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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Continental Staffing, Inc.

File: B-299054

Date: January 29, 2007

Gilbert J. Ginsburg, Esq., for the protester.

James H. Roberts, III, Esq., and Carrol H. Kinsey, Jr., Esq., Van Scoyoc Kelly, for TriStar Imaging, LLC, an intervenor.

Phillipa L. Anderson, Esq., and Dennis Foley, Esq., Department of Veterans Affairs, for the agency.

John W. Klein, Esq., and Kenneth W. Dodds, Esq., for the Small Business Administration.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contention that solicitation's cascading set-aside clause violates certain set-aside provisions in the Federal Acquisition Regulation is untimely when first raised after award; the alleged solicitation impropriety was clear from the face of the solicitation, and the protester was required, under our Bid Protest Regulations, to raise this issue prior to the time set for the submission of offers.

2. Contention by protester, a service-disabled veteran-owned small business (SDVOSB), that, under terms of the solicitation's cascading set-aside clause, agency should have made award in the SDVOSB tier is denied where agency reasonably decided that the condition for making award at that tier--receipt of adequate competition among SDVOSB firms--had not been met given that four of the five proposals submitted by SDVOSBs were found unacceptable for taking exception to the solicitation's limitations on subcontracting clause.

DECISION

Continental Staffing, Inc. protests the award of a contract to TriStar Imaging, LLC by the Department of Veterans Affairs (VA) pursuant to solicitation for offers (SFO) No. 693-06-0014, issued to procure off-site radiology readings, to include film and CAT scans, during weekday hours for the VA Medical Center in Wilkes Barre, Pennsylvania. The SFO here used what the VA terms a "cascade set-aside

procedure.” SFO at 13. Continental argues that the cascade clause here conflicts with the requirements of the Federal Acquisition Regulation (FAR), and that the agency did not obtain permission to deviate from the FAR’s requirements. Alternatively, Continental contends that, even under the terms of the challenged clause, it should have received award, rather than TriStar.

We deny the protest.

BACKGROUND

On August 4, 2006, the VA Medical Center in Wilkes Barre, Pennsylvania issued this SFO to supplement its in-house radiology capability with daytime off-site radiology interpretation services, to be performed by licensed radiologists. The SFO estimated a need for approximately 70 film readings, and 10 CAT scan studies, per day, and sought unit prices for readings and studies. SFO at 1. The solicitation anticipated award of a fixed-price contract to the “responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered.” *Id.* at 13.

Two clauses incorporated into this SFO are relevant to the dispute here. First, the SFO incorporated the Limitations on Subcontracting Clause at FAR § 52.219-14. This clause requires that for services, other than construction, the offeror agree that “at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.” FAR § 52.219-14(b)(1).

Second, the SFO contained a clause entitled, “Method of Award – Cascade Set-Aside Procedure.” SFO at 13. The relevant portions of this clause advised:

1. Any award(s) resulting from this solicitation will be made using the following the [sic] cascade set-aside order of precedence:

1.1 In accordance with FAR Subpart 19.1405, any award under this solicitation will be made on a competitive basis first to an eligible Service Disabled Veteran Owned small business [SDVOSB] concern . . . in accordance with FAR 19.1405 [repetition in original], *provided* that there is adequate competition among such firms.

1.2 If there is inadequate competition for award to a SDVOSB concern, award will be made competitively to a small business concern IAW FAR 19.5.

1.3 If there is inadequate competition for award to a small business concern, award will be made on the basis of full and open competition considering all offers submitted by responsible business concerns.

2. Adequate competition shall be deemed to exist if—

2.1 At least two competitive offers are received from qualified, responsible business concerns at the tier under consideration; and

2.2 Award will be made at fair market prices as determined in accordance with FAR 19.202-6.

Id. (Emphasis in original.)

On September 20, the VA received 10 proposals—five from SDVOSB concerns, three from small businesses (including TriStar), one from a large business, and one from an offeror whose size could not be ascertained because the offeror omitted the representations and certifications portion of its offer. Contracting Officer's (CO) Statement at 1. In reviewing the proposals received from the five SDVOSB concerns, the CO noticed immediately that four of the offerors proposed to subcontract with the medical professionals providing these services, rather than propose them as employees. As a result, the CO concluded that these four proposals from SDVOSB concerns had not offered to comply with the limitations on subcontracting clause, and the proposals were excluded from further consideration for award. Id. at 2.

