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Decision

Matter of: The Oryza Group, LLC

File: B-416719; B-416719.2

Date: November 26, 2018

Christopher R. Shiplett, Esq., Randolph Law, PLLC, for the protester.
CPT Jeremy D. Burkhart, LTC Andrew J. Smith, Scott N. Flesch, Esq., Department of the Army, for the agency.
Noah B. Bleicher, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging solicitation amendment that required offerors to recertify their small business status at the task order level is denied where recertification requirement was within the agency's discretion and applied equally to all offerors.

DECISION

The Oryza Group, LLC, of Douglasville, Georgia, protests the terms of task order request (TOR) No. W91247-18-4P0K, which was issued by the Department of the Army for sustainment information system (SIS) support for the U.S. Army Reserve Command. Oryza, the incumbent contractor, objects to the solicitation requirement that firms recertify their status as a service-disabled veteran-owned small business (SDVOSB) at the time of proposal submission.

We deny the protest.

BACKGROUND

On June 22, 2018, the Army issued the TOR to holders of Veterans Technology Services 2 (VETS 2) indefinite-delivery, indefinite-quantity (IDIQ) governmentwide acquisition contracts (GWACs) pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 16.5. Agency Report (AR), Tab 3, Initial TOR, at 1. The TOR contemplated the issuance of a primarily fixed-price task order for a 1-year base period and two 1-year option periods for SIS support services to include fielding, sustainment, and installation of Army developed SIS hardware and software platforms. *Id.* at 2; AR, Tab 3.a., TOR Performance Work Statement, at 2. The task order was to be issued to

the firm that submitted the lowest-priced, technically acceptable proposal, following the agency's assessment of each offeror's technical experience, management approach, staffing approach, and price. Initial TOR at 2, 9-12.

The TOR was set aside for SDVOSBs. Id. at 2. In this regard, the TOR initially provided as follows:

[Task order proposals] received from concerns that are not SDVOSB concerns in accordance with NAICS [North American Industry Classification System] Code 541513 and small business size standard applied for this requirement shall be considered nonresponsive and will be rejected in accordance with FAR Clause 52.219-6. Offerors must represent in good faith that at the time of their written representations, they are a SDVOSB in accordance with the NAICS Code and small business size standard applied for this requirement.

Id. at 2-3.

The agency received proposals from three VETS 2 contractors, including Oryza, prior to the submission deadline on July 30, 2018. Contracting Officer's Statement (COS) at 3. A task order evaluation board (TOEB) evaluated proposals and determined that Oryza's \$21,849,870 offer was the lowest-priced, technically acceptable proposal. AR, Tab 14, Oryza Technical Evaluation, at 1; Tab 27, Pre-Negotiation Objective Memo., at 7; COS at 4. The TOEB thereafter reviewed the System for Award Management (SAM), which indicated that Oryza was not certified as an SDVOSB.¹ COS at 4; AR, Tab 13, Oryza SAM Report, at 9 (showing Oryza was not a small business for NAICS Code 541513). Given that the agency intended to issue the order to an SDVOSB, the agency amended the TOR on August 18 to clarify that offerors were required to recertify their status as an SDVOSB at the time of the initial task order proposal submission. Specifically, the Army revised the above-quoted TOR provision to read as follows:

ORDER SIZE REREPRESENTATION (OSR) AT THE ORDER LEVEL.
This TOR is set-aside for firms within the VETS2 GWAC that meet the small size status of Service-Disabled Veteran-Owned Small Business (SDVOSB) in accordance with NAICS Code 541513 and small business size of \$27.5M on the date they submit their initial TOP in accordance with FAR clause 52.219-27. Re[-]presentation of the firms' size status as an SDVOSB at the time of initial TOP submission is required.

TOPs received from concerns that are not SDVOSB at the time of initial TOP submission in accordance with NAICS Code 541513 and small business size standard applied for this requirement shall be considered nonresponsive and will be rejected in accordance with FAR Clause

¹ The other two offerors were certified as SDVOSBs in SAM. COS at 4.

52.219-6. Offerors must re[-]present and recertify that at the time of their initial TOP submission, they are a SDVOSB in accordance with the NAICS Code and small business size standard applied for this requirement.

AR, Tab 11, TOR amend. 0006, at 3. The agency concurrently issued evaluation notices (EN) to the offerors requesting best and final price proposals, as well as clarifying that revised proposals were to be prepared in accordance with the amended TOR, and submitted by August 21. AR, Tab 18, Oryza EN, at 1.

Prior to submitting a final proposal, Oryza protested the amended TOR.

DISCUSSION

Oryza objects to the TOR's size recertification requirement.² In this respect, the protester represents that while it was awarded its VETS 2 contract as an SDVOSB, the firm is no longer a small business and would not be eligible for task order award if it was required to recertify its SDVOSB status at the task order level. Protest at 3-4; see also AR, Tab 16, Email from Oryza to Army Contracting Officer, Aug. 10, 2018 (8:59 a.m.) (advising that Oryza is "now classified as a large business"). As result, Oryza contends that the Army is improperly treating the firm unequally because only Oryza, the "putative winner," would be "disqualified by the imposition of the retroactive recertification requirement."³ Protest at 5.

The agency responds that the TOR had always required that offerors represent that they were SDVOSBs at the time of proposal submissions, and that the amendment to the TOR merely clarified this requirement. Memorandum of Law (MOL) at 16. The agency further contends that that the recertification requirement was within in the agency's discretion, and there was never a specific intent to avoid awarding the order to Oryza. Id. at 9-10, 19.

