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Decision

Matter of: American Relocation Connections, LLC

File: B-416035

Date: May 18, 2018

Bret S. Wacker, Esq., and Emily J. Baldwin, Esq., Clark Hill PLC, for the protester. Kimberly L. Cohen, Esq., Department of Homeland Security, for the agency. Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's decision not to set a solicitation aside for small businesses is dismissed for failure to state a valid basis of protest because set-asides under the Federal Supply Schedule are discretionary.
 2. Mandatory set-aside requirements for veteran-owned businesses under the Veterans Benefits, Health Care, and Information Technology Act of 2006 apply only to procurements conducted by the Department of Veterans Affairs.
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DECISION

American Relocation Connections, LLC (ARC), of Fairfax, Virginia, protests the decision by the Department of Homeland Security, Customs and Border Protection (CBP) agency, not to set aside request for quotations (RFQ) No. 70B05C18Q00000021 for small businesses. The protester argues that the agency was required to set aside the solicitation, which anticipates the establishment of a blanket purchase agreement (BPA) under the General Services Administration's (GSA) Federal Supply Schedule (FSS), for small businesses. The protester also argues that the agency's market research and decision not to set aside the RFQ were unreasonable.

We dismiss the protest.

BACKGROUND

CBP issued the solicitation on January 19, 2018, seeking quotations to provide employee relocation services. Agency Report (AR), Tab 7, RFQ, at 1. The services include assistance for employees with home sales, move management, transportation

service selection, and related counseling. AR, Tab 7, Attach. 1, Statement of Work, at 1-4. The RFQ was issued under the FSS provisions of Federal Acquisition Regulation (FAR) subpart 8.4, and is limited to vendors holding contracts under schedule No. 48, with special item Nos. 653-1, 653-4, 653-5, and 653-7. Id. at 1; AR, Tab 9, RFQ amend. 2, at 1. The agency issued RFQ amendment 1 on February 5, which states that the applicable North American Industrial Classification System (NAICS) code is 531210. AR, Tab 8, RFQ amend. 1, at 2. The agency states that the anticipated value of the award is expected to “far exceed[]” the simplified acquisition threshold. Contracting Officer’s Statement (COS) at 2; see FAR § 2.101. The RFQ anticipates the establishment of a fixed-price BPA with a base period of 1 year with four 1-year options. RFQ at 3, 19.

Prior to issuing the solicitation, the agency conducted market research, which concluded that the agency was not likely to receive quotations from two or more small businesses. COS at 1. After issuing the solicitation, a CBP contract specialist corresponded with the Department of Homeland Security, Office of Small & Disadvantaged Business Utilization (OSDBU) regarding the decision not to set the RFQ aside for small business. On February 6, an OSDBU adviser stated that he had no objections to the unrestricted strategy based on the information provided by CBP. AR, Tab 10, Email from OSDBU, Feb. 6, 2018 (10:07 a.m.). ARC filed this protest on February 13, prior to the RFQ’s closing date.

DISCUSSION

ARC raises two primary challenges to CBP’s decision not to set the solicitation aside for small businesses. First, the protester argues that applicable statutory and regulatory provisions require the agency to set the solicitation aside for small businesses. Second, the protester argues that the agency’s market research, upon which the agency relied in not setting the RFQ aside for small businesses, was not reasonable. For the reasons discussed below, we conclude that ARC fails to state a valid basis of protest because the agency is not required to set aside the solicitation for this FSS procurement. For this reason, we also dismiss the protester’s challenge to the adequacy of the agency’s market research regarding its decision not to set aside the solicitation.¹

Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

¹ ARC also raises other collateral arguments regarding its challenges to CBP’s decision not to set the solicitation aside for small businesses. Although we do not address every issue, we have considered them all and find no basis to sustain the protest.

Interested Party Status

As an initial matter, CBP argued that ARC is not an interested party to challenge the agency's decision not to set aside the solicitation for small businesses because the protester's representations in the System for Award Management (SAM) website stated that the firm was not a small business under NAICS code 531210 at the time it filed its protest. Agency Request for Dismissal, Feb. 21, 2018, at 2. The agency argued that based on this representation, the protester was not an interested party because it could not compete for the award if its protest were sustained and the solicitation were set aside for small businesses.

