



Decision

Matter of: A1 Procurement, JVG

File: B-404618.3

Date: July 26, 2011

Derrick Storms, Esq., for the protester.

Tracy Downing, Esq., Department of Veterans Affairs, for the agency.

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DIGEST

1. GAO has jurisdiction to review a protest challenging a contracting officer's decision that the protester was not listed in the Department of Veterans Affairs (VA) VetBiz database as eligible for award under a VA service-disabled, veteran-owned small business set-aside.
 2. The contracting officer reasonably determined that the protester was not listed in the VetBiz database and was not eligible for award.
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DECISION

A1 Procurement, JVG, a joint venture,¹ of Miami, Florida, protests the rejection of its proposal and the award of a contract to DRT Cemetery Management, of San Francisco, California, under request for proposals (RFP) No. VA-786-10-RP-0329, issued by the Department of Veterans Affairs (VA) as a service-disabled, veteran-owned small business (SDVOSB) set-aside for ground maintenance services.

We deny the protest.

¹ The joint venture here consists of A1 Procurement, LLC, an SDVOSB concern, and Green Carpet Landscaping & Maintenance, Inc., a small business concern. See Protest (B-404618.3), exh. B, Proposal Transmittal Letter.

BACKGROUND

The Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. Law No. 109-461, provides the VA with independent authority to restrict competition to SDVOSB concerns under certain circumstances. 38 U.S.C. § 8127(d). In this regard, 38 U.S.C. § 8127(e) states that a small business concern may be awarded a contract only if the small business concern and the veteran owner of the small business concern are listed in a database of veteran-owned small business (VOSB) concerns, which the Act requires the Secretary of Veterans Affairs to maintain. The Secretary is required to verify that each small business concern listed in the database is owned and controlled by veterans, and where a service-connected disability is indicated, to verify the service-disabled status of the veteran. 38 U.S.C. § 8127(f). The VA has designated the Vendor Information Pages (VIP) as the database of businesses approved to participate in VA's veteran-owned small business program, and www.VetBiz.gov (VetBiz) as the Web portal that hosts the VIP. See 38 C.F.R. § 74.1.

VA's acquisition regulations provide, in relevant part, that to receive award under a VA veteran-owned small business program set-aside:

(b) At the time of submission of offer, the offeror must represent to the contracting officer that it is a--

(1) SDVOSB concern or VOSB concern;

* * * * *

(3) Verified for eligibility in the VIP database.

(c) A joint venture may be considered an SDVOSB or VOSB concern if

(1) at least one member of the joint venture is an SDVOSB or VOSB concern, and makes the representations in paragraph (b) of this section.

See Veterans Affairs Acquisition Regulation (VAAR), 48 C.F.R. § 819.7003.

With regard to the procurement at issue, the RFP was issued on September 2, 2010 as an SDVOSB set-aside for the award of a fixed-price contract for grounds maintenance services at the Golden Gate National Cemetery in San Bruno, California. Offerors were informed that award would be made on a best value basis, considering technical capability, past performance, and price. RFP at 88.

On September 16, A1 Procurement, LLC, and Green Carpet finalized a joint venture agreement forming A1 Procurement, JVG. Protest (B-404618.3), exh. C, Joint

Venture Agreement. The joint venture submitted its proposal to the VA on September 17, the due date for proposals. Id., exh. B, Proposal Transmittal Letter.

The VA received 10 proposals, including A1 JVG's and DRT's. The VA rejected A1 JVG's proposal because its proposed price was significantly below the government cost estimate and the prices of the other offerors. Agency Report (AR) (B-404618.1), Tab 6, VA Debriefing Letter, Dec. 1, 2010. A1 JVG protested to our Office. We sustained the protest because the record did not show that the agency's price evaluation was reasonable. We recommended that the agency reevaluate the protester's proposal, and as a part of this reevaluation, consider whether the joint venture was an eligible SDVOSB concern to receive award. See A1 Procurement, JVG, B-404816.1, Mar. 14, 2011, 2011 CPD ¶ 53.

Subsequent to our decision, the VA rejected A1 JVG's proposal because the joint venture, which was stated to be a separate entity, was not listed in the VetBiz database.² The VA also determined that A1 JVG's joint venture agreement provided that the small-business partner in the joint venture would perform substantially all of the work required by the contract, which the VA found violated the subcontracting limitations in VAAR clause 852.219-10(c)(1).³ AR (B-404618.3), Tab 27, VA Debriefing Letter, Apr. 28, 2011.

DISCUSSION

A1 JVG protests that the VA's rejection of its proposal was unreasonable because the contracting officer erroneously concluded that the joint venture was not listed in the VetBiz database. A1 JVG argues that, under VAAR § 819.7003(b) and (c), the joint venture could rely on the VetBiz listing of the SDVOSB managing partner in the joint venture.⁴

As an initial matter, the VA contends, citing our decision in TEC/WEST-TEC JV, B-402573.3, July 30, 2010, 2010 CPD ¶ 174, that GAO does not have jurisdiction to review the contracting officer's determination that A1 JVG is ineligible for award in

² A1 JVG admits that its joint venture is a separate legal entity. See Comments (B-404618.3) at 5 n.3. In this regard, the VA's regulations require the joint venture to be a separate legal entity. See 38 C.F.R. § 74.1.

³ In pertinent part, VAAR clause 852.219-10(c)(1) provides that in a services contract an SDVOSB concern must perform at least 50 percent of the personnel costs.

