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Decision

Matter of: Fiskars Brands, Inc., dba Gerber Legendary Blades

File: B-412730; B-412730.2

Date: May 20, 2016

Frank Murray, Esq., David T. Ralston, Jr., Esq., and Anna S. Ross, Esq., Foley & Lardner LLP, for the protester.

Dustin F. Hecker, Esq., Posternak Blankstein & Lund, LLP, for the intervenor.
Colleen T. Loughran, Esq. and Gwendolyn M. Hoover, Esq., Defense Logistics Agency, for the agency.

Laura Eyester, Esq., and Cherie J. Owen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Procuring agency has the discretion to make a service-disabled veteran-owned small business (SDVOSB) sole-source award even if the requirement could be satisfied using the General Services Administration's Federal Supply Schedule.
 2. Procuring agency has the discretion to make an SDVOSB sole-source award where the contracting officer does not have a reasonable expectation that two or more SDVOSBs would submit quotations for the work.
 3. Procuring agency is not required to file an SDVOSB status protest when there is nothing in the quotation that calls into question the awardee's SDVOSB status.
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DECISION

Fiskars Brands, Inc., dba Gerber Legendary Blades, of Portland, Oregon, protests the award of a sole-source contract for combat knives to ARG Tactical LLC, of Phoenix, Arizona, a service-disabled veteran-owned small business (SDVOSB), under request for quotations (RFQ) number SPE7MX-15-X-0020, issued by the Defense Logistics Agency (DLA). Gerber contends that the agency's SDVOSB sole-source award to ARG Tactical is contrary to law because the requirement could have been satisfied through the General Services Administration's (GSA's) Federal Supply Schedule (FSS) program, the agency's market research does not support the SDVOSB sole-source award, and the agency was required to refer the awardee to the Small Business Administration (SBA) for a status determination.

We deny the protest.

BACKGROUND

On May 8, 2015, DLA posted a notice on the Federal Business Opportunities (FedBizOpps) website¹ stating that it was considering issuing a solicitation and award for a long term, indefinite-delivery purchase order (IDPO) contract for different types of combat knives, including one with National Stock Number (NSN) 1095-01-466-8569. Agency Report (AR), Tab 5, Market Research, at 1, 4, 8. In the notice, DLA requested potential suppliers to respond to the survey by May 14 and state, among other things, the company's small business and socio-economic status and whether it is a manufacturer or reseller of the item. Id. DLA did not receive any responses by May 14; however, at some point it received responses from Gerber, ARG Tactical, and Benchmade Knife Company expressing an interest in a long term contract. AR, Tab 4, Justification for Other than Full and Open Competition, at 2-3; Tab 5, Market Research, at 10, 20; Tab 6, Small Business Coordination Record, at 2.

On September 9, DLA issued solicitation No. SPE7MX-15-X-0016 using full and open competition, seeking offers for a five-year, IDPO contract for combat knives with NSN 1095-01-466-8569. Protest at 4-5.² On September 10, ARG Tactical, an SDVOSB reseller of the knives, emailed DLA and challenged the agency's decision to issue the solicitation using full and open competition since it had won prior contracts for this item as a result of its SDVOSB status. AR, Tab 5, Market Research, at 39. On September 14, DLA cancelled the solicitation. Protest at 5.³

On October 26, DLA approved a justification for other than full and open competition for the acquisition of combat knives with NSN 1095-01-466-8569, which stated that DLA had issued a sources sought notice, reviewed prior acquisition history, and had received an expression of interest from only the following three vendors: Benchmade Knife (a small business manufacturer), Gerber (a large business manufacturer), and ARG Tactical (an SDVOSB reseller for Benchmade Knife). AR, Tab 4, Justification for Other than Full and Open Competition, at 1-4. The agency

¹ FedBizOpps is the governmentwide point of entry for business opportunities greater than \$25,000. See Federal Acquisition Regulation (FAR) § 2.101 (designating FedBizOpps as the governmentwide point of entry).

² See also <https://www.fbo.gov/spg/DLA/J3/DSCC/SPE7MX-15-X-0016/listing.html> (last visited May 17, 2016).

³ See also <https://www.fbo.gov/spg/DLA/J3/DSCC/SPE7MX-15-X-0016/listing.html> (last visited May 17, 2016).

concluded that it was authorized by the Veterans Benefits Act of 2003, 15 U.S.C. § 657f, to issue an SDVOSB sole-source award for the following reason:

Only one known SDVOSB source of supply for the items is ARG Tactical (64NY0). ARG Tactical is a dealer offering the product of a small business manufacturer, Benchmade Knife (041N2).

Id. at 1.

