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Decision

Matter of: Goodwill Industries of the Valleys; SourceAmerica

File: B-415137

Date: November 29, 2017

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DIGEST

Protest is sustained where the General Services Administration’s acquisition of custodial services in connection with award of a lease fails to comply with the applicable requirements of the Javits-Wagner-O’Day Act, under which protester is the mandatory source for the custodial services.

DECISION

Goodwill Industries of the Valleys, of Roanoke, Virginia, and SourceAmerica, of Vienna Virginia, protest the General Services Administration’s (GSA) actions in connection with the award of a “full service” lease (No. GS-03P-LVA00172) to VVP, LLC, of Charlottesville, Virginia, for office space and custodial services in a building that houses the Charlottesville courthouse; the protesters maintain that GSA’s actions violate the Javits-Wagner-O’Day Act (JWOD Act) and that Act’s implementation under the AbilityOne program.¹

¹ The AbilityOne program is among the nation’s largest sources of employment for people who are blind or have significant disabilities. The program is administered by the U.S. AbilityOne Commission, which is the operating name for the Committee for Purchase From People Who Are Blind or Severely Disabled, which Congress established pursuant to the JWOD Act. Following receipt and review of the agency report responding to the protest, GAO requested input from the U.S. AbilityOne Commission, and advised counsel for the protester and the agency of that request. The
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More specifically, Goodwill² and SourceAmerica³ note that, pursuant to the JWOD Act and its implementing regulations, Goodwill is the mandatory source for the custodial service requirements at the Charlottesville courthouse,⁴ and assert that GSA's "failure either to carve out the custodial services from the VVP full service lease contract for award to Goodwill, or to direct VVP to contract for those services from Goodwill, violates procurement law and renders the lease unlawful." Protest at 2.

We sustain the protest.

BACKGROUND

Summary of the JWOD Act and Implementing Regulations

The JWOD Act and its implementing regulations are intended to "increase employment and training opportunities for persons who are blind or have other severe disabilities" through authorization of the noncompetitive acquisition of specified products and services from qualified nonprofit agencies (NPAs) that employ persons with such disabilities. 41 U.S.C. §§ 8501-8506; 41 C.F.R Chapter 51. The Act established a "Committee for Purchase From People Who Are Blind or Severely Disabled" (now the U.S. AbilityOne Commission) and granted exclusive authority to the Commission to establish and maintain a procurement list of products and services that must be purchased from qualified NPAs.⁵

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Commission's response was provided to counsel for the parties and, thereafter, the parties were permitted to file submissions addressing the Commission's response.

² Goodwill is a qualified AbilityOne nonprofit agency (NPA) that employs disabled persons.

³ SourceAmerica, previously known as "National Industries for the Severely Handicapped," is one of two central nonprofit agencies (CNAs) authorized by the JWOD Act to assist in administration of the AbilityOne program. See 41 U.S.C. § 8503(c). The implementing regulations provide that NPAs such as Goodwill "shall be represented by" SourceAmerica. 41 C.F.R. § 51-4.1.

⁴ There is no dispute that the AbilityOne Commission has designated Goodwill as the mandatory source to perform the custodial services. See U.S. AbilityOne Commission Response to GAO Request, Nov. 20, 2017, at 2.

⁵ The AbilityOne Commission is also required to determine the fair market value for the products and services that are purchased. 41 U.S.C. § 8504(a).

Specifically, the JWOD Act states:

An entity of the Federal Government intending to procure a product or service on the procurement list . . . shall procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled in accordance with regulations of the [AbilityOne Commission] . . .⁶

41 U.S.C. § 8504(a) (underlining added). The implementing regulations further provide that:

Contracting activities procuring services which have included within them services on the Procurement List shall require their contractors for the larger service requirement to procure the included Procurement List services from nonprofit agencies designated by the [AbilityOne Commission].

