially received award of a Historically Underutilized Business Zone (HUBZone) contract, and hence was not considered for one of the remaining small business awards; the fact that the protester was subsequently decertified as a qualified HUBZone small business concern in no way renders the agency's earlier small business awards improper--if anything, the protester's failure to receive a small business award resulted from its inaccurate representation that it was eligible for a HUBZone award, not from any violation of procurement law or regulation by the agency.

DECISION

FPM Remediations, Inc. of Rome, New York protests the decision by the Army Corps of Engineers not to award FPM a small business contract under request for proposals (RFP) No. W912DR-08-R-0002, to provide environmental support services.

We dismiss the protest because it does not establish a valid basis for challenging the agency's actions.

Here, the RFP was issued on July 1, 2008 as a small business set-aside and contemplated multiple awards of contracts to perform environmental services at various known or suspected hazardous, toxic and/or radiological military sites. The solicitation contemplated award of up to six indefinite-delivery/indefinite-quantity contracts, with at least one contract awarded to a small service-disabled veteran-owned, small business (SDVOSB) concern, one to an historically underutilized business zone (HUBZone) concern, one to a section 8(a) concern, and up to three additional contracts awarded to small business concerns. RFP amend. 6, at 2. The awards challenged by FPM are the small business contracts.

As is relevant here, the solicitation announced:

Offerors which are certified under multiple categories will be eligible for each category in which they are certified . . . Offerors which compete **unsuccessfully** for the 8(a), HUBZone small business or SDVOSB Set-Aside will be eligible for one of the additional Small Business Awards . . . (Offerors will still only be eligible for one award).

Id. (emphasis added).

The Corps received a total of 12 proposals, 2 of which were from HUBZone concerns, including FPM.¹ The agency ultimately made six awards, one in each small business subcategory and three to other small businesses. FPM was awarded the HUBZone contract on December 19, and all offerors were provided notice of award, or non-award on December 22. Agency Motion to Dismiss, exh. 6, Supplemental Source Selection Decision Document, at 2.

On December 30, UXB International, Inc., the other HUBZone offeror, filed a protest with the Small Business Administration (SBA) challenging FPM's HUBZone status. On February 6, 2009, the SBA made a formal determination that FPM was not a qualified HUBZone small business concern eligible for award of the HUBZone contract and that FPM would be decertified.² As a result, on February 11, the Corps

¹ At the time of proposal submission, FPM self-certified as both a qualified HUBZone small business and an eligible small business concern.

² FPM appealed this determination to the SBA's Associate Administrator for Government Contracting and Business Development. This appeal was denied on February 26.

terminated FPM's HUBZone contract. On February 23, FPM filed this protest with our Office.

FPM alleges that the agency improperly failed to consider the firm for one of the other small business awards after its initial contract had been terminated following a successful HUBZone status protest. In addition, FPM challenges the agency's evaluation of proposals and the subsequent best value award determinations.

Among other things, the agency asserts that during the initial evaluation and selection period FPM was not considered for any other award because FPM had been selected for award of the HUBZone contract. Agency Motion to Dismiss, at 3-4. We agree.

Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f) (2008), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Id.

The solicitation here specifically provided that only offerors who were not selected for award under one of the small business subcategories would be considered for one of the remaining small business awards. In this regard, the agency reports that it first selected the awardees under each small business subcategory--8(a), HUBZone and SDVOSB--and then it selected the other small business awardees from the remaining pool of eligible small business offerors. These award determinations were consistent with the express requirements of the solicitation.

The fact that FPM's initial HUBZone award was later terminated after a successful HUBZone status protest does not render the agency's earlier award determinations unreasonable, nor does it otherwise establish that the agency violated a procurement statute or regulation. In fact, if anything, it was FPM's inaccurate representation that it was eligible for award as a HUBZone small business that resulted in its selection and resulting unavailability when the remaining small business awards were made. Hence, FPM, not the agency, is responsible for its lack of award and we see nothing in this record that would require the agency to reopen the competition to permit the protester to compete for another award for which it might be eligible.

Accordingly, the protest is dismissed.

Gary L. Kepplinger
General Counsel