Under our Bid Protest Regulations, a protester must be an interested party to pursue a protest before our Office. 4 C.F.R. § 21.1. An interested party is an actual or prospective offeror or vendor whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Id. § 21.0(a)(1). A firm that would not be eligible to compete for the award of a contract based on its size status is not an interested party to challenge the terms of the solicitation. Analytical Graphics, Inc., B-413385, Oct. 17, 2016, 2016 CPD ¶ 293 at 12.

In response to the request for dismissal, ARC acknowledged that its entry in the SAM website stated that the firm was not a small business under NAICS code 531210 at the time it filed its protest. Protester's Response to Request for Dismissal, Feb. 26, 2018, at 4. The protester explained, however, that there was an "administrative error in [ARC's] SAM registration, which it has promptly researched and corrected." Id. The protester further states that it updated its SAM registration information after receipt of the agency's dismissal request to certify that the firm is a small business under NAICS code 531210. Id. Based on the protester's updated representation, we concluded that the protester was an interested party to pursue the protest and denied the request for dismissal.² Email from GAO to Parties, Feb. 28, 2018.

Small Business Set-Aside

ARC argues that applicable statutory and regulatory provisions require CBP to set aside the solicitation for small businesses, and that the agency unreasonably failed to do so. We conclude that the agency is not required to set aside this FSS procurement for small businesses, and that the agency's decision to not set aside the procurement was a discretionary act that does not give rise to a valid basis of protest.

The Small Business Act, 15 U.S.C. § 644(a), states that "small businesses shall receive any award or contract" if it is in the interest of "assuring that a fair proportion of the total

² Our notice to the parties denying the request for dismissal noted that the SAM website requires firms to acknowledge that misrepresentations are subject to civil and criminal penalties. Email from GAO to Parties, Feb. 28, 2018.

purchase and contracts for good and services. . . are awarded to small business concerns.” 15 U.S.C. § 644(a). As implemented in the Small Business Administration’s (SBA) regulations and the FAR, this statutory provision, referred to here as the Small Business Rule of Two, requires agencies to set aside for small business participation a procurement valued over the simplified acquisition threshold if there is a reasonable expectation of receiving fair market offers from at least two small business concerns. 13 C.F.R. § 125.2(f)(2); FAR § 19.502-2(b).

In 2010, Congress amended the Small Business Act to address small business set-asides under multiple award contracts. Specifically, section 1331 of the Small Business Jobs Act of 2010, Pub. L. 111-240, added a provision that required the Administrator for Federal Procurement Policy and the SBA Administrator, in consultation with the Administrator of the General Services Administration, to publish regulations by which agencies, “may, at their discretion” set aside orders placed against multiple award contracts for small business concerns. 15 U.S.C. § 644(r). SBA’s regulations and the FAR were amended to implement this statutory provision to state that a contracting officer has the authority to set-aside such orders. 13 C.F.R. § 125.2(e)(6)(i); FAR § 8.405-5.

Specifically, the FAR provisions implementing the statutory small business provision set forth above and the FSS program expressly state that the set-aside requirements of FAR part 19 do not apply to FSS procurements, with the exception of certain discretionary actions and provisions. FAR §§ 8.404(a), 8.405-5(a), 38.101(e). In this respect, the FAR provides that an agency may, “in its discretion,” set aside orders or BPAs for any of the small business concerns identified in FAR part 19, *i.e.*, small businesses, 8(a) participants, Historically Underutilized Business Zone small business concerns, service-disabled veteran-owned small business (SDVOSB) concerns, and economically disadvantaged women-owned small business concerns and women-owned small business (WOSB) concerns eligible under the WOSB program. FAR §§ 8.405-5(a)(1), 19.502-4, 19.000(a)(3).

Our Office has explained that, based on the regulatory implementation of the Small Business Act, agencies are not required to follow the Small Business Rule of Two when issuing orders or establishing BPAs under the FSS. Aldevra, B-411752, Oct. 16, 2015, 2015 CPD ¶ 339 at 5-7; *see also* Edmonds Sci. Co., B-410179; B-410179.2, Nov. 12, 2014, 2014 CPD ¶ at 336 at 7 (SBA and FAR regulations grant discretion to a contracting officer as to whether to set aside orders placed under FAR subpart 16.5 multiple award contracts). Based on the regulations cited above and our decision in Aldevra, B-411752, CBP argues that the Small Business Rule of Two does not apply to the FSS procurement here.

