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Decision

Matter of: Washington-Harris Group

File: B-401794; B-401794.2

Date: November 16, 2009

Daryle A. Jordan, Esq., and Howard G. Cooley, Esq., Patrick Henry LLP, for the protester.

Joseph G. Billings, Esq., and Rita J. Piel, Esq., Miles & Stockbridge PC, for Skyline Ultd Inc., an intervenor.

Maj. Carla T. Peters, Department of the Army, for the agency.

Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging service-disabled veteran-owned small business (SDVOSB) awardee's ability to perform more than 50 percent of the contract requirements is denied because, although the solicitation stated that SDVOSB concerns would receive an evaluation preference, the solicitation was not set aside for SDVOSB offerors; thus, the Federal Acquisition Regulation provisions which state that SDVOSB prime contractors must perform more than 50 percent of a contract's requirements do not apply to this solicitation.

DECISION

Washington-Harris Group (WHG), of Greenbelt, Maryland, protests the award of a contract to Skyline Ultd Inc., of Round Rock, Texas, under request for proposals (RFP) No. W9133L-09-R-0001, issued by the Department of the Army, Army National Guard Bureau (NGB), for case management and administrative services. WHG argues that the agency improperly gave evaluation credit to Skyline as a service-disabled veteran-owned small business (SDVOSB), even though Skyline's proposal appears to state that its subcontractor will perform more than 50 percent of the contract requirements.

We deny the protest.

BACKGROUND

The solicitation was issued on April 3, 2009, and sought proposals to provide medical and dental non-clinical case management and administrative staffing services in support of the NGB in 54 U.S. states and territories. The RFP anticipated the award of a fixed-price contract, with time-and-materials line items for other direct costs and travel, and with a 1-year base performance period and four 1-year option periods. The RFP advised offerors that the required services were being solicited under the General Services Administration's Federal Supply Schedule (FSS) contract 621-I, Professional and Allied Healthcare Staffing Services.¹ RFP, Instructions to Offerors, ¶ 1.2.

The RFP stated that proposals would be evaluated on the basis of six evaluation factors: SDVOSB status, understanding the requirement, management plan/key personnel, personnel/staffing plan, past performance, and price. RFP, Instructions to Offerors, § 4.0. The past performance evaluation factor had two subfactors, relevant experience, and past performance questionnaires. *Id.* § 4.5.11. The SDVOSB status and understanding the requirement factors were of equal weight and were each individually more important than any of the other evaluation factors, which were of decreasing importance, with price being the least important factor. *Id.* § 3.0.

As relevant here, the SDVOSB evaluation factor stated that the agency would give favorable consideration to SDVOSB concerns, but also explained that offerors did not have to be SDVOSB concerns to be eligible for award:

The Government will evaluate the offeror's [SDVOSB] status. The Federal Government strongly supports the participation of [SDVOSB] concerns in the Federal Supply Schedule Program. As such, the Government has decided to evaluate whether an offeror is a [SDVOSB] as a primary evaluation factor when making the best value determination in this competition. In this regard, offerors will receive

¹ Although the solicitation is identified on its cover page as an RFP and sought "proposals" from offerors, the solicitation also stated that it was limited to offerors who had FSS contracts, which indicates that the solicitation was in fact a request for quotations (RFQ). *See* RFP, Instructions to Offerors, ¶ 1.1. The source selection decision and Contracting Officer's Statement also call the solicitation an RFQ, and both state that the procurement was conducted under the FSS provisions of FAR part 8.4. Because the appropriate characterization of the solicitation as an RFQ or RFP does not affect the outcome of this protest, we refer to the solicitation in this decision as an RFP and the offerors' submissions as proposals for the sake of consistency with the language of the solicitation.

a rating as either “[SDVOSB] - Yes” or “[SDVOSB] - No.” An offeror does not have to be a SDVOSB in order to be considered for award. The Source Selection Authority (“SSA”) will favorably view an offeror’s Small Business status.

RFP, Evaluation Criteria, § 4.1.