41 C.F.R. § 51-5.2(e) (underlining added).

Chronology of Relevant Events

In 2004, custodial services at the Charlottesville Courthouse were added to the AbilityOne procurement list. See 68 Fed. Reg. 68,024 (Dec. 5, 2003). Since that time, Goodwill, or a predecessor AbilityOne NPA, has performed the custodial services at the Charlottesville courthouse.

GSA has leased the building that houses the Charlottesville courthouse from VVP for several years; the current lease, for approximately 39,000 square feet of office and related space, expires on January 23, 2018. Agency Request for Dismissal, Sept. 1, 2017, at 2. Similarly, GSA has separately contracted with Goodwill to perform custodial services at the Charlottesville courthouse for several years; the current contract for custodial services expires on January 31, 2018. Id.

On October 12, 2016, a VVP representative sent an email to Goodwill, stating that VVP was in the process of negotiating a new lease with GSA. The VVP representative further stated, “it appears we [VVP] will be taking over the cleaning contract,” and asked Goodwill to “please provide me with the scope of work and a quote for such.” Protest, exh. B, Email from VVP to Goodwill, Oct. 12, 2016.

On November 18, 2016, Goodwill responded to VVP’s request by submitting its proposal for the custodial services. Protest, exh. C, Email to VVP with Goodwill’s

⁶ Provided there is a qualified NPA that is ready and able to perform services on the AbilityOne procurement list, the only exception to the Act’s mandatory acquisition of services provision is for services acquired from Federal Prison Industries, Inc. 41 U.S.C. § 8504(b).

Proposal. With its proposal, Goodwill disclosed various assumptions on which the proposal was based; noted that the proposal contemplated award of a contract between VVP and Goodwill pursuant to the GSA lease; and reminded VVP that Goodwill was the “mandatory, designated source” for the custodial services. Id. at 2.

On May 31, 2017, consistent with VVP’s earlier representation to Goodwill that VVP “will be taking over the cleaning contract” under its new lease, GSA advised Goodwill that GSA would not contract directly with Goodwill for custodial services following expiration of the current custodial services contract. Protest, exh. A, Emails, at 5. Since the custodial services were “included within” the lease requirements, Goodwill subsequently sought to confirm that GSA was requiring VVP “to procure the included [custodial services]” from Goodwill pursuant to the AbilityOne regulations. See 41 C.F.R. § 51-5.2(e) (quoted above).

On August 10, GSA responded to Goodwill’s queries, asserting that it had “no authority to direct [VVP]” to use any particular contractor to perform the custodial services. Protest, exh. A, Emails, at 2. Based on that statement, Goodwill filed this protest.

DISCUSSION

The protesters assert that GSA’s actions in connection with the lease to VVP violate the requirements of the JWOD Act and its implementing regulations. Specifically, the protesters maintain that the Act requires GSA to either contract directly with Goodwill for the custodial services or direct VVP to subcontract with Goodwill for those services--and assert that GSA has done neither.

In responding to the protest, GSA first seeks dismissal based on various procedural grounds. Among other things, GSA asserts that our Office lacks jurisdiction to consider this protest because the JWOD Act’s implementing regulations state that:

Any alleged violations of the JWOD Act or these regulations by entities of the Government shall be investigated by the [AbilityOne Commission], which shall notify the entity and afford it an opportunity to submit a statement.

41 C.F.R. § 51-5.8.

GSA asserts that this provision grants exclusive authority to the AbilityOne Commission to address and resolve any statutory and regulatory violations under the AbilityOne program. We disagree.

GAO’s bid protest jurisdiction is established by the Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-3557, and directs that “a protest concerning an alleged violation of a procurement statute or regulation shall be decided” by GAO. Id. at § 3552. CICA defines a protest as an objection to, among other things, the award or proposed award of a contract “by a Federal agency.” Id. at § 3551(1).