Notwithstanding the clear guidance in the regulations, the protester contends that the decision by the United States Supreme Court in Kingdomware Technologies v. United States, 136 S. Ct. 1969 (2016) requires agencies to follow the Small Business Rule of Two when placing orders or establishing BPAs under the FSS. In this regard, the protester notes that Aldevra, B-411752, was issued prior to Kingdomware v. U.S., and

was therefore overturned by the Supreme Court's decision.³ The protester's argument, however, conflates the Small Business Rule of Two governed by the Small Business Act with a different rule addressed in Kingdomware v. U.S., which concerns procurements by the Department of Veterans Affairs (VA) under the Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 VA Act).

Our Office has issued a series of decisions concerning the 2006 VA Act, which requires the VA to set aside procurements for veteran owned small business (VOSB) firms or SDVOSB firms if the VA determines that there is a reasonable expectation that offers will be received by at least two VOSB or SDVOSB concerns and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d); Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183; Kingdomware Techs., B-405727, Dec. 19, 2011, 2011 CPD ¶ 283; Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112; Crosstown Courier Serv., Inc., B-406262, Mar. 21, 2012, 2012 CPD ¶ 119. Our decisions refer to this requirement as the "VA Act Rule of Two." E.g., AeroSage LLC, B-414314, B-414314.2, May 5, 2017, 2017 CPD ¶ 137 at 4. Our Office sustained a number of protests based on our conclusion that the VA Act Rule of Two requires the VA to first consider setting aside a procurement for SDVOSB and VOSB firms before conducting a procurement on an unrestricted basis through the FSS. See Aldevra, B-405271, *supra*; Kingdomware Techs., *supra*; Aldevra, B-406205, *supra*; Crosstown Courier Serv., Inc., *supra*. In response to these decisions, the VA advised in 2012 that it would not follow our recommendations concerning our interpretation of the 2006 VA Act. See GAO Annual Report to Congress for Fiscal Year 2012, at 1, www.gao.gov/products/GAO-13-162SP (last visited May 10, 2018).

In 2016, the Supreme Court reviewed the requirements of the 2006 VA Act in Kingdomware v. U.S., concluding that the 2006 VA Act contained mandatory language which required the VA to consider a set aside for SDVOSB and VOSB firms prior to conducting a procurement on an unrestricted basis through the FSS. Kingdomware v. U.S., 136 S. Ct. at 1976-78. The Court also concluded that an FSS order is a "contract" for purposes of applying the requirements of the 2006 VA Act. *Id.* at 1978-79.

ARC argues that the Supreme Court's decision in Kingdomware v. U.S. requires agencies placing orders or establishing BPAs under the FSS to follow the Small Business Rule of Two. The Court's ruling in Kingdomware v. U.S., however, concerned the VA Rule of Two under the 2006 VA Act. *Id.* at 1973-74. This act applies only to the VA, and thus has no applicability to a procurement by an agency such as CBP. See 38 U.S.C. § 8127(d). Nothing in Kingdomware v. U.S. addressed the provisions of SBA's regulations, and FAR part 19 or subpart 8.4 discussed above, which provide that contracting officers have discretion when setting aside an order against the FSS.

³ Our Office denied a request for reconsideration regarding Aldevra, B-411752, noting that the Supreme Court's decision in Kingdomware v. U.S. expressly stated that the holding of that decision applied prospectively, and not retroactively. Aldevra--Recon., B-411752.2, Oct. 5, 2016, 2016 CPD ¶ 284 at 4.

Finally, ARC argues that the Supreme Court's decision in Kingdomware v. U.S. requires all agencies to assess whether a procurement should be set aside for small businesses based on 15 U.S.C. § 644(j), which states that all procurements with an anticipated value above the micro-purchase threshold and below the simplified acquisition threshold are automatically set aside for small business concerns unless the contracting officer concludes that the agency will not likely obtain offers from two or more small business concerns that are competitive in terms of market prices, quality, and delivery. Unlike the Small Business Rule of Two set forth in SBA's regulations at 13 C.F.R. part 125 and FAR § 19.502(b), the Rule of Two for procurements between the micropurchase threshold and simplified acquisition threshold is set forth in the Small Business Act, SBA's implementing regulations, and the FAR. See 15 U.S.C. § 644(j); 13 C.F.R. § 125.2(f)(1); FAR § 19.502(a).

