



Decision

Matter of: FedCon RKR JV LLC

File: B-405257

Date: October 4, 2011

David Myers for the protester.

Tony A. Ross, Esq., Department of Veterans Affairs, for the agency.

Noah Bleicher, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Department of Veterans Affairs' determination that protester was not eligible for award was unobjectionable where record shows that protester was not listed and verified in Vendor Information Pages database of eligible service-disabled veteran-owned small business concerns, as required by law.

DECISION

FedCon RKR JV LLC,¹ of Sterling, Virginia, protests the rejection of its bid under Department of Veterans Affairs (VA) invitation for bids (IFB) No. VA-245-11-IB-0113, issued as a set-aside for service-disabled veteran-owned small businesses (SDVOSB), for interior renovations at the VA Medical Center in Martinsburg, Virginia. FedCon asserts that the VA improperly rejected its bid on the basis that the firm was not listed and verified as an SDVOSB eligible for award.

We deny the protest.

BACKGROUND

The Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, provides the VA with independent authority to restrict competition to

¹ FedCon RKR JV LLC, is a joint venture consisting of Federal Construction Services, Inc.—an SDVOSB whose status is listed as verified by the VA—and RKR Construction LLC. Protest at 3; Comments at 4.

SDVOSB concerns under certain circumstances. 38 U.S.C. § 8127(d) (2006 & Supp. 2011). In this regard, 38 U.S.C. § 8127(e) states that a small business concern may be awarded a contract only if the concern and the veteran owner of the concern are listed in a database of veteran-owned small businesses (VOSB), which the Act requires the Secretary to maintain. The VA has designated the Vendor Information Pages (VIP) as the database of businesses approved to participate in the VA's VOSB program, and www.VetBiz.gov as the web portal that hosts the VIP. See 38 C.F.R. § 74.1 (2011).

Prior to October 13, 2010, to be listed in the VIP database (and therefore to be eligible for award), a firm could self-certify its status as a VOSB or SDVOSB. Protest, encl. 1, Memorandum from VA Acting Associate Deputy Assistant Secretary for Procurement Policy, Systems and Oversight and Accompanying Class Deviation from VA Acquisition Regulation (VAAR) § 804.1102 (VA Memorandum), at 1-3. However, due to instances of fraud in firms misrepresenting their status, self-certification is no longer accepted. Id. In this regard, as of October 13, 2010, the VA is statutorily required to verify a firm's VOSB or SDVOSB status before the firm can be listed in the VIP database and receive an award under the VA's VOSB program. 38 U.S.C. § 8127(f)(4).

Firms that were listed in the VIP database prior to the VA verification requirement maintain their VIP database listing until December 31, 2011, but the VOSB or SDVOSB status of these firms has to be verified before award can be made to them. VAAR § 804.1102; Protest, encl. 1, VA Memorandum, at 1. To address this situation, the VA's deputy senior procurement executive issued a "class deviation" requiring that the VA's Center for Veterans Enterprise (CVE) verify the status of any "apparently successful offeror" that is listed in the VIP database, but has not yet been verified. Protest, encl. 1, VA Memorandum, at 3. The deviation requires that all solicitations issued under the VA's VOSB program on or after October 1, 2010, include a provision outlining an expedited verification process for these firms.² Id. at 4. Under this provision, the apparently successful offeror or bidder, "unless currently listed as verified," must submit to the CVE a verification application and documentary materials to establish the ownership and control of the concern.³ Id.; see 38 C.F.R. § 74.2(a). The CVE then has 21 business days to verify the firm's VOSB

² The deviation expires on December 31, 2011, the effective date of the requirement that all VOSBs and SDVOSBs listed in the VIP database must be verified. See Protest, encl. 1, VA Memorandum, at 3; VAAR § 804.1102.

³ An offeror or bidder has 5 business days from receiving written notice of its status as the apparently successful offeror to submit its verification application and documentary materials. IFB at 10.

or SDVOSB status.⁴ Protest, encl. 1, VA Memorandum, at 5. The contracting officer is to rely on the CVE's determination when making award. Id. at 3.

With respect to the procurement at issue, the VA issued the IFB on May 10, 2011, as an SDVOSB set-aside. IFB at 1. The IFB provided that the award would be limited to an SDVOSB listed in the VIP database and "verified for ownership." IFB at 6. The IFB also included the class deviation provision discussed above that provided a mechanism where an apparently successful bidder that was listed in the VIP database, but whose SDVOSB status had not been verified, could receive an expedited verification review. IFB at 10.

