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Decision

Matter of: FedServ-RBS JV, LLC

File: B-411790

Date: October 26, 2015

Wayne A. Keup, Esq., Wayne A. Keup, PLLC, for the protester.
Carl E. Pruitt, Esq., Department of the Army, Corps of Engineers; and
John W. Klein, Esq., and Alison M. Mueller, Esq., Small Business Administration, for the agencies.
Elizabeth Witwer, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Although the Government Accountability Office will not review substantive Small Business Administration determinations regarding a section 8(a) program participant's eligibility for a particular award, our Office will entertain a protest alleging that regulations have been violated or misapplied in the making of such determinations of eligibility.
2. An agency is not required to stay the award of a contract to permit the Small Business Administration to complete its review of a proposed 8(a) joint venture pursuant to 13 C.F.R. § 124.513(e)(1).

DECISION

FedServ-RBS JV, LLC, of Sanford, Florida, protests the award of a contract to H&S Resources Corporation, of Columbia, Maryland, under request for proposal (RFP) No. W912PM-15-R-0005, which was issued by the Department of the Army, Corps of Engineers (Corps), Wilmington District, for all services related to the maintenance, repair, minor construction, and operation of the John H. Kerr Reservoir Project in Boydton, Virginia. The RFP was issued as a competitive small business set-aside under section 8(a) of the Small Business Act, 15 U.S.C. § 627(a). The Corps rejected FedServ-RBS's proposal after the Small Business Administration (SBA) notified it that the joint venture was not eligible for award. FedServ-RBS alleges that the Corps failed to follow the required procedures for seeking the SBA's approval of the protester's proposed 8(a) joint venture because

the agency did not allow sufficient time for the SBA to complete its review of the proposed joint venture agreement.¹

We deny the protest in part and dismiss it in part.

BACKGROUND

The Corps issued the solicitation on April 28, 2015, as an 8(a) set-aside. Agency's Request for Dismissal (July 20, 2015) at 1. On January 27, months prior to the issuance of the solicitation, the Corps offered the requirement to the SBA for award through the SBA's 8(a) program. Agency's Offering Letter (Jan. 27, 2015). The SBA notified the Corps on February 2 that the requirement had been accepted into the 8(a) program. SBA's Acceptance Letter (Feb. 2, 2015).

The solicitation, as amended, provided that proposals were due by May 29. Protest at 2. The agency received timely proposals from five offerors, including the protester. Agency's Request for Dismissal (July 20, 2015) at 1; SBA's Comments (Aug. 7, 2015) at 1.

FedServ-RBS Joint Venture, LLC is a joint venture between FedServ, Inc., a participant in the SBA's 8(a) program, and Re-engineered Business Solutions, Inc. (RBS), a non-8(a) small business. On June 4, FedServ-RBS submitted a copy of its joint venture application to the SBA's district office in Jacksonville, Florida, which services the 8(a) participant, FedServ, Inc. Protest at 2.

On June 16, the district office returned the application to the 8(a) participant along with a letter identifying missing and incomplete information in the application. Id. The district office identified a number of deficiencies in the joint venture application, including the failure to meet the following regulatory requirements: to establish a special bank account in the joint venture's name, to itemize the equipment to be supplied by the 8(a) participant, and to provide a copy of the joint venture's operating agreement. SBA District Office's Letter to FedServ-RBS (June 16, 2015) at 1-2. See also SBA's Comments (Aug. 7, 2015) at 4-5 (citing 13 C.F.R. §§ 124.513(c)(5), (6), and (7)).

The June 16 letter from the district office was not opened by FedServ-RBS until June 26 when the recipient, the president and chief operating officer (CEO) of the 8(a) participant, returned from business-related travel. Protester's Response to Agency's Request for Dismissal (July 27, 2015) at 3. On July 1, FedServ-RBS mailed the completed joint venture application to the district office. Protest at 2. The district office received the application on July 2. Protester's Response to SBA's Supp. Comments (Oct. 1, 2015) at 4.

¹ References herein to "the agency" are to the Corps.