Based on the determination above, Continental's proposal was viewed as the only acceptable offer received from an SDVOSB concern. The CO then concluded that the agency had not received adequate competition from SDVOSB offerors to justify an award in that tier. (As defined in the cascade clause, at least two competitive offers from qualified, responsible business concerns were needed to make award within a given tier. SFO at 13.) Thus, the CO, in essence, moved Continental's proposal from the SDVOSB tier to the small business tier, and turned her review to the other proposals received from small business concerns.

At the small business tier, the CO concluded, for reasons not relevant here, that two of the three proposals should be excluded from further consideration. Id. This left only the proposals of Continental and TriStar eligible for award within the small business tier. The CO then sent the Continental and TriStar proposals to the technical evaluation team. After their review, which resulted in assigning technical and price scores to these proposals, requesting and receiving final proposals, and rescoring the proposals, the CO selected TriStar's lower-priced, higher-rated proposal for award. This protest followed.

DISCUSSION

Continental raises only two issues for our review. First, it argues that the VA's cascade clause—and specifically, the decision to cascade from the SDVOSB tier to the small business tier—violated the FAR provisions applicable to SDVOSB set-asides set forth at FAR § 19.1405. Second, it argues that even applying the cascade clause as

written, Continental should have received award because the five proposals received from SDVOSBs constituted adequate competition under the terms of the clause.¹

The VA answers that Continental's first argument is untimely, as it challenges an alleged solicitation impropriety that should have been raised prior to the time set for the submission of offers. With respect to Continental's alternative argument for award under the clause, the VA contends that it reasonably concluded there was not adequate competition among SDVOSBs to justify an award at that tier.

The VA Clause and the FAR

Continental's first argument is based on the conflict between the standard for determining adequate competition under the cascade clause in the solicitation, and the FAR's provisions applicable to SDVOSB set-asides. Under the solicitation, the presence of adequate competition is a necessary condition for award within a given tier. The clause specifies that adequate competition will not be "deemed" to exist unless the agency receives "at least two competitive offers . . . from qualified, responsible business concerns at the tier under consideration." SFO at 13. In contrast, the FAR provisions applicable to SDVOSB set-asides expressly indicate that "[i]f the [CO] receives only one acceptable offer from [an SDVOSB] concern in response to a set-aside, the [CO] should make an award to that concern." FAR § 19.1405(c).

Continental also argues that this conflict between the SFO and the FAR is so stark that the company reasonably assumed the VA must have received permission to deviate from the requirements of the FAR. Continental states it did not learn that the VA failed to obtain permission to deviate from the FAR until the day it filed its protest, and that it was reasonable to wait until learning that the VA did not have a deviation from the FAR to file this challenge. We disagree.

In our view, the argument Continental now raises--i.e., that the cascade clause in this solicitation is inconsistent with the SDVOSB set-aside scheme in the FAR--involves a matter that was clear from the face of the solicitation. Under the solicitation scheme, award would not be made to an SDVOSB unless offers were received from at least two qualified, responsible SDVOSB offerors; under the FAR's SDVOSB set-aside scheme, an award "should" be made to an SDVOSB even if there is only one qualified, responsible offeror. Challenges like this, which go to the heart of the underlying ground rules by which a competition is conducted, should be resolved as early as practicable during the solicitation process, but certainly in advance of an award decision, not afterwards. In this regard, our Bid Protest Regulations require

¹ This protest is limited to a challenge of the operation of the cascade clause. Continental does not argue that it should have prevailed in a comparison with TriStar's lower-priced, higher-rated proposal.

that protests of solicitation improprieties which are apparent prior to the time set for the receipt of initial proposals must be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(2) (2006).

We also disagree with the contention that a protester can reasonably assume that an agency must have received permission to deviate from the requirements of the FAR, and thus forgo raising a solicitation challenge. We note first that the protester has provided no cases to support its interpretation of our timeliness rules. In addition, we think allowing offerors to assume that solicitation provisions that appear inconsistent with regulatory requirements must have been included with permission would have an undesirable impact on the procurement system by delaying until some later date the resolution of questions that could clearly be determined before contractor and government resources are expended in pursuing, and awarding contracts. See HMX, Inc., B-291102, Nov. 4, 2002, 2003 CPD ¶ 52 at 5-7 (where protester's interpretation of the requirements of an applicable statute were in direct conflict with the requirements of a solicitation, any challenge to the solicitation had to be filed prior to the closing date for the receipt of proposals, not after award). Finally, we think the assertion that it was reasonable to assume that the agency must have received a deviation from the requirements of the FAR underscores the patent nature of the alleged solicitation defect. This basis of protest is untimely.²

Adequate Competition Under the Clause

As set forth above, the VA concluded that it had not received adequate competition from SDVOSB offerors, as required by its cascade clause, to justify an award in that tier. The VA reached this conclusion because the clause stipulated that competitive offers from at least two qualified, responsible business concerns were needed to make award within a given tier. SFO at 13. In the VA's view, since four of the five SDVOSB offerors submitted proposals that did not offer to comply with the solicitation's subcontracting limitation, those proposals should not be viewed as competitive offers from qualified, responsible business concerns for the purpose of establishing adequate competition. We agree.