Here, the plain language of the JWOD Act establishes that it is a procurement statute⁷ and, although the Act pre-dates CICA, Congress did not exclude violations of the JWOD Act from GAO's bid protest jurisdiction. Accordingly, GAO has routinely addressed the merits of protests challenging a procuring agency's actions in the context of the JWOD Act and its implementing regulations.⁸ See, e.g., Integrity National Corp., B-411582, Sept. 1, 2015, 2015 CPD ¶ 278; National Industries for the Blind, B-409528.20, July 2, 2014, 2014 CPD ¶ 204; Alternative Contracting Enters., LLC; Pierce First Medical, B-406265 et al., Mar. 26, 2012, 2012 CPD ¶ 124; OSC Solutions, Inc., B-401498, Sept. 14, 2009, 2009 CPD ¶ 185. Here, we reject GSA's assertion that our Office lacks jurisdiction to consider the protesters' allegations regarding GSA's noncompliance with the JWOD Act.

Next, GSA maintains that GAO should dismiss the protest, without addressing the substance of the alleged statutory violation, on the basis that the protest was not timely filed. In this regard, the agency asserts that the protesters "knew that GSA intended to procure a fully serviced replacement lease to include custodial services" and knew that GSA "did not plan to contract for custodial services in Charlottesville" more than 10 days prior to filing the protest. GSA Request for Dismissal, Sept. 1, 2017, at 4, 5.

The protesters respond that GSA's August 10 statement was the first time they knew, or had reason to know, that GSA would not contract directly with Goodwill for the custodial services and would not require that VVP contract with Goodwill for those services in contravention of the regulation at 41 C.F.R. § 51-5.2(e). Indeed, the protesters maintain that, in light of VVPs request that Goodwill submit a proposal for the services, along with Goodwill's response that, among other things, reminded VVP that Goodwill was a mandatory source for the services, Goodwill had no basis to protest until it received GSA's August 10 assertion that it had "no authority" to require that VVP contract with Goodwill.

Under our Bid Protest Regulations, protests other than those based on alleged solicitation improprieties must generally be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

⁷ "An entity of the Federal Government intending to procure a product or service on the procurement list . . . shall procure the product or service from a qualified nonprofit agency. . . ." 41 U.S.C. § 8504(a) (underlining added).

⁸ In contrast, GAO will not consider protests challenging the AbilityOne Commission's determination regarding items to be included on the procurement list. See, e.g., Microform, Inc., B-246253, Nov. 13, 1991, 91-2 CPD ¶ 460; Abel Converting, Inc., B-229581, Mar. 4, 1988, 88-1 CPD ¶ 233.

Here, we reject GSA's assertion that the protest was untimely filed. On the basis of the record here, specifically including VVP's request that Goodwill submit a proposal for the custodial services; Goodwill's response to that request; and GSA's silence prior to its August 10 email asserting it had "no authority" to require VVP to acquire custodial services from Goodwill;⁹ we conclude that the protesters reasonably believed that GSA was complying with the JWOD Act's requirements by directing VVP to contract with Goodwill for the custodial services. Since the protest was filed within 10 days after GSA's August 10 email, we decline to dismiss the protest as untimely.

Next, GSA requests that we dismiss the protest on the bases that: the protesters do not qualify as interested parties; the alleged violation involves a matter of contract administration; and/or the protest involves a subcontract--all of which may form the basis for our Office to dismiss a protest. See 4 C.F.R. § 21.5.

First, based on the protesters' clear interest in performing the custodial services at issue, we reject GSA's assertion that they fail to qualify as interested parties under our Bid Protest Regulations.¹⁰ See 4 C.F.R. § 21.0(a)(1). Further, in light of the specific statutory and regulatory provisions discussed above, we reject GSA's assertions that the protest should be dismissed because it relates to a potential subcontract or involves a matter of contract administration. In short, we have considered all of GSA's various procedural arguments, and we decline to dismiss the protest.

Finally, we turn to the substance of the protesters' assertion that GSA's actions violate the clear provisions of the JWOD Act and its implementing regulations. The crux of the protesters' complaint is that GSA has improperly failed to either contract directly with Goodwill for performance of the custodial services at the Charlottesville courthouse or require VVP to contract with Goodwill for those services.