Sequentially, on June 25, the day before FedServ-RBS opened the district office's letter, the Corps determined that FedServ-RBS's proposal presented the best value to the government. Agency's Request for Dismissal (July 20, 2015) at 2. Accordingly, that same day, the contract specialist submitted a letter, by email, to the district office in Jacksonville, Florida, notifying it that FedServ-RBS was the apparent awardee and requesting the SBA's determination of FedServ-RBS's eligibility as an SBA-approved 8(a) joint venture for the subject procurement. Id.; Agency's Notice of Apparent Successful Offeror (June 25, 2015). Attached to the request, the contract specialist included a copy of the previously submitted letter offering the requirement for award through the SBA's 8(a) program dated January 27, and the SBA acceptance letter dated February 2. Id.

Initially, it appears that the district office misinterpreted the Corps's request. Instead of responding with FedServ-RBS's 8(a) eligibility, the district office provided instructions regarding how a requirement should be offered to the SBA for award through the 8(a) program, which the Corps had already done months prior. See Agency's Request for Dismissal (July 20, 2015) at 2-3; SBA District Office's Email (June 26, 2015, 8:28 a.m.) at 1-2.

After clarification by the Corps's contract specialist by telephone, see Agency's Request for Dismissal (July 20, 2015) at 3, the district office notified the agency on July 1 that it "has determined that '**FedServ-RBS JV**' is **not** an approved 8(a) Joint Venture as of July 1, 2015 and therefore is **not eligible** for contract award[.]" SBA's Determination Letter (July 1, 2015) (emphasis in original). At the time of the determination, the district office had not received a complete joint venture application from FedServ-RBS. Protester's Response to SBA's Supp. Comments (Oct. 1, 2015) at 4 (explaining that the district office received FedServ-RBS's completed application on July 2).

Upon receipt of the SBA's notice, the source selection authority reevaluated the remaining offerors and determined that H&S Resources Corporation presented the best value to the government. Agency's Request for Dismissal (July 20, 2015) at 3. On July 7, the Corps requested verification of H&S Resources's 8(a) eligibility from the SBA's servicing district office in Maryland and was notified on July 9 that the SBA accepted the offer on behalf of H&S Resources. Id. at 3-4.

The Corps awarded the subject contract to H&S Resources on July 9 and notified the unsuccessful offerors, including FedServ-RBS, on July 10. Id. at 4; Protest at 2. FedServ-RBS filed this protest on July 16.

DISCUSSION

FedServ-RBS alleges that the Corps failed to follow the required procedures for approval of an 8(a) joint venture following FedServ-RBS's selection as the apparent

successful offeror. Protest at 1, 4; Protester's Response to Agency's Request for Dismissal (July 27, 2015) at 1. Specifically, FedServ-RBS contends that the Corps did not allow sufficient time for the SBA's consideration and approval of its joint venture agreement. Protester's Response to SBA's Comments (Aug. 12, 2015) at 2; Protester's Response to SBA's Supp. Comments (Oct. 1, 2015) at 4. FedServ-RBS argues that the SBA's regulations implicitly require sufficient time be afforded for the "fair consideration by SBA of the joint venture agreement." Protester's Response to SBA's Comments (Aug. 12, 2015) at 2. For the reasons discussed below, we find no basis to sustain the protest.²

As a preliminary matter, the Corps argues that our Office does not have jurisdiction to entertain FedServ-RBS's challenge, which the Corps characterizes as a challenge to FedServ-RBS's eligibility as an 8(a) joint venture. Agency's Request for Dismissal (July 20, 2015) at 4-5. The Small Business Act, 15 U.S.C. § 637(b)(6), gives the SBA, and not our Office, the conclusive authority to determine matters of small business size status for federal procurements. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1) (2013); Carpetmaster, B-294767, Nov. 4, 2004, 2004 CPD ¶ 226 at 4. The Small Business Act, however, does not preclude our review of allegations that regulations have been violated or misapplied in the making of such determinations of eligibility. GLR-CMC A Joint Venture, B-281004, Dec. 18, 1998, 98-2 CPD ¶ 152 at 3, 4; Professional Sec. Corp., B-410606, Jan. 13, 2015, 2015 CPD ¶ 2 at 3 (citing 4 C.F.R. § 21.5(b)(3)).

