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Decision

Matter of: Falken USVI, LLC

File: B-416581.2

Date: January 2, 2019

Kenneth A. Martin, Esq., The Martin Law Firm, PLLC, for the protester.
Jonathan D. Shaffer, Esq., John S. Pachter, Esq., Mary Pat Buckenmeyer, Esq., and Julia S. Shagovac, Esq., Smith Pachter McWhorter PLC, for Ranger American of the VI Inc., the intervenor.
Hillary J. Freund, Esq. and Rina Martinez, Esq., Department of Homeland Security, for the agency.
Nora K. Adkins, Esq. and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 et. seq. is denied where the agency's evaluation was reasonable, and treated the vendors equally.

DECISION

Falken USVI, LLC, a small business located in St. Thomas, U.S. Virgin Islands, protests the issuance of a purchase order to Ranger American of the VI Inc., a small business located in St. Thomas, U.S. Virgin Islands, by the Department of Homeland Security, Federal Emergency Management Agency (FEMA), pursuant to request for quotations (RFQ) No. 70FBR218Q00000999_01 for security guard services at various U.S. Virgin Island locations. The protester alleges that the agency failed to reasonably evaluate Falken's and Ranger's quotations regarding Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act) eligibility. See 42 U.S.C. §§ 5121 et. seq. The protester also alleges that the agency's Stafford Act eligibility evaluation did not treat vendors equally.

We deny the protest.

BACKGROUND

FEMA is authorized to provide disaster assistance to individuals and households for emergencies, major disasters, and incidents of national significance under the Stafford Act. Contracting Officer's Statement (COS) at 1; 42 U.S.C. §§ 5121 et. seq. On September 20, 2017, the President of the United States issued a major disaster declaration under the authority of the Stafford Act for the territory of the U.S. Virgin Islands as a result of the devastating effects from Hurricane Maria. COS at 1; see Disaster Declaration, 82 FR 46813-14 (Oct. 6, 2017).

On May 22, 2018, FEMA issued the RFQ via the FedBid website¹ pursuant to the commercial item and simplified acquisition procedures of Federal Acquisition Regulation (FAR) parts 12 and 13. COS at 2. The RFQ sought armed guard services to safeguard federal employees, visitors, and property at both temporary and fixed facilities in St. Croix, St. Thomas, and St. John, during the disaster and emergency declaration. RFQ at 35. The solicitation was set aside for local small businesses residing or primarily doing business in the disaster-affected areas pursuant to the Stafford Act. Id. at 3-4, 6. The solicitation contemplated the award of a fixed-price purchase order to the vendor offering the lowest-priced, technically acceptable quotation. Id. at 4. The RFQ provided for a 2-month base period with three 2-month option periods. Id.

With respect to the Stafford Act set-aside, the RFQ provided as follows: “[t]he area covered in this contract is: The Territory of the United States Virgin Islands Disaster Declaration (DR 4340) which includes the islands of St. Croix, St. John and St. Thomas.” Id. The RFQ required each vendor to represent that it does, or does not, reside or primarily do business in the designated set-aside area pursuant to FAR provision 52.226-3--Disaster or Emergency Area Representation. Id. FAR provision 52.226-3 provides, in relevant part:

(c) An offeror is considered to be residing or primarily doing business in the set-aside area if, during the last twelve months[:]

(1) The offeror had its main operating office in the area; and

(2) That office generated at least half of the offeror's gross revenues and employed at least half of the offeror's permanent employees.

(d) If the offeror does not meet the criteria in paragraph (c) of this provision, factors to be considered in determining whether an offeror resides or primarily does business in the set-aside area include[:]

¹ FedBid, Inc., is a commercial online procurement services provider that operates a website at FedBid.com, which, among other things, hosts reverse auctions.

(1) Physical location(s) of the offeror's permanent office(s) and date any office in the set-aside area(s) was established;

(2) Current state licenses;

(3) Record of past work in the set-aside area(s) (e.g., how much and for how long);

(4) Contractual history the offeror has had with subcontractors and/or suppliers in the set-aside area;

(5) Percentage of the offeror's gross revenues attributable to work performed in the set-aside area;

(6) Number of permanent employees the offeror employs in the set-aside area;

(7) Membership in local and state organizations in the set-aside area; and

(8) Other evidence that establishes the offeror resides or primarily does business in the set-aside area. For example, sole proprietorships may submit utility bills and bank statements.