The RFP advised offerors that they would receive credit as an SDVOSB under two conditions: (1) if the prime contractor was an SDVOSB concern; or (2) if the offeror was a joint venture where one of the joint venture partners was an SDVOSB concern that performed more than 50 percent of the contract requirements. More detail was provided in questions and answers provided in amendment 3 to the RFP as follows:

Question 21. Regarding Factor 1 - Service-Disabled Veteran-Owned Small Business (page 34 of the solicitation). If an offeror (non-SDVOSB concern) teams with a SDVOSB concern, with the SDVOSB concern acting as the subcontractor, how will the offeror be rated? Would the offeror still receive a “No” rating for this factor?

Response 21: In order to receive a “Yes” for this factor, the Prime must be an SDVOSB.

Question 22. Regarding Factor 1 - Service-Disabled Veteran-Owned Small Business (page 34 of the solicitation). If an offeror (non-SDVOSB concern) teams in a Joint Venture, with the SDVOSB concern serving as a Joint Venture partner, how will the offeror be rated? Would the offeror still receive a “No” rating for this factor?

Response 22. If the Joint Venture team member can show that more than 50% will be performed by a SDVOSB, they will receive a “yes” for factor 1.

Question 23. . . . Since the Government will give offerors a rating of either “Service-Disabled Veteran-Owned Small Business- Yes” or “Service-Disabled Veteran-Owned Small Business- No”, does that mean the Government only supports the participation of SDVOSB concerns in this procurement if the SDVOSB concern is acting as the prime contractor?

Response 23. In order to receive a “Yes” for this factor, the Prime must be an SDVOSB.

RFP amend. 3, at 6 (emphasis added).

The Army received three proposals by the closing date of May 7, including WHG and Skyline. As relevant here, Skyline’s proposal stated that it would act as the prime

contractor for the contract, and that another company, Sterling Medical Associates, would be a subcontractor to Skyline.

The agency convened a source selection evaluation board (SSEB) to evaluate the offerors' technical proposals. The SSEB evaluation was provided to the contracting officer (CO), who was also the source selection authority. The CO reviewed the SSEB evaluations and ratings, but also conducted an independent review of the offerors' proposals. AR, Tab 14, Source Selection Decision (SSD), at 5, 7-15. In the SSD, the CO expressed disagreement with several of the SSEB's ratings.² As relevant here, the CO: (1) decreased Skyline's rating under the management/key personnel factor from excellent to very good; (2) increased WHG's rating under the understanding of the requirement factor from marginal to satisfactory; and (3) increased WHG's rating under the relevant experience subfactor of the past performance factor from low risk to very low risk. AR, Tab 14, SSD, at 5. The CO also found that both offerors were SDVOSB concerns. *Id.* at 7, 13.

The Army's final evaluation ratings for the offerors' proposals were as follows:

	WHG	SKYLINE
SDVOSB Status	Yes	Yes
Understanding of the Requirement	Satisfactory	Excellent
Management/ Key Personnel	Satisfactory	Very good
Personnel/Staffing	Satisfactory	Excellent
Past Performance	Very low risk	Very low risk
– Relevant Experience	Very low risk	Very low risk
– Past Performance Questionnaires	Low risk	Very low risk
Price	\$66,361,308	\$66,166,889

Id.

The CO concluded that a tradeoff determination was not required because Skyline's proposal had the highest technical rating, and lowest proposed price, and awarded the contract to Skyline on August 11. *Id.* The agency provided notice of the award to WHG on August 13, and this protest followed.

² For the technical factor, the agency used an evaluation scheme of excellent, very good, satisfactory, marginal, and unsatisfactory. RFP, Instructions to Offerors § 3.2. For the performance risk factor, the agency used an evaluation scheme of very low, low, average, above average, high, and neutral risk. *Id.* § 4.5.6.

DISCUSSION

WHG raises two primary arguments: (1) that the Army unreasonably interpreted the RFP as not requiring SDVOSB prime contractors to perform more than 50 percent of the contract requirements, and therefore improperly credited Skyline as being an SDVOSB offeror; and (2) that even under the agency's own interpretation of the solicitation, Skyline should not have received credit as an SDVOSB offeror.³ For the reasons discussed below, we disagree.

