



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Pro South-Emcon, a Joint Venture

File: B-405267; B-405268

Date: August 18, 2011

Walter Harrell for the protester.

S. Leo Arnold, Esq., Ashley, Ashley & Arnold, for Babcock Construction Co., an intervenor.

Bruce E. Barnett, Esq., Department of Veterans Affairs, for the agency.

Alexander R. Welsh, Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation requires that a service-disabled veteran-owned small business offeror be listed in the VetBiz database, that requirement applies to a joint venture offeror and is not met by one of the joint venturers' compliance.
 2. Protester is not an interested party to challenge agency's evaluation where the record shows that the protestor's proposal would not be eligible for an award even if the protest were sustained.
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DECISION

Pro South-Emcon, a Joint Venture ("Pro South-Emcon" or "protestor"), of Peachtree City, Georgia, protests the Department of Veterans Affairs' (VA) award of two contracts to Dunbar Mechanical, of Toledo, Ohio, and Babcock Construction Co., of Newbern, Tennessee, pursuant to request for proposals (RFP) Nos. VA-249-11-RP-0063 and VA-249-11-RP-0065 for replacement of air handler units in two buildings at the Department of Veterans Affairs Medical Center in Memphis, Tennessee. The protestor argues that the agency improperly based its award determinations on the awardees' lower prices and failed to properly consider the solicitations' non-price evaluation factors.

We dismiss the protest on the basis that Pro South-Emcon is not an interested party.

BACKGROUND

In May 2011, the solicitations were issued as set-asides for service-disabled veteran-owned small business (SDVOSB) offerors. The solicitations identified the following evaluation factors: past performance of the prime contractor; air handling unit construction experience; key personnel experience; construction approach; and price. Additionally, the solicitations provided that offerors must be registered and verified through the VA's database of verified veteran-owned small businesses, VetBiz.

Proposals were submitted on June 8 by Pro South-Emcom, Dunbar and Babcock. Pro South-Emcom's proposals offered the highest prices and received the lowest ratings under the non-price evaluation factors for both procurements. Agency Report (AR) exh. 8, 9. Thereafter, Dunbar and Babcock were each selected for contract awards. These protests followed.

DISCUSSION

Pro South-Emcom asserts that the agency's source selection decisions failed to properly reflect the merits of Pro South's proposals with regard to the non-price evaluation factors. The protestor asserts that the VA did not follow the evaluation and award procedures as prescribed in the solicitations and that, had those procedures been followed, it would have received a more favorable determination and potentially would have received an award. Specifically, the protestor argues that it was eliminated from consideration on the basis of price alone, contrary to the evaluation criteria delineated in the solicitations, which required evaluation of technical considerations in addition to cost.

In response, the agency maintains that it properly evaluated Pro South-Emcom's proposals. Further, the agency notes (and Pro South-Emcom does not dispute) that, although one member of the Pro South-Emcom joint venture (Pro South Construction LLC) was registered as an SDVOSB on the VetBiz database, the joint venture itself was not. Accordingly, the agency maintains that the joint venture was not eligible for award. We agree.

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).

We have specifically held, with regard to facts virtually identical to those presented here, that the requirements for registration on the VetBiz database are applicable to a joint venture offeror, and the fact that one member of the joint venture is registered does not meet those requirements. A-1 Procurement, JVG, B-404618.3, July 26, 2011, 2011 CPD ¶ __.

Here, while Pro South Construction Services, LLC, one of the joint venturers, is an SDVOSB concern listed in the VetBiz database, the record shows that the joint venture offeror itself--Pro South-Emcon--is not. Accordingly, Pro South-Emcon was not eligible for award under the terms of the solicitations. Id.

Under GAO's bid protest regulations, only interested parties may protest procurement actions by Federal agencies such as the ones undertaken here by the VA. 4 C.F.R. § 21.1(a) (2011). That is, a protestor must be "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 4 C.F.R. § 21.0(a)(1). A protestor is not an interested party where it could not be considered for an award even if its protest were to be sustained. Yoosung T&S, Ltd., B-291407, Nov. 15, 2002, 2002 CPD ¶ 204 at 3.

Here, even if GAO were to recommend that VA reevaluate the submitted proposals, the protestor would not be eligible to receive the award, due to the fact that the protestor is not a listed SDVOSB concern as required by the solicitations. Accordingly, the protestor is not an interested party and lacks standing to maintain a protest with this Office.

The protest is dismissed.

Lynn H. Gibson
General Counsel