Here, FedServ-RBS's alleges that the Corps misapplied regulations governing the process for approval of 8(a) joint ventures. See e.g., Protester's Response to Agency's Request for Dismissal (July 27, 2015) at 2 ("The violation/misapplication of the regulations governing the approval of an 8(a) joint venture is what this protest is all about."). Accordingly, we will consider the protest.

As relevant to the protester's argument, Section 8(a) of the Small Business Act authorizes the SBA to contract with other government agencies and to arrange for the performance of those contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a); Professional Sec. Corp., supra, at 3. In order to award through the 8(a) program, federal agencies offer requirements to the SBA, and the SBA accepts those requirements that eligible 8(a) participants can perform. 13 C.F.R. §§ 124.502, 124.503.

After a requirement has been accepted by the SBA and the agency has selected an apparent successful officer, the agency is required to submit the identity of the offeror to the SBA district office servicing that offeror for an eligibility determination.

² FedServ-RBS raises other collateral issues. Although our decision does not specifically address every argument, we have considered all of the protester's arguments and find that none provides a basis on which to sustain the protest.

13 C.F.R. § 124.507(b). Upon receipt of such a request, the district office must determine, within 5 working days, whether the apparent successful offeror is eligible for award.³ 15 C.F.R. § 124.507(b)(1). Eligibility is based on the program criteria of the 8(a) business development program and includes, for example, whether the 8(a) participant is a small business under the NAICS code assigned to the requirement. 13 C.F.R. § 124.507(b)(2). If the SBA determines that the apparent successful offeror is ineligible, the SBA will notify the procuring agency; at which time, the procuring agency may identify the next highest evaluated firm and submit that firm to the applicable SBA district office for an eligibility determination. 13 C.F.R. § 124.507(b)(3).

Additionally, where the apparent successful offeror is a proposed 8(a) joint venture, SBA approval of the joint venture application is required prior award. 13 C.F.R. § 124.513(e)(1); BGI-Fiore JV, LLC, B-409520, May 29, 2014, 2014 CPD ¶ 160 at 3. The parties agree that the SBA is not required to review every joint venture application submitted by an offeror in response to a solicitation. Protest at 3; Agency's Request for Dismissal (July 20, 2015) at 6; SBA's Comments (Aug. 7, 2015) at 3; SBA's Supp. Comments (Sept. 28, 2015) at 3-4. Instead, as our Office has previously explained, based on the SBA's representations, the SBA is not obligated to review submitted 8(a) joint venture agreements until such time as the joint venture has been selected for award.⁴ Hughes Grp. Solutions, B-408781.2, Mar. 5, 2014, 2014 CPD ¶ 91 at 4; BGI-Fiore JV, supra, at 5 n.2.

³ At our Office's invitation, the SBA provided comments addressing the issues presented in FedServ-RBS's protest. The SBA explains that this timeframe reflects the "maximum amount of time" allotted for the SBA to provide an eligibility determination. SBA's Comments (Aug. 7, 2015) at 5. The SBA contends, and we agree, that the regulation does not require the SBA to wait until the fifth day to provide an eligibility determination. Id. See also Agency's Response to SBA's Supp. Comments (Oct. 1, 2015) at 2.

⁴ The SBA explains, however, that although "[n]othing in SBA's regulations require SBA to review a joint venture agreement before the apparent successful offeror has been identified[,]" an SBA district office may, depending on its resources and workload, review an agreement "at an earlier point in time." SBA's Supp. Comments (Sept. 28, 2015) at 3. For this reason, the SBA explains that it has proposed a rule allowing 8(a) participants to "submit a joint venture agreement to SBA for approval at any time, whether or not in connection with a specific 8(a) procurement." Id. at 4 n.1 (citing 80 Fed. Reg. 6618, 6634 (Feb. 5, 2015)). Despite the proposed rule, we conclude that nothing in the SBA's regulations or the proposed rule would require the district office to commence its review of a joint venture application until the joint venture has been identified as the apparent successful offeror. SBA's Comments (Aug. 7, 2015) at 3; SBA's Supp. Comments (Sept. 28, 2015) at 3-4.