(e) If the offeror represents it resides or primarily does business in the set-aside area, the offeror shall furnish documentation to support its representation if requested by the Contracting Officer. The solicitation may require the offeror to submit with its offer documentation to support the representation.

FAR provision 52.226-3; RFQ at 4-5.

FEMA received five quotations in response to the solicitation, including quotations from Falken and Ranger. Agency Report (AR), Tab O, Award Memorandum, at 1. As relevant here, the agency first reviewed each offeror's disaster area representation to determine Stafford Act set-aside eligibility. COS at 5. The agency then issued clarification questions to vendors regarding their Stafford Act set-aside eligibility. See AR, Tab H, Falken Eligibility Clarification Questions; AR, Tab I, Ranger Eligibility Clarification Questions. Based upon the information provided by the vendors in response to the RFQ and the agency's clarification questions, the agency concluded that two firms provided sufficient evidence of residing or primarily doing business in the disaster-affected area (Ranger and another vendor). AR, Tab O, Award Memorandum, at 2. As it pertains to Falken, the agency concluded that the firm did not meet the local criteria set out at FAR provision 52.226-3(c). AR, Tab K, Falken Initial Eligibility

Determination, at 1; AR, Tab U, Falken Final Eligibility Determination, at 1-5.² The agency also conducted an analysis pursuant to FAR provision 52.226-3(d), and concluded that the information submitted by Falken failed to demonstrate that it met the Stafford Act eligibility requirements. AR, Tab U, Falken Final Eligibility Determination, at 1. The agency then evaluated the firms' technical and price quotations, and concluded that Ranger provided the lowest-priced, technically acceptable quotation. AR, Tab O, Award Memorandum, at 2-3.

On September 26, Falken received a notice of unsuccessful vendor letter, which included a brief explanation of the award to Ranger. AR, Tab V, Falken Unsuccessful Vendor Letter, at 1. Thereafter, Falken filed this protest.

DISCUSSION

Falken challenges FEMA's determination that, for purposes of the Stafford Act set-aside, Falken was not a firm residing or primarily doing business in the disaster-affected area. The protester also challenges the agency's conclusion that Ranger met the Stafford Act set-aside criteria. Falken also argues that the agency's Stafford Act eligibility evaluation was not equal because the agency used different standards to evaluate Falken's and Ranger's eligibility.

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate quotations, nor substitute our judgment for that of the agency, as the evaluation of quotations is a matter within the agency's discretion. See Stone Hill Park, LLC, B-414555.4, July 18, 2017, 2017 CPD ¶ 226 at 4. Rather, we will review the record only to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. Id. A protester's disagreement with reasonable evaluation judgments does not provide a basis to sustain its protest. See American Native Veterans of Louisiana, B-414555.2, July 11, 2017, 2017 CPD ¶ 219 at 4. Based on our review of the record, we find no basis to object to the agency's evaluation.³

² The agency conducted two eligibility determinations. The first, was a contemporaneous evaluation, AR Tab K, Falken Initial Eligibility Determination; the second, was conducted after Falken filed a pre-award protest to our Office, which was dismissed as premature, AR, Tab U, Falken Final Eligibility Determination. See Falken USVI, LLC, B-416581, Aug. 27, 2018 (unpublished decision). Both eligibility determinations found Falken failed to meet the Stafford Act eligibility requirements. AR, Tab K, Falken Initial Eligibility Determination, at 1; AR, Tab U, Falken Final Eligibility Determination, at 1-5.

³ While we do not address each of the protester's allegations, we have reviewed them all and find the agency's evaluation reasonable and consistent with the solicitation's evaluation criteria. For example, Falken alleged that Ranger was not a responsible vendor. The agency responded to this argument in its agency report. Falken did not provide a response to the agency's arguments in its comments. Thus, we find Falken

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The Stafford Act authorizes agencies to provide a preference to, or set aside disaster relief recovery contracts for, individuals or firms residing or doing business primarily in the designated disaster area. The Stafford Act provides in relevant part:

Use of local firms and individuals

(a) Contracts or agreements with private entities.

(1) In general. In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency.

* * * * *

(3) Specific geographic area. In carrying out this section, a contract or agreement may be set aside for award based on a specific geographic area.