⁹ The record shows various internal GSA communications regarding the requirement that VVP contract with Goodwill to perform the custodial services, as well as various communications between GSA and the protesters. AR, Tab 10, General Correspondence, at 1-59. Although the internal GSA communications expressly discuss GSA's regulatory obligation to require that VVP contract with Goodwill for the custodial services, none of GSA's communications with Goodwill prior to August 10 reasonably put the protesters on notice that GSA would fail to comply with this obligation. Id.

¹⁰ In seeking dismissal, GSA notes that "[w]hile VVP submitted a proposal to satisfy the space requirement, Protester failed to do so," and similarly complains that the protesters "did not submit a lease proposal." GSA Request for Dismissal, Sept. 1, 2017, at 5, 8. GSA's reliance on the protesters' failure to submit a lease proposal does not provide a basis for dismissing the protest. As GSA knows, the protesters had no interest in providing office space and, as GSA also knows, Goodwill did, in fact, submit a proposal to perform the custodial services at issue in response to a request from VVP--the current leaseholder. Accordingly, we decline to dismiss the protest on the basis of GSA's assertion that the protesters do not qualify as interested parties.

In response, GSA does not assert that its actions comply with the statutory and regulatory requirements. Rather, GSA asserts that the award of a lease for real property is not subject to the requirements of the JWOD Act and its implementing regulations. Agency Report, Sept. 26, 2017, at 10-12. We disagree.

First, GAO has previously explained that similar procurement statutes and regulations apply to the “acquisition of real property leasehold interests,” concluding “there is little dispute that a real property lease is a ‘contract’.” See The Argos Group, LLC, B-406040, Jan. 24, 2012, 2012 CPD ¶ 32 at 4; General Services Administration--Recon., B-406040.2, Oct. 24, 2012, 2012 CPD ¶ 297 (lease awards are subject to statutory provisions implementing socioeconomic programs such as the HUBZone program). Further, GSA cites to no statutory provision, nor to any other authority, for the proposition that lease procurements are exempt from the JWOD Act requirements. Finally, the plain language of the JWOD Act and its implementing regulations provides no exception for leases. Rather, the language of the Act broadly applies to all procurements that are conducted by “[a]n entity of the Federal Government”—with the only exception to the Act’s mandatory source requirements being applicable to acquisitions from Federal Prison Industries, Inc. 41 U.S.C. § 8504(b). Accordingly, we reject GSA’s assertion that a lease for real property is not subject to the JWOD Act requirements.

As discussed above, the record here establishes that: (1) the custodial services at issue are included in the AbilityOne Commission’s procurement list; (2) the JWOD Act requires that services on the procurement list be purchased from the AbilityOne organization designated by the Commission; (3) Goodwill is the AbilityOne organization designated as the mandatory source for the custodial services; and (4) the Act and its implementing regulations expressly provide that, when services on the AbilityOne procurement list are included in the procurement of larger services, the contracting activity “shall require” the contractor for the larger services to procure the AbilityOne services from the organization designated by the AbilityOne Commission. In short, GSA is leasing a building that requires custodial services and, rather than procuring those services through the mandatory source that has been designated pursuant to the JWOD Act (or directing the lessor to do so), GSA has bundled the janitorial services into the lease without regard to the Act.

On this record, we reject GSA’s apparent premise that it may, in effect, avoid compliance with the requirements of the JWOD Act and its implementing regulations by including the AbilityOne custodial services for the Charlottesville courthouse within a “full service” lease to VVP.

The protest is sustained.

RECOMMENDATION

Based on our conclusion that GSA's actions violate the JWOD Act and its implementing regulations, we recommend that GSA either (1) enter into a direct contract for the custodial services at issue in a manner consistent with the JWOD Act or (2) modify the lease with VVP to direct subcontract performance of the custodial services consistent with the Act and its implementing regulations. We also recommend that the protesters be reimbursed their costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d). The protesters' certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

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