First, WHG argues that the agency's interpretation of the SDVOSB evaluation factor was unreasonable. As discussed above, the RFP stated that the agency would give favorable evaluation consideration to an SDVOSB offeror, and that an offeror's status was one of the two most important evaluation factors. The protester does not dispute that Skyline, on its own, is an SDVOSB concern, as defined under Small Business Administration regulations. Instead, WHG argues that Skyline should not be eligible to receive credit as an SDVOSB under this procurement because, in the protester's view, the solicitation and applicable FAR provisions state that SDVOSB contractors must perform more than 50 percent of the contract requirements in order to receive credit as an SDVOSB.

As a preliminary matter, WHG does not specifically state what statutory or regulatory provision it believes was violated in giving the SDVOSB evaluation credit to Skyline. However, the protester presumably refers to FAR part 19.14, which governs awards under the SDVOSB program. The FAR states that when an agency makes an SDVOSB sole-source award, or restricts a competition to SDVOSB offerors, the solicitation must include the clause at FAR § 52.219-27, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside. FAR §§ 19.1405, 19.1406. This clause requires an SDVOSB offeror--in a set-aside or sole-source procurement--to agree to perform, for service contracts, "at least 50 percent of the cost of personnel for contract performance." FAR § 52.219-27(c)(1).

There is no dispute in this record that Skyline will perform less than 50 percent of the contract requirements. Instead, the Army contends, and we agree, that the SDVOSB set-aside clause at FAR § 52.219-27 was not included in this solicitation, was not required to be included here, and has no application to this procurement. This RFP expressly states that this procurement was neither an SDVOSB set-aside nor an SDVOSB sole-source award. RFP, Evaluation Criteria, § 4.1. We conclude,

³ WHG raised additional arguments in its protest concerning the evaluation of its proposal under the understanding of the requirement, management /key personnel, and personnel/staffing factors. Although the army responded these arguments in its report on the protest, WHG did not address the agency's response in its comments on the report. We therefore consider these arguments abandoned. See Dependable Disposal & Recycling, B-400929, Feb. 3, 2009, 2009 CPD ¶ 69 at 3.

therefore, that the requirement for an SDVOSB contractor to perform at least 50 percent of the personnel costs in a service contract does not apply to this procurement.

WHG also argues that the Army's interpretation of the solicitation was unreasonable because the RFP stated that an SDVOSB joint venture partner, but not an SDVOSB prime contractor, must perform more than 50 percent of the contract requirements in order to receive SDVOSB evaluation credit. The protester contends that there was no reasonable basis to distinguish between these two types of offerors and that the agency should have read the solicitation "as a whole" and applied the restriction to both offerors. As discussed above, however, the solicitation explicitly stated that these two categories of business arrangements would be treated differently in the evaluation. See RFP amend. 3, at 6. To the extent that the protester believes these solicitation provisions were improper or inconsistent with the FAR requirements for SDVOSBs, it cannot now timely challenge them, as such a challenge must be raised prior to the time for submission of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1); Continental Staffing, Inc., B-299054, Jan. 29, 2007, 2007 CPD ¶ 18 at 4-5.

Second, WHG argues that, even if the Army's interpretation of the solicitation is reasonable, Skyline should not have received the SDVOSB credit because Skyline should not have been considered the prime contractor under its proposal. In this regard, the protester argues that a teaming agreement between Skyline and Sterling indicates that Sterling, rather than Skyline, is the prime contractor. We disagree.

Skyline's proposal stated that the company was an SDVOSB, and included a February 26, 2009, letter from the Department of Veterans Affairs (VA) stating that the company had been certified as an SDVOSB. AR, Tab 9, Skyline Proposal, at 1. Skyline's proposal also stated the following in the executive summary of its proposal regarding the relationship between the two entities:

As a [SDVOSB] providing excellent program management, logistics, and IT services support to the government for nearly a decade, Skyline will serve as the prime contractor. As the subcontractor partner, Sterling Medical furnishes well over 2,000 ([full-time equivalent]) qualified contract healthcare providers on behalf of federal agencies at more than 100 government facilities in the United States and 12 overseas nations.

