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Decision

Matter of: Combined Effort, Inc.

File: B-402573

Date: June 4, 2010

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William L. Bruckner, Esq., Bruckner & Walker, LLP, for the intervenor.
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Department of Veterans Affairs; Kenneth W. Dodds, Esq., Small Business
Administration, for the agencies.
Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Although the Small Business Administration (SBA) has since changed its interpretation of the applicable regulation, contracting agency--consistent with SBA's interpretation of its regulations at the time this award was to be made--properly rejected protester's offer under a solicitation set aside for service-disabled veteran-owned small business concerns (SDVOSBC) where SBA had determined that the protester did not qualify as an SDVOSBC with regard to another solicitation, and this determination remained in effect at the time the agency rejected the offer.

DECISION

Combined Effort, Inc. (CEI) of Jamestown, California, protests the rejection of its proposal under request for proposals (RFP) No. VA-101-10-RP-0013, issued by the Department of Veterans Affairs (VA), Office of Construction and Facilities Management, for general construction and other services at the Fort Rosecrans National Cemetery in San Diego, California.

We deny the protest.

BACKGROUND

The Current Protest

The agency issued the RFP as a set-aside for service-disabled veteran-owned small business concerns (SDVOSBC) on November 30, 2009, with a due date for proposals of January 14, 2010. Award was to be made on the basis of the lowest-priced technically acceptable offer. The agency received 13 proposals in response to the solicitation. CEI submitted its proposal on January 14, and self-certified that it was an SDVOSBC.

Concurrently, CEI was also an offeror on an unrelated VA procurement (solicitation No. VA-786A-10-IB-0003). CEI submitted its bid under that solicitation on December 14, 2009, and self-certified that it was an SDVOSBC. CEI was the apparent low bidder in this procurement but, on December 23, CEI's status as an SDVOSBC was challenged by two other offerors. The Small Business Administration (SBA) reviewed the challenges and, on February 1, 2010, concluded that CEI did not meet the SDVOSBC eligibility requirements at the time it submitted its offer on December 14. The SBA reached this result after determining that CEI did not meet the "unconditional ownership" requirement for SDVOSBC status because the service-disabled majority owner's interest in the firm was encumbered by a loan from the firm's minority, non-service-disabled owner. The SBA decision stated that CEI "did not meet the [SDVOSBC] eligibility requirements at the time of offer for the solicitation," and that "CEI was not eligible to bid on and perform the protested contract and is additionally ineligible to bid on or receive any future SDVOSBC contracts." SBA Decision Feb. 1, 2010, at 1. The decision also stated that it was "effective immediately and represents the final SBA decision on the matter unless it is either overturned on appeal or relief is granted under 13 C.F.R. § 125.27(g)." Id.

After reviewing the SBA's decision, CEI realized that it had failed to provide the SBA with critical documentation in the course of the SBA status protest. Specifically, CEI failed to provide documentation demonstrating that the loan supposedly encumbering the ownership interest of CEI's service-disabled majority owner had been forgiven on October 12, 2009, months prior to the proposal due date here. In an attempt to correct its error, CEI first considered filing an appeal of the SBA's February 1 decision to the SBA's Office of Hearings and Appeals (OHA). However, because the OHA's procedures prohibit the submission of new evidence on appeal, CEI concluded that an OHA appeal would be unavailing, and chose not to file such an appeal. Instead, on February 5, CEI submitted a recertification request to SBA, asking the agency to certify that CEI was in compliance with SDVOSBC status requirements for future procurements.

With regard to the procurement at issue in this protest, CEI informed the contracting officer of the SBA's determination that CEI was not an eligible SDVOSBC, and submitted to the contracting officer an explanation of its failure to provide the SBA with critical documentation relevant to the status protest, as well as a copy of its

February 5 recertification request. On February 16, the VA contacted CEI and requested that it provide further information about its current SDVOSBC status. The VA also indicated to CEI that although it had submitted the lowest-priced proposal, the agency could not make award to CEI unless CEI appealed the SBA's February 1 decision. On February 22, CEI advised the agency that it would not appeal the SBA's decision due to the OHA's prohibition on the submission of new evidence, but was instead pursuing recertification from the SBA.

On February 23, the VA disqualified CEI from award, on the basis that the company was not an eligible SDVOSBC. CEI filed this protest on March 2, asserting that the agency had acted improperly by making a determination of CEI's SDVOSBC status without referral to the SBA.¹ Protest at 1.

On March 26, the SBA concluded that CEI had overcome the grounds for the SBA's February 1 decertification decision. The recertification decision stated that "[e]ffective immediately, CEI is eligible to submit offers on, and receive awards of, any future contracts set aside for competition among SDVOSBCs." Recertification Decision at 1.