On June 22, the VA conducted a public opening of eight bids, and FedCon's bid was the lowest. Agency Report (AR), exh. 3, Abstract of Bids, at 1-2; Contracting Officer's Statement at 1. After bid opening, the contracting officer reviewed the VIP database and determined that FedCon was not listed. Contracting Officer's Statement at 1; see AR, exh. 5, VetBiz.gov Database Search Results, at 1. The contracting officer also contacted the CVE to determine if FedCon qualified for an expedited verification review under the class deviation. Contracting Officer's Statement at 1. The CVE advised the contracting officer that FedCon was not eligible for an expedited review because it was not already "listed or visible" in the VIP database.⁵ Id.

Because FedCon was not listed in the VIP database, the VA concluded that the firm was not eligible for award and rejected FedCon's bid on June 27. Contracting Officer's Statement at 1. This protest followed.

DISCUSSION

The protester argues that the VA improperly rejected its bid because the contracting officer incorrectly determined that FedCon was not listed in the VIP database, and because the firm qualifies for an expedited verification review of its VIP application

⁴ VA regulations otherwise provide 60 days for the CVE to process an application for verified status. 38 C.F.R. § 74.11(a). If the application is approved, a firm's status must be verified on a yearly basis for the firm to remain listed in the VIP database. See 38 C.F.R. § 74.15(a).

⁵ FedCon submitted a VIP program online registration form on June 9 (two weeks prior to bid opening), but did not complete the verification application until August 15 (two months after bid opening). Comments, exh. 1, VIP Verification Application, at 1-2; Agency Response to GAO Questions, Sept. 1, 2011, at 2. FedCon's SDVOSB status is still being reviewed by CVE. Agency Response to GAO Questions, Sept. 1, 2011, at 3; Comments at 3.

under the class deviation.⁶ Protest at 2; Comments at 2. The VA contends that FedCon was not listed in the VIP database at the time of award, and therefore FedCon does not qualify for an expedited verification decision under the class deviation and is ineligible for award. AR at 4-5.

As noted above, an SDVOSB firm must be listed in the VIP database in order to receive a contract award in an SDVOSB set-aside procurement. 38 U.S.C. § 8127(e). A firm cannot be listed in the VIP database without the VA first verifying the firm's SDVOSB status. 38 U.S.C. § 8127(f)(4). In connection with solicitations issued on or after October 1, 2010 (such as the one here), the class deviation permits an expedited review of firms that are listed but not verified in the VIP database if those firms are selected for award. Protest, encl. 1, VA Memorandum, at 1-5; IFB at 10. Otherwise, the review of a firm's SDVOSB status will be completed, "when practicable," within 60 days after receipt of a completed application for verification. 38 C.F.R. § 74.11.

Here, FedCon does not assert that it was listed but not verified in the database prior to enactment of the pre-listing verification requirement in October 2010, such that the firm would qualify for an expedited review of its status if selected for award. Rather, FedCon asserts only that it commenced the application process for verification and listing on June 9, 2011.⁷ FedCon did not complete the verification application until August 15 (two months after bid opening), and CVE is currently reviewing the firm's status on a non-expedited basis. Agency Response to GAO Questions, Sept. 1, 2011, at 3; Comments at 3. Given that FedCon was not listed in the VIP database when it submitted its application, the firm is not entitled to an expedited review of its status. Instead, the firm is statutorily precluded from being listed in the VIP database until its SDVOSB status is verified. See 38 U.S.C. § 8127(f)(4). Because the firm was not listed in the database at the time of award,

⁶ The protester also argues that it is eligible for award because one member of the joint venture was listed as verified in the VIP database as required by VAAR § 819.7003. Comments at 4. However, as our Office has previously held, VAAR § 819.7003(c)(1) does not exempt a joint venture from the statutory requirement that it must be listed in the VIP database in order to be eligible for award. A1 Procurement, JVG, B-404618.3, July 26, 2011, 2011 CPD ¶ 140 at 3.

⁷ FedCon contends that, subsequent to June 9, it was told "repeatedly" by the VA that the firm was listed in the VIP database. Comments at 2-3. However, FedCon has not presented any evidence to substantiate, and the record does not support, these claims. Furthermore, as stated above, the firm cannot be listed in the database until its status is verified. See 38 U.S.C. § 8127(f)(4).

and is not entitled to an expedited review of its SDVOSB status, the firm is ineligible for award of the contract here. See 38 U.S.C. § 8127(e).

The protest is denied.

Lynn H. Gibson
General Counsel