AR, Tab 9, Skyline Proposal, at iv.

The CO explains that she found that Skyline was an SDVOSB by reviewing the offeror's self-certification and letter from the VA in its proposal. Supp. CO Statement at 1. In addition the CO reviewed the following information to verify Skyline's SDVOSB status: the GSA schedule contract listed in Skyline's proposal; Skyline's Central Contractor Registration entry; and Skyline's representations and certifications in the Online Representations and Certifications Application website.

Id. at 1-2; AR, Tab 14, SSD, at 7. With regard to the relationship between Skyline and Sterling, the CO reviewed the executive summary information quoted above, and concluded that the proposal clearly identified Skyline as the prime contractor, and Sterling as the subcontractor. Id. at 2. Based on these analyses, the CO concluded that Skyline merited evaluation credit as an SDVOSB.

With regard to WHG's argument, the Army provided in its report on the protest a copy of a "Master Teaming Agreement" between Sterling and Skyline.⁴ The teaming agreement sets forth an arrangement whereby Skyline may perform work under Sterling's FSS contract 621-I. The "Objective" for the agreement is as follows: "This Agreement is for the purpose of establishing the cooperative relationship of the Parties and for facilitating the utilization of Skyline under Sterling Medical's [GSA] Schedule, in order to further the interests of both Team Members." AR, Tab 9A, Teaming Agreement, at 1. WHG argues that the teaming agreement shows that Skyline will be Sterling's subcontractor on the contract, based on the following statements:

(D) Sterling Medical desires to appoint Skyline as a dealer under its [GSA] schedule.

(E) In order to facilitate Skyline's participation as a small business and as [an] SDVOSB Sterling Medical desires to also utilize Skyline as mutually agreeable as a subcontractor under its schedule.

Id.

In reviewing a protest of an agency's evaluation of proposals, our Office will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's mere disagreement with the agency's judgment in its evaluation of offerors' proposals does not establish that the evaluation was unreasonable. C. Lawrence Constr. Co., Inc., B-287066, Mar. 30, 2001, 2001 CPD ¶ 70 at 4.

Here, the protester does not dispute that the agency did not have the teaming agreement during the course of the procurement, nor does the protester argue that the teaming agreement was required to be provided as part of Skyline's proposal. The agreement simply was not part of the agency's evaluation and selection decisions.

⁴ The teaming agreement was not included in Skyline's proposal, and the CO did not review the document prior to the award of the contract to Skyline. Supp. CO Statement at 3. Instead, the document was provided by Skyline to the agency after the protest was filed.

In any event, we also disagree with WHG's view that the teaming agreement shows that Skyline will act as Sterling's subcontractor for this procurement. The stated purpose of the teaming agreement is to allow Skyline to utilize Sterling's GSA schedule contract. To the extent that the teaming agreement states that Skyline will be a subcontractor to Sterling, we think it is only within the context of Sterling's FSS contract. In this regard, the teaming agreement does not mention any specific solicitations or contracts, but instead provides for a general arrangement wherein Skyline may perform work under Sterling's schedule contract. Moreover, this approach was sanctioned by the RFP, which stated that a prime contractor could utilize a subcontractor's FSS contract in performing the contract, provided that "all services provided must be within the scope of the team's respective schedules." RFP amend. 3, at 6.

In sum, we think that the Army reasonably concluded that, under the terms of its proposal, Skyline was the prime contractor for this procurement, and was therefore entitled under the terms of the RFP to receive credit as an SDVOSB offeror.⁵

The protest is denied.

Lynn H. Gibson
Acting General Counsel

⁵ WHG raises other collateral agreements. For example, the protester argues that because the awardee's proposal refers to a Skyline-Sterling team, the awardee should be considered as a joint venture or that the two companies should be considered as having something other than a prime-subcontractor relationship. We think, as discussed above, that the proposal clearly designates Skyline as the prime contractor. We have reviewed all of the protester's arguments, and conclude that none provides a basis for sustaining the protest.