42 U.S.C. § 5150. The legislative history of the Stafford Act makes clear that the congressional intent was to benefit local people and businesses in disaster-affected areas. Executive Protective Sec. Serv., Inc., B-299954.3, Oct. 22, 2007, 2007 CPD ¶ 190 at 8. Here, the RFQ was set aside for firms residing or primarily doing business in the disaster-affected U.S. Virgin Islands. RFQ at 4, 70.

Falken submitted a quotation in response to the solicitation, which represented that it resides or primarily does business in the local set-aside area. AR, Tab E, Falken Quotation, at 39. In this regard, Falken's quotation stated that it has an office in St. Croix and an office in St. Thomas. Id. at 4. Falken's quotation explained that Falken Industries, LLC, headquartered in Manassas, Virginia, "formulated Falken [USVI] in October of 2017 to develop and maintain the training requirements for the U.S. Government." Id. Falken provided that it is a U.S. Virgin Islands based independent corporation and small business registered in the System for Award Management network with a unique Independent Revenue Service tax ID number. Id. Falken also submitted the following information to support its local set-aside designation: the address for each of the three offices, which would service the contract (St. Thomas, St. Croix, and Manassas, Virginia); individual names of office staff and guards in the St. Thomas and St. Croix offices; licenses for a Watchman, Guard, and Patrol Agency in

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abandoned this allegation. McKissack-URS Partners, JV, B-406489.7, Jan. 9, 2013, 2013 CPD ¶ 25 at 4 n.2.

St. Thomas and St. Croix (issued Nov. 2017); and the address of its St. Thomas banking institution, among other things. Id. at 5, 16, 32-33. Falken's quotation also specified that it intends to hire all guards from within the set-aside area and that it generates [DELETED] percent of its revenue from the set-aside area. Id. at 39.

In response to the agency's clarification questions, Falken provided the following additional documentation: lease agreements for its St. Thomas (signed Feb. 2018) and St. Croix (signed Nov. 2017) locations; a breakdown of Falken's and Falken Industries operating offices and their date of establishment; a listing of the number of permanent employees in and outside of the local set-aside area; a bond covering its Watchman, Guard, and Patrol Agency licenses in the U.S. Virgin Island (issued Oct. 2017); the rental agreement of Falken's Resident Agent (signed Mar. 2018); bank statements from April and May of 2018; proof of payment of U.S. Virgin Island taxes (Feb. 2018); and its certificate of existence in the U.S. Virgin Islands (issued Oct. 2017), among other things. AR, Tab J, Falken Response to Clarification Questions.

Ranger also submitted a quotation in response to the solicitation, which certified that it resides or primarily does business in the designated set-aside area. AR, Tab T, Ranger Locality Determination, at 1. Ranger provided the following in support of its local status: Articles of Incorporation, certified by the Lieutenant Governor for the Virgin Islands (certified July 30, 1993); licenses for a Watchman, Guard, and Patrol Agency for its St. Thomas and St. Croix offices (2013-2018); tax returns (2012-2016); tax receipts (2017-2018); a listing of the number of permanent employees in the set-aside area; and a breakdown of its operating offices with dates of establishment (St. Thomas 1996; St. Croix 1999), including evidence of leases for both locations, among other things.⁴ AR, Tab M, Ranger Response to Clarification Questions.

The contracting officer conducted an evaluation of the information submitted by both Falken and Ranger to assess each vendor's disaster area representation. Based on the information provided, the contracting officer initially concluded that neither Falken nor Ranger met the set-aside criteria of 52.226-3(c). See AR, Tab U, Falken Final Locality Determination, at 1; AR, Tab T, Ranger Locality Determination, at 1. That is, the contracting officer found that neither offeror had a main office in the set-aside area that generated at least half of the offeror's gross revenues and employed at least half of the offeror's permanent employees. Id.

The contracting officer then assessed the quotations based on the eight factors of FAR provision 52.226-3(d). With respect to Falken, the contracting officer concluded that the firm did not provide sufficient evidence to demonstrate that it resides or primarily does business in the set-aside area pursuant to FAR provision 52.226-3(d). AR, Tab U, Falken Final Locality Determination, at 1, 5. In this regard, the contracting officer noted that Falken identified two operating offices in the U.S. Virgin Islands, a St. Croix location

⁴ The information reviewed by the agency was provided in Ranger's initial quotation and/or its response to the agency's clarification questions.

