U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: International Service Contractors, LLC

File: B-421326.2

Date: October 27, 2023

Brian Mitchell for the protester.
Daniel F. Edwards, Esq., Taft Stettinius & Hollister LLP, for the State of Hawaii, the intervenor.
Lieutenant Colonel Nolan T. Koon, Department of the Army, for the agency.
Kenneth Kilgour, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's conduct of procurement is dismissed where the allegations fail to state a valid basis of protest.

DECISION

International Service Contractors, LLC (ISC), of Clermont, Florida, protests the exclusion of its proposal from consideration for award and the agency's establishment of a competitive range consisting only of the proposal of the State of Hawaii, Department of Human Services, Division of Vocational Rehabilitation, Ho`opono--Services for the Blind (HSB), under request for proposals (RFP) No. W5168W23R0005, issued by the Department of the Army for Dining Facility Attendant (DFA) services at Schofield Barracks, Hawaii. The protester contends that the Army's conduct of the procurement was unreasonable.

We dismiss the protest.

BACKGROUND

The RFP, set aside for small businesses, contemplated the issuance of a single fixed-price indefinite-quantity contract for DFA services. RFP at 1, 42. The RFP advised

offerors that the procurement was subject to the Randolph-Sheppard Act (RSA).[1] RFP at 61. Accordingly, the RFP further notified offerors, "although the solicitation is set-aside 100 [percent] for small business, the State Licensing Agency will also be permitted to submit a proposal in accordance with 34 C.F.R. [§] 395.33(b)." *Id.* The RFP went on to explain that "[t]his notice is not designed to discourage competition rather, it notifies all potential offerors that the priority established by the R-SA for proposals received from SLAs and their blind vendors is applicable to this procurement." *Id*. The RFP also indicated that source selection would be conducted utilizing Federal Acquisition Regulation (FAR) part 12 in conjunction with FAR part 15. RFP at 61. Award would be made to the responsible offeror with the lowest-price technically acceptable proposal, (LPTA) "or to the SLA under the R-SA priority." *Id*. To that end, the RFP explained as follows:

> *Note: Pursuant to the Randolph-Sheppard Act (R-SA), 20 U.S.C. §* 107 *Operation of Vending Facilities and 34 CFR § 395.33 Operation of Cafeterias by Blind, priority award will be made to the State Licensing Agency (SLA) as other than the LPTA if the Government determines the requirement delineated in this solicitation can be provided by the SLA at a reasonable cost, with food of a high quality comparable to that currently provided.*

RFP at 67. The agency would evaluate proposals using three factors: technical capability, past performance, and price. *Id.* at 68. The technical capability factor had two subfactors: organizational structure and staffing plan. *Id*. To be acceptable, a proposal was required to be evaluated as acceptable under all factors and subfactors. *Id*.

HSB and ISC submitted proposals. Protest, attach. 4, Pre-Award Notice at 1. The Army evaluated ISC's proposal as unacceptable under the staffing plan subfactor of the technical capability factor, and therefore unacceptable for the factor overall. Protest, attach. 7, Debriefing Letter at 5. The Army advised the protester that, because HSB qualified for priority under the RSA, the agency would enter into "direct negotiations" with HSB and that, "in accordance with FAR 15.306," ISC's proposal would "receive no further consideration for award." Protest, attach. 4, Pre-Award Notice at 1. The Army then provided ISC with a debriefing and advised ISC that the agency's "evaluation did not include an assessment as to whether [ISC's] proposal could be revised to become acceptable, which under a regular competition is a factor in determining whether a vendor should be included in the competitive range." Protest, attach. 6, Debriefing at 1-2. The Army went on to explain that its "determination to establish a competitive range of 1 offeror and proceed with direct negotiations with Ho`opono Services for the Blind (Hawaii SLA) was solely based on application of the priority delineated in the R-SA." Protest, attach. 6, Debriefing at 1-2. This protest followed.

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[1] The RSA establishes a priority for blind persons represented by a state licensing agency (SLA) in the award of contracts for, among other things, the operation of vending facilities and cafeterias in federal buildings. *See* 20 U.S.C. § 107; 34 C.F.R. § 395.33.

DISCUSSION

ISC challenges the Army's grant of a priority to the SLA under the RSA. Protest at 8. ISC also asserts that the agency failed to determine that the SLA was providing a reasonable price. *Id*. Finally, ISC disputes the reasonableness of the agency's evaluation of the protester's proposal and the proposal's subsequent exclusion from the competitive range. *Id*. For the reasons discussed below, we dismiss each of these allegations.

Decision to Grant Priority to SLA Under the RSA

ISC asserts that the "agency does not demonstrate how priority was given to the SLA at a reasonable cost if their final cost has not been decided." Protest at 8. The agency argues that "the Protester's allegations fail to make any credible allegations of agency error," and, at most, the "protest articulates a frustration with the preferential treatment afforded the SLA" under the RSA. Req. for Dismissal at 7.

Our role in resolving bid protests is to review whether a procurement action constitutes a violation of a procurement statute or regulation. 31 U.S.C. § 3552. To achieve this end, 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. *Mitchco Int'l, Inc*., B-418481.3, B-418481.4, June 9, 2020, 2020 CPD ¶ 210 at 5.