On November 3, DLA issued RFQ SPE7MX-15-X-0020 to ARG Tactical. RFQ at 1. In its quotation, ARG Tactical represented that it was an SDVOSB. AR, Tab 7, ARG Tactical Quotation, at 19. In addition, the DLA contracting officer confirmed that ARG Tactical had represented itself as an SDVOSB in its System for Award Management (SAM) profile, which was valid through November 23, 2016, and noted in the price negotiation memorandum that “SAM was reviewed. There is no negative data associated with ARG Tactical.” AR, Tab 9, Price Negotiation Memorandum, at 4; Tab 8, ARG Tactical’s SAM Profile, at 1, 6.

On February 2, 2016, DLA issued a sole-source award to ARG Tactical with a not-to-exceed price of \$1,278,686.33. AR, Tab 2, Purchase Order; Tab 13, Notice of Award, at 1. On February 9, Gerber wrote to DLA and set forth the reasons it believed that ARG Tactical did not qualify as an SDVOSB. AR, Tab 10, Gerber Letter to DLA.⁴ On February 12, Gerber filed a protest with this Office.

DISCUSSION

Gerber challenges the agency’s SDVOSB sole-source award for the combat knives. Specifically, the protester argues that the agency is legally prohibited from issuing an SDVOSB sole-source award if it can satisfy the requirement through the FSS. Protest at 1. The protester also argues that the agency’s market research shows that there is more than one SDVOSB reseller of the knives, and therefore the SDVOSB sole-source award was inappropriate. Supplemental Protest at 3. In addition, the protester challenges ARG Tactical’s SDVOSB status and contends that the agency was required to file an SDVOSB protest to SBA before issuing the award. Protest at 10-11. In response, the agency states that the Veterans Benefit Act of 2003 and implementing regulations permit the SDVOSB sole-source award, its market research concluded that only one SDVOSB was interested in the long

⁴ On February 16, DLA forwarded Gerber’s February 9 protest letter to the SBA. AR, Tab 11, Email from DLA to SBA, at 4. SBA dismissed the protest because Gerber Legendary Blades was not an interested party pursuant to its regulations, 13 C.F.R. § 125.8(b), since only the SBA or contracting officer may protest an SDVOSB sole source award. AR, Tab 17, SBA Dismissal of Protest.

term contract, and it had no basis to protest ARG Tactical's SDVOSB status. Based on our review of the record, we find no basis to sustain the protest.

SDVOSB Sole-Source Award

The protester argues that the sole-source award to ARG Tactical, an SDVOSB, is "unlawful...[because] the requirement could be satisfied through an order under the [FSS]." Protest at 1. The agency states that the Veterans Benefit Act of 2003 and implementing regulations provide a contracting officer with the discretion to issue an SDVOSB sole-source award. AR at 2-4.

Section 36 of the Small Business Act, 15 U.S.C. § 657f, sets forth the provisions of the Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651, 2662 (2003), and provides the contracting officer with the discretion to issue an SDVOSB sole-source award if certain conditions are met. 15 U.S.C. § 657f(a) ("a contracting officer may award a sole source contract" to an SDVOSB). However, an agency may not issue an SDVOSB sole-source (or set-aside) award if the procurement would otherwise be made using Federal Prison Industries (18 U.S.C. §§ 4124 and 4125) or the Javits-Wagner-O'Day (JWOD) Act⁵ (41 U.S.C. § 46 et seq.). Id. § 657f(c). Both SBA and the Federal Acquisition Regulatory Council have implemented these statutory provisions in regulations, which state that an agency may not issue an SDVOSB sole-source award if the requirement can be satisfied using Federal Prison Industries, the JWOD Act, or is currently being performed under the authority of the SBA's 8(a) Business Development program. 13 C.F.R. § 125.20(a); FAR §§ 19.1404(a),(d); see also 69 Fed. Reg. 25274 (May 5, 2004) ("The law limits use of SDVOSB procurement authority to procurements that would not otherwise be made from Federal Prison Industries (section 4124 or 4125 of title 18, United States Code) or the [JWOD] Act (41 U.S.C. 46 et seq.)").⁶ Therefore, there is nothing in the Small Business Act or implementing regulations that preclude an SDVOSB sole-source award if the requirement can be satisfied using the GSA's FSS.

⁵ The JWOD Act is implemented through the AbilityOne program. 41 C.F.R. § 51-1.3.

⁶ Further, the FAR states that SDVOSB sole source and set-aside awards do not apply to orders under indefinite-delivery contracts or orders against GSA's FSS, except as provided in other parts of the FAR, which permit discretionary set-asides of such orders. FAR §§ 19.1404(b),(c), citing to FAR §§ 16.505(b)(2)(i)(F), 8.405-5. This FAR provision implements section 1331 of the Small Business Jobs Act of 2010 and permits discretionary set-asides of task- and delivery-orders under multiple-award contracts. See 76 Fed. Reg. 68032 (Nov. 2, 2011).