² For the record, the protester does not request our consideration of this issue under the significant issue exception to our timeliness rules. 4 C.F.R. § 21.2(c). Nonetheless, we have considered this possibility. What constitutes a significant issue, however, must be decided on a case-by-case basis, Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18 at 4, and based on our review of the record in this case, and in the absence of a request that we do so, we will not invoke the significant issue exception to our timeliness rules here. We thus leave to a future, timely-filed protest, the question of whether cascading set-aside clauses comply with the requirements of the FAR.

We think the decision about whether the competition in a given tier was adequate—i.e., whether competitive offers were received from at least two qualified, responsible business concerns—was properly made after an initial determination of how many competitive offers were received. The record here shows that the four proposals submitted by SDVOSB offerors were never subjected to a review by the evaluation team; instead, they were excluded from further consideration based on a judgment by the CO that none of the four had submitted an acceptable proposal because they had not offered to comply with the subcontracting limitation.

During the course of this protest, we sought the views of the Small Business Administration (SBA) on these issues. The SBA contends that the proposals submitted by the four SDVOSB offerors should have been evaluated and if concerns remained about whether those offerors would comply with the subcontracting limitation, they should have been allowed to pursue a certificate of competency (COC) review at the SBA. Under this approach, the SBA suggests that the VA might have reached a different conclusion about the adequacy of the competition at the SDVOSB tier.

We agree, as a general matter, that an agency's judgment as to whether a small business offeror will be able to comply with a subcontracting limitation presents a question of responsibility for review by the SBA. See 13 C.F.R. § 125.6(f); Spectrum Security Servs., Inc., B-297320.2, B-297320.3, Dec. 29, 2005, 2005 CPD ¶ 227 at 6. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, we have considered this to be a matter of the proposal's acceptability. KIRA Inc., B-287573.4, B-287573.5, Aug. 29, 2001, 2001 CPD ¶ 153 at 3. Thus, to the extent that these proposals were properly viewed as unacceptable and were therefore excluded from further consideration before the technical review ever began, we think it was reasonable for the VA not to include them in determining whether it had obtained adequate competition for purposes of this clause.³

In our view, the situation here is very different from that reviewed by the Court of Federal Claims in its decision in Greenleaf Constr. Co., Inc. v. United States, 67 Fed. Cl. 350 (2005), which the protester contends supports its position. The Greenleaf decision involves a similarly-worded cascading set-aside clause that did not anticipate making award within a tier unless the agency received "at least two competitive offers . . . from qualified responsible business concerns." Greenleaf at 351-352. Although the agency in Greenleaf had received several competitive proposals from small businesses, and had established a competitive range and held discussions, subsequent events that occurred much later in time ultimately reduced

³ We also note that none of the four SDVOSB offerors rejected for failure to comply with the subcontracting limitation imposed by this solicitation challenged that conclusion.

to one the number of small business offerors. After an initial agency decision to cascade to the next tier, the agency reversed its decision⁴ and concluded that despite those subsequent events—which are far too detailed for recitation here—the competition received was adequate to support an award under the terms of the clause. After a detailed analysis, the court concluded that the agency’s decision that adequate competition had been received, and its decision not to cascade to the next tier despite there being only one remaining offeror eligible for award at that tier, was reasonable. Id. at 361.

Unlike in Greenleaf, the VA decision to exclude from further consideration four of the five proposals received from SDVOSB offerors was made before the agency conducted its detailed evaluation of proposals, and before it established a competitive range. Since we think an agency may properly consider unacceptable a proposal that, on its face, fails to comply with a solicitation’s subcontracting limitation, see KIRA Inc., supra, and since the early rejection of these proposals left only one acceptable and responsible offeror at the SDVOSB tier, we think the agency reasonably concluded, under the terms of its cascade set-aside clause, that it had not received adequate competition to make an award at the SDVOSB tier.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁴ The agency’s initial decision was protested to our Office. When the agency decided to reverse its decision, we dismissed the pending protest. The Chapman Law Firm Co., LPA, B-293105.15, B-293105.16, June 22, 2005.