² While the task order will be in support of a Department of Defense organization, the VETS 2 GWAC is a civilian IDIQ awarded by the General Services Administration (GSA). COS at 2. As such, the protest is within our Office's jurisdiction because the value of the order to be issued exceeds \$10 million. See 41 U.S.C. § 4106(f); Analytic Strategies LLC; Gemini Indus., Inc., B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 340 at 4-5.

³ The firm raises additional, related challenges to the recertification requirement in its protest and a supplemental protest. See Protest at 4; Supp. Protest at 2-4. However, in its comments, Oryza failed to meaningfully address the agency's substantive responses to these arguments. See Comments at 1-5. Consequently, we consider these objections abandoned and do not address the arguments further. See Enterprise Servs. LLC, B-415517, B-415517.2, Jan. 18, 2018, 2018 CPD ¶ 83 at 9 n.10.

When a firm is awarded an IDIQ contract (including a multiple award contract like the VETS 2 GWAC) as an SDVOSB, the firm is generally considered an SDVOSB throughout the life of that contract, and is not required to recertify its size status for each order issued under the contract.⁴ 13 C.F.R. § 125.18(e)(1); see Enterprise Info. Servs., Inc., B-403028, Sept. 10, 2010, 2010 CPD ¶ 213 at 3. Agencies have the discretion, however, to request that offerors recertify their business status in response to a solicitation for an order. 13 C.F.R. § 125.18(e)(5); see Technica Corp., B-413339, Sept. 19, 2016, 2016 CPD ¶ 264 at 3. If a solicitation expressly requires a vendor to recertify its size status in response to a solicitation for an order, the size status of the vendor will be determined as of the date of the recertification. 13 C.F.R. § 125.18(e)(5).

Here, we find nothing objectionable with the agency's request that offerors recertify their SDVOSB status. As an initial matter, we note that whether the TOR originally required that offerors recertify their SDVOSB status--a point disputed by the parties--need not be resolved because the amended TOR unequivocally requested recertification. See TOR amend. 0006, at 3. In addition, the protester does not dispute that the Army had the discretion to request that VETS 2 contract holders recertify their SDVOSB status. See Protest at 1-9. Thus, the first inquiry turns solely to whether it was objectionable for the agency to request business status recertification via a solicitation amendment and evaluation notices. We conclude that there was nothing improper with this approach.

More specifically, the FAR provides that a contracting officer shall amend a solicitation when the government changes its requirements or terms. FAR § 15.206(a). Here, the record reflects that while the procurement had always been set aside for SDVOSBs, the contracting officer determined that it was necessary to "clarify[] [the agency's] previous intent to require re-representation at the task order level." COS at 6. Accordingly, rather than cancel the solicitation and resolicit the requirement, the agency amended the TOR, as provided for by the FAR. Notably, the protester has not cited to any law, regulation, or legal authority that precluded this approach to requesting size recertification. Further, we find reasonable the agency's explanation that cancelling the solicitation and reopening the procurement, as the protester would prefer, would be "tremendously wasteful, unnecessarily delay the procurement process, and harm the other offerors who meet the Army's requirements." MOL at 13. Thus, we find nothing improper with the agency's decision to amend the TOR, rather than cancel it, to include explicit language requesting size recertification. See InuTeq, LLC, B-411781, Oct. 21, 2015, 2015, CPD ¶ 324 (denying protest of a task order solicitation where protester challenged an amendment clarifying the requirement for size recertification at the time of proposal submission).

⁴ The VETS 2 GWAC is a 10-year contract with a 5-year base period that runs from February 23, 2018, through February 22, 2023. AR, Tab 5, GSA Small Business GWAC Ordering Guide, at 32. For contracts with durations of more than 5 years (including options), an SDVOSB is required to recertify its SDVOSB status toward the end of the base period. 13 C.F.R. § 125.18(e)(2).

Next, we turn to Oryza's primary contention that the size recertification resulted in unequal treatment. See Protest at 5; Comments at 4-5. Based on our review of the record, we conclude that the protest allegation has no merit. In this respect, we highlight that the requirement applied to all offerors; Oryza was not the only offeror required to recertify its SDVOSB status. That Oryza ultimately cannot make the required representations does not establish improper action on the part of the Army. Rather, it simply demonstrates that award to Oryza would not "support the SDVOSB Procurement Program, and achieve [the agency's] socioeconomic goals and objectives," which were some of the primary reasons for ordering under the VETS 2 GWAC. See AR, Tab 26, Determination of Best Procurement Approach, at 1-2. Moreover, we note that implementing Oryza's preferred approach of resoliciting the procurement would, in effect, ultimately result in favorable treatment to Oryza at the expense of the other offerors.⁵

On this record, we decline to sustain Oryza's allegation of disparate treatment.⁶ Indeed, as the Army notes, while an agency must treat offerors equally, "equality of outcome is never guaranteed." MOL at 18; see generally Exec Plaza, LLC, B-400107, B-400107.2, Aug. 1, 2008, 2008 CPD ¶ 143 at 6-7 (denying protest challenging terms of solicitation for the lease of office space where requirement at issue applied equally to all offerors, even though the requirement allegedly imposed additional costs on the protester).

The protest is denied.

Thomas H. Armstrong
General Counsel

⁵ Oryza represents that it "would have sought out a partner that was eligible to bid" if it was required to recertify its SDVOSB status prior to proposal submission. See Protest at 4.

⁶ To the extent the protester is suggesting that the agency's decision to seek size status recertification was made to avoid an award to Oryza, such implication finds no support in the record. We highlight that government officials are presumed to act in good faith, and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Bannum, Inc., B-411074.5, Oct. 10, 2017, 2017 CPD ¶ 313 at 7.