⁴ A1 JVG also protests that VA's determination that A1 JVG's proposal violates the subcontracting limitation contained in VAAR clause 852.219-10(c)(1). Given our decision, discussed below, finding that the contracting officer reasonably rejected the protester's proposal because the joint venture was not listed in the VetBiz database, we do not address this ground of protest.

this procurement. We agree that a firm's status as an SDVOSB concern and the VA's determination as to whether a firm should be included in the VetBiz database are not within our bid protest jurisdiction, as these have been given to VA to determine. TEC/WEST-TEC JV, supra, at 2-3.

In TEC/WEST-TEC JV, the protester challenged the SDVOSB status of the awardee. We concluded that GAO did not have jurisdiction to resolve protests of a firm's SDVOSB status under VA's Veterans First program because the Veterans Benefits, Health Care, and Information Technology Act of 2006 requires that SDVOSB eligibility be determined on the basis of a list maintained in a VA-controlled database (i.e., known alternatively as the VetBiz or VIP database), and that a firm's inclusion on the list is to be determined and verified by the VA.⁵ See 38 U.S.C. § 8127(e) and (f).⁶

The protest here, however, does not concern the agency's determination regarding the inclusion of a firm in the VetBiz database. Rather, A1 JVG protests the contracting officer's decision that the joint venture was not listed in the VetBiz database and is thus ineligible for award. As with other contracting officer procurement decisions, we will review whether that decision is reasonable and consistent with applicable procurement laws and regulations.⁷ See e.g., Eagle Home Med. Corp., B-402387, Mar. 29, 2010, 2010 CPD ¶ 82 at 4 n.4; see generally, SPM Mfg. Corp., B-228078.2, Apr. 18, 1988, 88-1 CPD ¶ 370 at 2-3 (GAO will review an agency's determination of a small business's nonresponsibility where the Small Business Administration concludes that the issue is not subject to its review); Gutierrez-Palmenberg, Inc., B-255797.3, et al., Aug. 11, 1994, 94-2 CPD ¶ 158 at 8 (GAO will review competitive 8(a) procurements for compliance with applicable procurement laws and regulations). Moreover, as the regulations at issue here represent the VA's implementation of a VA-specific procurement statute, we are required to give

⁵ In this regard, the Center for Veterans Enterprise is the office within the VA's Office of Small and Disadvantaged Business Utilization that is responsible for determining and verifying a firm's eligibility to be listed in the VetBiz database. See 38 C.F.R. § 74.11.

⁶ The VA's implementing regulations state that the VA's Executive Director, Office of Small and Disadvantaged Business Utilization, "shall decide all protests on service-disabled veteran-owned or veteran-owned small business status whether raised by the contracting officer or an offeror." VAAR § 819.307(c).

⁷ In this regard, 38 C.F.R. § 74.13 provides a mechanism for reconsideration of a decision to deny an application for listing on the VIP database. In contrast, VAAR § 819.307(a) provides that "contracting officers shall be solely responsible for determining...SDVOSB compliance with [the requirement for SDVOSBs to be verified in the VIP database]" and thus is subject to no internal VA review.

deference to an agency's reasonable interpretation of its regulations. Singleton Enters.-GMT Mech., A Joint Venture, B-310552, Jan. 10, 2008, 2008 CPD ¶ 16 at 3.

Here, we agree with the VA's conclusion that A1 JVG was not eligible to receive award under the VA's regulations implementing the Veterans Benefits, Health Care, and Information Technology Act of 2006. Contrary to the protester's arguments, VAAR § 819.7003(c)(1) does not exempt a joint venture from the requirement that it must be listed in the VetBiz database to be eligible for award.⁸ Subsection (b) of VAAR § 819.7003 plainly provides that, to be eligible for award under a VA veteran-owned small business program set-aside, an offeror must represent that it is an SDVOSB or VOSB concern and is listed in the VetBiz database.⁹ The offeror here is A1 JVG, and A1 JVG--as opposed to A1 LLC--is not listed.

Subsection (c) of the regulation does not propose an alternate method for offerors to be viewed as eligible for award under this program. Instead, the subsection states that a joint venture may be considered to be an SDVOSB or VOSB concern for a procurement if one member of the joint venture is an SDVOSB or VOSB and, as relevant here, the SDVOSB or VOSB member of the joint venture is listed as verified in the VetBiz database. See VAAR § 819.7003(c)(1). Satisfying the requirements in subsection (c) allows a joint venture to be considered to be an SDVOSB or VOSB offeror under subsection (b)(1). The joint venture offeror must still satisfy the remaining requirements of subsection (b), that is, as relevant here, to be listed in the VetBiz database.

In sum, given that the joint venture is not listed in the VetBiz database, which the VA has required in its implementation of this program, the contracting officer reasonably rejected A1 JVG's proposal as ineligible for award. This is the extent of our limited review in this matter. The question of whether A1 JVG will ultimately be included on the list of contractors eligible for award is a matter for the VA, not our Office. TEC/WEST-TEC JV, supra.

The protest is denied.

Lynn H. Gibson
General Counsel

⁸ We note that A1 JVG informed our Office that it has applied for a listing in VetBiz, but provided no indication of the timing of its application.

⁹ VAAR § 819.7003(c) also requires that the non-SDVOSB partners in the joint venture be small businesses under the appropriate size standard and that the joint venture meets the requirements under 13 C.F.R. § 125.15(b), which in addition to size requirements also addresses the contents of the joint venture agreement and performance of work requirements.