The Protests of Singleton Enterprises--GMT Mechanical, A Joint Venture

Our Office addressed many of the issues raised here in our decisions in two protests filed by Singleton Enterprises--GMT Mechanical, A Joint Venture. In the first Singleton protest (Singleton I), the VA rejected Singleton's proposal in connection with an SDVOSBC set-aside procurement on the basis of the VA's own determination that Singleton's joint venture agreement did not comply with the SBA's regulatory requirements for an SDVOSBC joint venture. Singleton Enters.--GMT Mech., A Joint Venture, B-310552, Jan. 10, 2008, 2008 CPD ¶ 16. We concluded that this action was improper because, "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." Id. at 3. We therefore sustained the protest and recommended that the VA forward the matter of Singleton's status to the SBA for its decision. The VA complied with our recommendation, and on February 20, 2008, the SBA concluded that Singleton was not an eligible SDVOSBC.

¹ CEI also states that the SBA's February 1 decision prohibited it from self-certifying as a SDVOSBC until it "cured the eligibility issue," in accordance with 13 C.F.R. § 125.28. CEI argues that this regulation does not require it to seek a formal determination of the SBA to overcome the SBA's prior decision. Thus, CEI asserts that, since it did not need to make any changes to its organization to cure its eligibility issue, it could again self-certify as a SDVOSBC immediately after the SBA's February 1 decision. We have previously expressed support for the SBA's interpretation of the regulation in question, and will not revisit it here. Singleton Enters.--GMT Mech., A Joint Venture, B-311343, Apr. 23, 2008, 2008 CPD ¶ 79 at 3 n.2.

Singleton later filed another protest (Singleton II), which presented a factual situation strikingly similar to the current protest. Singleton Enters.–GMT Mech., A Joint Venture, B-311343, *supra*. In Singleton II, Singleton was disqualified from a pending VA SDVOSBC set-aside procurement unrelated to the procurement in Singleton I, but on the basis of the SBA’s February 20 determination that Singleton was not an eligible SDVOSBC in connection with the procurement in Singleton I. The facts in Singleton II are identical to those before us now, except that in Singleton II, Singleton chose to file an appeal with OHA, which was ultimately denied.²

In both Singleton I and Singleton II, our Office solicited the views of the SBA. In Singleton I, the SBA concurred that the protest should be sustained. In Singleton II, the SBA stated that it had “no opposition” to the VA’s request that our Office dismiss the protest on the basis that Singleton was not an interested party to challenge the SDVOSBC set-aside procurement because the SBA had recently determined that Singleton was not an eligible SDVOSBC. SBA Submission in Singleton II, Apr. 3, 2008, at 1. The SBA explained as follows:

It is the SBA’s position that [Singleton] has been ineligible to represent itself as [an SDVOSBC] for the purposes of Federal procurement opportunities, or to bid on or receive SDVOSBC set-aside contracts, since February 20, 2008. As such, it would appear that the Protester does not qualify as an interested party with regard to the procurement at issue in this case.

Id. The SBA further stated that its “SDVOSBC protest determinations have both current and prospective effect,” and that, “before it can bid on or receive SDVOSBC contracts, Singleton-GMT must request that SBA grant it relief under 13 C.F.R. § 125.27(g) and prove that it merits such relief.” Id. at 3.

Our Office later requested that the SBA provide further views in response to the protester’s opposition to the VA’s request to dismiss the protest. In this submission, the SBA stated:

As SBA noted in its prior filing in this matter, 48 C.F.R § 19.307(h) stipulates that “[a]ll questions about [SDVOSBC] size or status must be referred to the SBA for resolution.” After questions concerning Singleton-GMT’s SDVOSBC status were referred to SBA, the Agency

² For example, in Singleton II, as in this protest, the offeror submitted its offer in the concurrent protest first, then submitted its offer in the protested procurement. The SBA then made a negative determination of the offeror’s status on the concurrent protest, which resulted in the offeror’s elimination by the procuring agency as ineligible under the protested procurement.

determined that the Protester did not meet applicable eligibility requirements and expressly prohibited it from bidding on or receiving any SDVOSBC contracts. That prohibition, which went into effect on February 20, 2008, was affirmed by OHA on March 27, 2008. Because the contract at issue in the instant protest was not awarded prior to February 20, 2008, 13 C.F.R. §§ 125.27 and 125.28 bar Singleton-GMT from being considered an eligible bidder.

SBA Submission in Singleton II, Apr. 11, 2008, at 4. In view of the SBA's submissions, we stated in our protest decision that the SBA concurred with the VA's position that the "rejection of [Singleton's] bid was mandated by the SBA's decision." Singleton Enters.--GMT Mech., A Joint Venture, B-311343, supra, at 2. We also concluded that "[b]ecause the SBA's February 20 determination that Singleton-GMT JV was not an SDVOSBC has remained in force and effect, the VA properly rejected Singleton-GMT JV's bid." Id. at 3.