In addition, the FAR addresses the priorities for use of certain mandatory sources and the use of “other sources,” such as the GSA’s FSS. See FAR § 8.002, Priorities for Use of Mandatory Sources; FAR § 8.003, Use of Other Mandatory Sources; FAR § 8.004, Use of Other Sources. Specifically, the FAR states that if agencies cannot satisfy their requirements using mandatory sources, then:

[A]gencies are encouraged to consider satisfying requirements from or through the non-mandatory sources listed in paragraph (a) of this section (not listed in any order of priority) before considering the non-mandatory source listed in paragraph (b) of this section. When satisfying requirements from non-mandatory sources, see 7.105(b) and part 19 regarding consideration of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including 8(a) participants), and women-owned small business concerns.

(a)(1) *Supplies*. Federal Supply Schedules, Governmentwide acquisition contracts, multi-agency contracts, and any other procurement instruments intended for use by multiple agencies, including blanket purchase agreements (BPAs) under Federal Supply Schedule contracts (e.g., Federal Strategic Sourcing Initiative (FSSI) agreements accessible at <http://www.gsa.gov/fssi> (see also 5.601)).

* * * * *

(b) Commercial sources (including educational and non-profit institutions) in the open market.

FAR § 8.004. The preamble of the Federal Register notice announcing this final FAR regulation responded to various comments on the proposed rule and discussed whether the rule was treating FSS and other similar contracts as mandatory sources. 78 Fed. Reg. 80376, 80377 (Dec. 31, 2013). In response, the FAR Council stated that “[t]he use of FSS is not required” and the “use of FSS is not mandatory”; however, agencies are encouraged to consider “using certain existing non-mandatory sources” before considering sources in the open market. Id.

Thus, there is nothing in statute or regulation stating that it is unlawful for an agency to issue an SDVOSB sole-source award when the requirement could be satisfied through an order under the FSS, as long as all conditions for a sole-source award are met.⁷ This protest allegation is denied.

⁷ As support for its argument, the protester relies on a 2013 SBA guidebook on veteran-owned small business contracting programs. See Veteran Owned Small Business Contracting Programs, June 2013, at 10 (available at https://www.sba.gov/sites/default/files/SDVOSB_workbook_0.pdf) (last visited May (continued...))

Market Research

The Small Business Act states that an agency may issue a sole-source SDVOSB award if “the contracting officer does not have a reasonable expectation that 2 or more small business concerns owned and controlled by service-disabled veterans will submit offers for the contracting opportunity.” 15 U.S.C. § 657f(a). The implementing regulations state the same. See 13 C.F.R. § 125.20(a); FAR § 19.1406(a)(1) (SDVOSB sole-source is permitted when the “contracting officer does not have a reasonable expectation that offers would be received from two or more service-disabled veteran-owned small business concerns”).

The protester argues that the agency’s own market research shows that there are at least two resellers of the Benchmade Knife combat knives on GSA’s FSS and, therefore, the sole-source award to ARG Tactical violates statute and regulations because 2 or more SDVOSB companies are capable of supplying the knife.⁸ Supplemental Protest at 3-5, citing to AR, Tab 5, Market Research, at 28-29. The agency responds that only one SDVOSB expressed an interest in a long term contract for the combat knives. Supplemental AR at 4-5.⁹

(...continued)

17, 2016). However, for our purposes, the relevant inquiry is whether the agency adhered to law and regulation and this cited guidance is neither a statement of law or regulation. See Reflectone Training Sys., Inc.; Hernandez Eng’g, Inc., B-261224, B-261224.2, Aug. 30, 1995, 95-2 CPD ¶ 95 at 6.

⁸ Specifically, the protester contends that because there are more than two SDVOSB resellers, the sole source award to an SDVOSB is improper. Supplemental Protest at 3-5. However, since there is only one small business manufacturer of the knife, the FAR precludes a competitive procurement set aside for SDVOSBs. Id. at 7-10, citing to FAR § 19.502-2(b)(1) (small business set-asides permitted only when offers will be obtained from at least two small business concerns offering the products of different small business concerns). Therefore, the protester concludes that there can never be either an SDVOSB set-aside or sole source award, and the knives must be procured using full and open competition. Supplemental Protest at 10. However, we conclude that the agency’s market research supports the determination that only one SDVOSB expressed an interest in a long term contract for the combat knives. Consequently, there is no basis for us to consider the protester’s claims concerning an SDVOSB set-aside at this time.

⁹ The agency also argues that the protest is untimely because it was filed more than 10 days after DLA published a redacted version of its sole source justification, which identified the market research it conducted, and that information about other potential SDVOSB resellers was publicly available prior to the protester’s filing of the supplemental protest on this issue. Supplemental AR at 2-3. Gerber Legendary
(continued...)