Once the procuring agency notifies the SBA of the apparent successful offeror, the SBA reviews the joint venture application to ensure that the proposed 8(a) joint venture is in compliance with all program participation restrictions and regulations. Id. If the joint venture agreement is approved, the SBA accepts the contracting agency's offer, and the agency may award the contract to the 8(a) joint venture. Id.

The SBA explains that, if the joint venture agreement is not approved, or if the SBA has not completed its review of a pending joint venture agreement within the 5 working days allotted in 13 C.F.R. § 124.507(b)(1), the district office must notify the agency that the firm is ineligible. SBA's Comments (Aug. 7, 2015) at 3. The SBA contends that "if SBA receives a request for an 8(a) eligibility determination for a joint venture after it has been identified by the procuring agency as the apparent successful offeror, and SBA had not yet approved the joint venture agreement, then it is appropriate for SBA to find the offeror ineligible for award."⁵ Id.

The record before us demonstrates that the Corps complied with the above regulations. The Corps submitted the subject requirement to the SBA on January 27, and it was accepted by the SBA on February 2. After the Corps identified FedServ-RBS as the apparent successful offeror, it notified the appropriate SBA district office and requested an eligibility determination. Agency's Notice of Apparent Successful Offeror (June 25, 2015) at 1.⁶

With respect to the SBA's notice of ineligibility, FedServ-RBS contends that the SBA's notice was "erroneous" because the SBA failed to inform the Corps that its determination was made prior to full consideration of the joint venture agreement and that SBA expected the completed joint venture application on or about July 1. Protester's Response to Agency's Request for Dismissal (July 27, 2015) at 5; Protester's Response to SBA's Comments (Oct. 1, 2015) at 3. FedServ-RBS also states that the Corps possessed a duty to make "inquiries" regarding the nature of FedServ-RBS's ineligibility and the status of its joint venture agreement. Id.

We cannot identify any provision in 13 C.F.R. § 124.507 or § 124.513 that would require the SBA to qualify for the procuring agency the details of its eligibility

⁵ The regulations do not appear to prohibit the district office from continuing its review of a pending joint venture agreement after the 5 working days have passed, and indeed, the SBA confirmed this during a conference call on October 8, 2015.

⁶ FedServ-RBS initially contended that the Corps failed to submit the required notice to the SBA of the apparent successful offeror, and, thus, the SBA was not afforded the opportunity to provide an eligibility determination. Protest at 3. In response, the Corps provided copies of its June 25 notice to the SBA and SBA's July 1 response that FedServ-RBS was ineligible as joint venture. Agency's Request for Dismissal (July 20, 2015), attach. 1 & 3. Accordingly, this protest ground is denied.

determination, explain the reasons for its determination, or provide the status of its review of an 8(a) joint venture agreement. FedServ-RBS identifies none. The SBA also acknowledges that its regulations impose no obligation on the SBA district office to provide such information. Conference Call (Oct. 8, 2015). Thus, we find no violation of a statute or regulation.

As discussed above, once the SBA informed the Corps that FedServ-RBS was not eligible for award, the Corps proceeded, in accordance with 13 C.F.R. § 124.507(b)(3), to identify the next highest evaluated firm and to seek SBA approval of that firm. Herein lies the crux of FedServ-RBS's protest – that the Corps did not afford the SBA reasonable time to review the joint venture agreement before proceeding to the next offeror. Protester's Response to SBA's Comments (Aug. 12, 2015) at 2.