In support of its argument, ARC cites an internal memorandum issued by the SBA in 2016 concerning the Supreme Court's holding in Kingdomware v. U.S. that states FSS orders are contracts. The memorandum provides guidance to SBA personnel, and states that all orders under indefinite-delivery, indefinite-quantity contracts, including the FSS, should be considered subject to the set-aside requirements of 15 U.S.C. § 644(j). AR, Tab 22, SBA Memorandum, Oct. 20, 2016, at 1-3. Based on this memorandum, the protester contends that the solicitation here should have been set aside for small businesses.

As discussed above, however, CBP states that the award is anticipated to be above the simplified acquisition threshold; the protester does not dispute this representation. COS at 2. For this reason, any interpretation of the provisions of 15 U.S.C. § 644(j), which apply to procurements below the simplified acquisition threshold, is irrelevant to this protest.

In any event, the SBA memorandum does not set forth mandatory procurement regulations, and instead sets forth internal guidance regarding how agency personnel should interpret existing statutes and regulations. As our Office has explained, we review alleged violations of procurement laws and regulations to ensure that the statutory requirements for full and open competition are met. 31 U.S.C. § 3552(a); Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. An agency's compliance with internal guidance or policies that are not contained in mandatory procurement regulations is not a matter that our Office will review as part of our bid protest function. LCPP, LLC, B-413513.2, Mar. 10, 2017, 2017 CPD ¶ 90 at 5. We conclude that the memorandum cited by the protester does not establish mandatory regulations for small business set-asides, and as such, is not for review under our bid protest function.

In sum, we conclude that the contracting officer here has discretionary authority to set-aside an order against the FSS, but is not required to do so. We therefore find that ARC's argument fails to state adequate legal grounds of protest, and therefore dismiss it on that basis. See 4 C.F.R. § 21.5(f).

Market Research

Next, ARC raises a number of challenges to CBP's market research and its conclusion that the agency was not likely to receive proposals from two or more small businesses at fair market prices. However, as discussed above, agencies have the discretion to set aside procurements under the FSS. FAR § 8.405-5(a)(2). Thus, even if our Office were to agree with ARC that CBP's market research was not reasonable, there would be no basis for our Office to recommend any corrective action because the agency would not be required to set aside the procurement. See AeroSage, LLC, B-414640, B-414640.3, July 27, 2017, 2017 CPD ¶ 233 at 5 (agencies have the discretion to seek a waiver of the nonmanufacturer rule, FAR § 19.102(f)(5); based on this discretion, an agency's refusal to seek a waiver of the nonmanufacturer rule does not provide a basis to sustain a protest).⁴ We therefore find that ARC's argument fails to state adequate legal grounds of protest, and therefore dismiss it on that basis. See 4 C.F.R. § 21.5(f).⁵

The protest is dismissed.

Thomas H. Armstrong
General Counsel

⁴ We distinguish this pre-award challenge to the terms of a solicitation from a post-award challenge where an agency's source selection decision relies upon a discretionary matter. In this regard, where a solicitation states that an agency reserves the right to conduct an evaluation, where the agency elects to conduct the evaluation, and where the award decision relies on the results of that discretionary evaluation, we will review the evaluation for reasonableness—even though the decision to undertake the evaluation was discretionary. See NCI Info. Sys., Inc., B-412870.2, Oct. 14, 2016, 2016 CPD ¶ 310 at 13-15 (sustaining protest where the agency exercised its discretion, reserved in the solicitation, to evaluate proposals for price realism, but conducted an unreasonable evaluation); Solers Inc., B-409079, B-409079.2, Jan. 27, 2014, 2014 CPD ¶ 74 at 4-5 (same).

⁵ As a related matter, the protester raises several challenges relating to the agency's assignment of NAICS code 531210 to the solicitation. Our Bid Protest Regulations provide that we will not review an agency's assignment of a NAICS code to a procurement. 4 C.F.R. § 21.5(b).