The determination as to whether an agency expects two or more SDVOSBs to submit an offer is a matter of business judgment within the contracting officer's discretion that we will not disturb absent a showing that it was unreasonable. See DNO Inc., B-406256, B-406256.2, March 22, 2012, 2012 CPD ¶ 136 at 4. Although agencies need not use any particular methodology when conducting market research, measures such as prior procurement history, market surveys, and advice from the agency's small business specialist may all constitute adequate grounds for a contracting officer's decision. See id. at 4-5. Further, this Office has stated that an agency may issue an SDVOSB sole-source award even where another SDVOSB exists that could conceivably perform the contract, but has expressed no interest in the work. MCS Portable Restroom Serv., B-299291, Mar. 28, 2007, 2007 CPD ¶ 55 at 7; see also Chicago Dryer Co., B-401888, Dec. 8, 2009, 2009 CPD ¶ 253 at 2 (an agency is not required to contact all potential sources when conducting market research regarding the feasibility of sole-source procurement).

Here, DLA conducted market research, which included a sources sought notice, a review of all responses received expressing an interest in the acquisition, and a review of the prior procurement history. AR, Tab 4, Justification for Other than Full and Open Competition; Tab 5, Market Research. Specifically, the record shows that DLA received responses from only Benchmade Knife, Gerber, and ARG Tactical concerning a long term IDPO, that prior acquisition history since 2010 showed that awards for the combat knives had only been made to these same three companies, and that DLA had contracted with ARG Tactical on the last two acquisitions for the knives. AR, Tab 4, Justification for Other than Full and Open Competition, at 3; Tab 5, Market Research, at 39-40; AR at 5. DLA therefore concluded that ARG Tactical was the sole SDVOSB that expressed an interest in the acquisition for combat knives. Id. Consequently, DLA reasonably exercised its discretion in determining that the acquisition was appropriate for an SDVOSB sole-source award because its market research showed that only one SDVOSB was interested in the long term IDPO. This protest allegation is denied.

(...continued)

Blades asserts that its supplemental protest that "DLA's own pre-solicitation market research establishes that there are *at least two* SDVOSB resellers of the Benchmade Knife combat knife that could reasonably have been expected to submit offers" was submitted on time because it first became aware of this information when it received the agency report. Second Supplemental Comments at 4. We agree that the supplemental protest, which alleges the agency was aware of another SDVOSB reseller, has been submitted within 10 days of the protester first learning of the information and has been filed in accordance with the timeliness provisions of our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2).

SDVOSB Status

Finally, the protester contends that DLA was required to protest ARG Tactical's SDVOSB status to the SBA before issuing the sole-source award. Protest at 9-14.

The SBA, and not our Office or the procuring agency, is the designated authority for determining whether a firm is an eligible SDVOSB under the SBA's program, and it has established procedures for interested parties to challenge a firm's status. See Singleton Enters.-GMT Mech., A Joint Venture, B-310552, Jan. 10, 2008, 2008 CPD ¶ 16 at 3; see also 13 C.F.R. §§ 125.24-27; FAR § 19.307. Therefore, we will generally dismiss a protest challenging a firm's small business or socio-economic status. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1). However, a limited exception applies where a protester argues that the awardee's offer shows, on its face, that it is not eligible for award as a small business, or in this case as an SDVOSB; in those instances, we will review the reasonableness of the contracting officer's decision not to refer the matter to the SBA. See Al-Razaq Computing Services, B-410491, B-410491.2, Jan. 7, 2015, 2015 CPD ¶ 28 at 4; Hydroid LLC, B-299072, Jan. 31, 2007, 2007 CPD ¶ 20 at 3.

Here, the protester argues that publicly available information, but not anything on the face of ARG Tactical's proposal, calls into question its SDVOSB status. Protest at 9-14. The record shows that the agency reviewed ARG Tactical's quotation and SAM profile prior to award, and both showed that ARG Tactical represented that it was an SDVOSB. AR at 4; AR, Tab 7, ARG Tactical Quotation, at 19; Tab 8, ARG Tactical SAM Profile, at 1, 6. Thus, the protester has not shown that anything on the face of ARG Tactical's proposal would have called into question its SDVOSB status.¹⁰ We therefore deny this protest issue.

The protest is denied.

Susan A. Poling
General Counsel

¹⁰ To the extent the protester challenges ARG's SDVOSB status based on information other than that contained on the face of ARG's proposal, we dismiss the protest. As noted above, the Small Business Act, 15 U.S.C. § 657f(d), gives the SBA the conclusive authority to determine SDVOSB status for federal procurements. See Singleton Enters.-GMT Mech., A Joint Venture, *supra*. We therefore will not review a protester's challenge to another company's SDVOSB status. See Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1).