FedServ-RBS concedes, however, and the SBA and the Corps agree, that there exists no express provision of the regulations that would compel an agency to stay award of the contract until the SBA's review is complete. Conference Call (Oct. 8, 2015). Rather, FedServ-RBS contends that such a requirement is "implicit" in the regulations. Protester's Response to SBA's Comments (Aug. 12, 2015) at 2. FedServ-RBS argues that the requirement in subsection 124.513(e)(1), *i.e.*, that the SBA approve the joint venture prior to award, implies that an agency should stay award for a reasonable amount of time to permit fair consideration of the joint venture agreement. *Id.*; Protester's Response to SBA's Supp. Comments (Oct. 1, 2015) at 3.

The Corps responds that the regulations do not (and are not intended to) provide a "right" on behalf of an 8(a) participant or joint venture to require the agency to stay its award any longer than necessary for the SBA to issue its eligibility determination pursuant to 13 C.F.R. § 124.507(b)(1). Agency's Response to SBA's Supp. Comments (Oct. 1, 2015) at 2. The Corps further contends that agencies should not be "held hostage" by the SBA's review of a joint venture agreement, which could entail numerous exchanges between the SBA and the joint venture and significant time.⁷ *Id.* at 3. Because, as discussed above, the relevant SBA regulations did not require the Corps to stay its proposed award to permit the SBA to complete its

⁷ Although FedServ-RBS points out that its completed joint venture application "was in SBA's hands" 5 working days after the Corps identified FedServ-RBS as the apparent successful offeror, *see* Protester's Response to Agency's Request for Dismissal (July 27, 2015) at 4, this fact is of no import because the SBA's receipt of the joint venture application only triggered the commencement of the SBA's review – a process, which FedServ-RBS recognizes, can take some time. *Id.* at 5 (acknowledging that "additional time would be required for a proper evaluation of the joint venture").

review of an 8(a) joint venture agreement, we find no basis to conclude that the agency or the SBA violated any applicable law or regulation.⁸

Next, FedServ-RBS points out that because the SBA is not obligated to commence its review of a joint venture agreement until the joint venture has been identified as the apparent successful offeror and because the SBA's review of a joint venture agreement often takes longer than the 5 working days allotted in 13 C.F.R. § 124.507(b)(1), the SBA's interpretation of its regulations could effectively preclude newly-formed joint ventures from receiving the award of a contract unless the agency is willing and able to postpone the award of the contract until completion of the SBA's review. Protester's Response to Agency's Request for Dismissal (July 27, 2015) at 1; Protester's Response to SBA's Comments (Aug. 12, 2015) at 1; Protester's Response to SBA's Supp. Comments (Oct. 1, 2015) at 4. To the extent newly-formed 8(a) joint ventures may face difficulties under the SBA's interpretation, we believe that this is a consequence of SBA's regulations. For this reason, this is not a matter our Office will address.⁹ 4 C.F.R. § 21.5(b).

Finally, to the extent that FedServ-RBS alleges that its initial submission was not deficient and that the SBA erred in its evaluation, this is a matter solely for the SBA's review. 4 C.F.R. § 21.5(b); GLR-CMC A Joint Venture, *supra*, at 3-4 (barring our Office's review of substantive determinations by the SBA regarding a program participant's eligibility for a particular award). In any event, we note that this basis of protest was raised more than 10 days after FedServ-RBS knew or should have known of the basis, and is therefore untimely. 4 C.F.R. § 21.2(a)(2); Protester's Response to SBA's Supp. Comments (Oct. 1, 2015) at 4-5.

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel

⁸ Because we find no requirement for the agency to stay the award, an agency's reasons for proceeding to make an award to the next highest evaluated firm are irrelevant. Accordingly, FedServ-RBS's allegation that the Corps's inability to wait for the SBA to complete its review was due to the lack of advance planning, *see* Protester's Response to SBA's Comments (Aug. 12, 2015) at 3-4 (*citing* TLC Servs., Inc., B-252614, June 22, 1993, 93-1 CPD ¶ 481 at 2), does not provide a basis for sustain the protest.

⁹ We note that it does not appear, based on the facts of this case, that FedServ-RBS was subject to the circumstances set forth in its argument. Here, the SBA's district office commenced its review of FedServ-RBS's joint venture application prior to receiving notification from the Corps that FedServ-RBS was the apparent successful offeror.