DISCUSSION

In the instant protest, the VA and the intervenor argue that the agency's actions here were fully in accord with the SBA's February 1 decision decertifying CEI, and our Office's decisions in Singleton I and Singleton II, which required the VA to reject CEI's offer once the VA learned of the SBA's February 1 decision decertifying CEI. They argue that, unlike in Singleton I, the contracting officer in this procurement did not make a determination on CEI's SDVOSBC status, but rather, as in Singleton II, merely followed an existing SBA determination of CEI's SDVOSBC status that was in effect at the time the agency intended to make award. Thus, the VA and the intervenor conclude that the VA did not reject CEI's offer on the basis of any VA determination, but on the basis of a standing SBA decision that CEI was "ineligible to bid on or receive any future SDVOSBC contracts." SBA Decision, Feb. 1, 2010, at 1.

In our view, this interpretation of the facts and relevant regulations and decisions is consistent with the SBA's position in the Singleton II protest. Specifically, we think the result in Singleton II supports the VA's conclusion that once the SBA determines that an offeror does not qualify as an SDVOSBC, the applicable regulations (13 C.F.R. §§ 125.27 and 125.28) bar that offeror from being considered on any other SDVOSBC procurement until the determination is overturned on appeal to OHA, or the SBA grants prospective recertification pursuant to 13 C.F.R. § 125.27.

We solicited the views of the SBA in reference to CEI's protest. In contrast to the SBA's previous advice on this issue, the SBA now contends that the VA should have considered CEI's offer and, if CEI were the apparently successful offeror, referred the matter of CEI's SDVOSBC status to the SBA for decision as an SDVOSBC status protest. Regarding the Singleton II decision, the SBA stated that although in that case it "acquiesced to a procuring agency's rejection of an offer based on a negative SDVO eligibility determination rendered in connection with an SDVO representation made on a prior procurement," in Singleton II "there was no reason to believe that

the protester might have been eligible in connection with the procurement in question despite having been found to be ineligible in connection with the prior procurement.” SBA Opinion, Apr. 23, 2010, at 3. In addition the SBA now maintains that the contracting officer in Singleton II should have referred the question of Singleton’s status to the SBA. The SBA also explains that, because there was no reason to believe that Singleton was an eligible SDVOSBC in that case, the failure to refer to SBA was a “harmless error.” SBA Submission, May 7, 2010, at 3.

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 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. The SBA has long interpreted these regulations to mean that questions concerning SDVOSBC status are not for resolution by the procuring agency, but by the SBA. Singleton Enters.–GMT Mech., A Joint Venture, B-310552, supra, at 3. The SBA now asserts that a standing SBA decision that an offeror is “ineligible to bid on or receive any future SDVOSBC contracts” in connection with a prior procurement is not conclusive in a subsequent procurement, but merely raises a question concerning the offeror’s status that the contracting officer must refer to the SBA for conclusive resolution. We see nothing in the SBA’s regulations (or the FAR) which conflicts with, or would prevent the SBA from taking, the position that notification of a decertification decision does not make a firm automatically ineligible for award, but instead requires the contracting officer to file a status protest in connection with a subsequent procurement.

We do not think that the facts in Singleton II can be meaningfully distinguished from the present protest and, as set forth below, we conclude that the SBA, in effect, has changed its position on this issue. In its April 11, 2008, submission in Singleton II, the SBA concluded that a standing decision of the SBA related to a prior procurement was to be followed by the contracting agency in a subsequent procurement. The SBA now takes the position that even where there is an SBA decision in effect on an offeror’s lack of SDVOSBC status, the contracting officer cannot reject a proposal from that offeror in a subsequent procurement without again referring the matter to the SBA.

Our Office gives 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 interpretations of its regulations great weight. Id. at 3. Thus, while the SBA’s position in the current protest runs contrary to its interpretation of these regulations at the time of the Singleton II protest, we cannot find unreasonable the current interpretation of the regulations now asserted by the SBA.

That said, we cannot conclude that the VA acted improperly in connection with the procurement at issue here, given that the agency acted in accordance with the SBA’s interpretation of its regulations in effect at the time it made its decision to reject CEI’s proposal. In this regard, our decision in Singleton II, which reflected the SBA’s

April 11, 2008 views on that protest, clearly supports the agency's and intervenor's arguments here that the SBA's February 1 decision decertifying CEI, still in effect on February 23, represented a bar to CEI's eligibility for award. In addition, we think the agency reasonably rejected CEI's offer, without referring the matter to the SBA. Accordingly, because CEI was not an eligible offeror on February 23, the date the agency intended to make award, CEI's protest of the rejection of its offer is denied.³

The protest is denied.

Lynn H. Gibson
Acting General Counsel

³ Due to the statutory stay in effect here, the award to the intervenor has not been made, and thus, at the actual time of award, CEI likely will be an eligible offeror. However, the agency's decision was proper at the time it rejected CEI's proposal, which is the relevant time for purposes of our review of the agency's action here.