established in October 2017, and a St. Thomas location established in February 2018, with a total of 113 permanent employees in the two locations. Id. at 1-4. The contracting officer also noted that Falken's licenses were not issued until October 2017 after the company's establishment in the U.S. Virgin Islands on October 13, 2017. Id. at 2. The contracting officer further stated that while Falken identified contracts it had entered into with businesses in the U.S. Virgin Islands, these contracts did not establish a history of local business relationships because all of the contracts arose within the last five months and were for small dollar amounts. Id. at 2-3. With respect to gross revenues, the contracting officer also concluded that the information provided did not demonstrate what portion of Falken's gross revenues were attributable to work performed in the set-aside area. Id. at 3. Moreover, the contracting officer found that most if not all of Falken's revenues in the set-aside area were from a FEMA contract awarded to Falken in February 2018. Id. Based on this information, the contracting officer concluded that Falken Industries is a "15 year old Virginia based company that set up a temporary, post-disaster operation in the U.S. Virgin Islands." Id. at 4.

With respect to Ranger, the contracting officer concluded that the firm demonstrated that it resides or primarily does business in the set-aside area. AR, Tab T, Ranger Locality Determination, at 1-3. In this regard, the contracting officer noted that Ranger filed its Articles of Incorporation in 1993, which were certified by the Lieutenant Government for the Virgin Islands. The contracting officer also noted that Ranger has two permanent offices in the U.S. Virgin Islands: a St. Thomas office, which moved to its current location in April 2014 from a location that was in operation since 1996; and a St. Croix office, which moved to its current location in January 2017 from a location that was in operation since 1999. Id. at 1-2. Ranger has 204 current permanent employees in the set-aside area, and maintained a Watchman, Guard, and Patrol Agency license every year from 2012 to 2018 in both St. Thomas and St. Croix; a Private Investigative Agency license in St. Croix from 2012-2018, and St. Thomas from 2006-2018; and an Armored Car Service license in St. Croix and St. Thomas from 2010-2017. Id. at 2-3. The contracting officer also noted that Ranger filed tax returns for its business in the U.S. Virgin Islands from 2012-2016 showing gross receipts or sales every year. Id. at 2. Based on the information provided by Ranger, the contracting officer concluded that Ranger "has been operating in the [U.S.] Virgin Islands since 1993, has maintained long-term, permanent locations in the St. Croix and St. Thomas, and has done significant business in the U.S. Virgin Islands for many years." Id. at 3.

On this record, we find that FEMA's evaluation of Falken's and Ranger's quotations was reasonable, equal, and consistent with the stated evaluation criteria. The contracting officer thoroughly evaluated the information provided by both vendors in conducting the Stafford Act set-aside evaluation. Initially, the contracting officer reasonably concluded that neither firm met the criteria of FAR provision 52.226-3(c). The contracting officer then reviewed the information provided by the vendors based on the factors of FAR provision 52.226-3(d). As explained above, the record demonstrates that the contracting officer reasonably concluded that Falken had not satisfied the burden of demonstrating that it resides or primarily does business in the set-aside area, while

Ranger provided sufficient information to demonstrate that it resides or primarily does business in the set-aside area.

We find no basis to disturb the contracting officer's thorough and well documented Stafford Act set-aside evaluation. Once an agency has given meaningful consideration to all relevant information, a protest challenging an agency's evaluation of such information will not be sustained unless the agency's judgments were unreasonable or contrary to the stated evaluation criteria. See AlliedBarton Security Servs. LLC, B-299929, et al., Oct. 9, 2007, 2007 CPD ¶ 175 at 8. We find the protester's challenge to the agency's evaluation here amounts to disagreement with the agency's judgment which, without more, does not establish that the evaluation was unreasonable. Id.

Falken also alleges that the agency's evaluation of the firms' set-aside eligibility did not treat vendors equally. Falken contends that the agency applied a different standard to Falken's eligibility evaluation than to Ranger's eligibility evaluation. Where a protester alleges unequal treatment in a technical evaluation, it must show that the differences in the evaluation did not stem from differences between the vendor's quotations. See Camber Corp., B-413505, Nov. 10, 2016, 2016 CPD ¶ 350 at 8. Falken has not made this showing. As the record demonstrates, Falken established its presence in the U.S. Virgin Islands in October 2017, after Hurricane Maria, whereas Ranger has been incorporated in the U.S. Virgin Islands since 1993. A review of the leases, contracts, tax records, and other information clearly supports this conclusion. Accordingly, the agency's evaluation is unobjectionable.

The protest is denied.

Thomas H. Armstrong
General Counsel