As an initial matter, under the RSA, blind vendors are to be afforded priority in the operation of cafeterias "when the Secretary [of the Department of Education (DOE)] determines, on an individual basis, and after consultation with the appropriate property managing department . . . that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise." 34 C.F.R. § 395.33(a). The applicable regulations provide that, in order to establish the ability of blind vendors to operate the cafeteria, the state licensing agency may be invited to submit a bid or proposal through a competitive process with the SLA's submission evaluated under criteria set forth by the agency. 34 C.F.R. § 395.33(b).

If an agency uses a competitive process and finds that the SLA is "within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for a final award[,]" the agency is required to notify the DOE Secretary and "the DOE Secretary will then determine, after consultation with the agency, whether such operations can be obtained at a reasonable cost with food of a high quality comparable to that currently provided employees." 34 C.F.R. § 395.33(a), (b). Alternatively, an agency may bypass the competitive process altogether and afford

priority in cafeteria operations by negotiating directly with the state licensing agency. 34 C.F.R. § 395.33(d).

Here, it was apparent from the RFP that the SLA priority would be determined through the use of a competitive process. *See* RFP at 61 (stating that, although the solicitation was set-aside for small businesses, the SLA was also permitted to submit a proposal in accordance with 34 CFR 395.33(b)). Consequently, the Army asserts, to the extent that ISC takes issue with the agency affording the SLA with the priority mandated by section 395.33, after it was found to be within a competitive range of firms eligible for award, GAO should dismiss the protest for failing to state a legal or factual basis. *Id.* at 7-8, *citing* 4 C.F.R. §§ 21.1(c)(4) and (f).

We agree with the agency that any allegation that the agency unreasonably provided a priority to the SLA fails to state a valid basis of protest. Offerors were on notice that the SLA could be afforded "priority" for award, and the applicable regulations clearly establish that the priority applies where an SLA has been included in a competitive range and ranked among those proposals which have a reasonable chance of being selected for a final award. Thus, to the extent that ISC is challenging the priority that the Army accorded SLA's proposal, that allegation fails to state a valid basis of protest.

Determination that SLA Would Offer a Reasonable Price

ISC also asserts that the agency unreasonably found that the SLA would offer a reasonable price, since the agency had not yet determined the awardee's final price.[2] *Id*. at 8. The premise on which this argument is based is flawed, however, as the record contains no agency finding that the SLA had offered, or would offer, a reasonable price. The notice of award advised ISC that the government "has determined the SLA, Ho`opono Services for the Blind, qualifies for priority consideration [in accordance with] the Randolph-Sheppard Act." Protest, attach. 4, Pre-Award Notice at 1. In response to questions from ISC, the Army advised the protester that "[t]he final evaluated price will be determined after we conclude direct negotiations with [the SLA]." Protest, attach. 6, Emails Between Protester and Agency at 1. The allegation that the agency unreasonably determined that the SLA offered a reasonable price fails to state a legally sufficient ground of protest, where the agency has, in fact, made no determination that the SLA offered a reasonable price. 4 C.F.R. §§ 21.1(c)(4) and (f).

More importantly, the RSA did not require the Army to determine that the SLA's initially proposed price was reasonable. Rather, in accordance with the RSA, the Army only needed to determine that the SLA was within the competitive range and ranked among those firms that had a reasonable chance for award. With the Army having made this determination, the Secretary of the DOE, in consultation with the Army, will determine if the SLA can provide the dining facility attendant services at a reasonable cost and comparable high quality. If the Secretary makes such a determination, the Army is required to enter into a contract or other agreement with the SLA to perform the

[2] ISC has not challenged HSB's ability to deliver high quality food. *See* Protest.

requirements. *See* 34 C.F.R. § 395.33(a). Because the agency has not yet announced what contract price was arrived at through that process, and because the Army has not announced an award in this competition, any assertion that the negotiated price will be unreasonable is premature. *Midwest CATV*, B-233105.3, Apr. 4, 1989, 89-1 CPD ¶ 351 at 3 (noting that, while an agency is in negotiations, and no award has yet been made, an allegation that the agency may make award to an unacceptable proposal is premature).

ISC also asserts that the RFP advised offerors that the Army would not make a competitive range determination until after holding discussions. The protester argues the Army's failure to conduct discussions prior to establishing a competitive range was inconsistent with the requirements of the RFP. Protest at 8. The solicitation language on which the protester relies provided as follows: "[i]n the event that discussions are held, a competitive range determination will be made." RFP at 67.

Notwithstanding that the language cited by the protester is not a model of clarity, we think that the protester's interpretation of it is unreasonable. In addition to the above language, the RFP included language advising offerors that, "[u]pon completion of discussions, the Government will request that any Offerors remaining in the competitive range submit a final revised proposal." *Id*. As argued by the agency, discussions occur after a competitive range is established, not before. Req. for Dismissal at 7 n.3. The RFP's inartful statement that, if discussions are held, a competitive range will be established, does not establish that the agency would conduct discussions prior to establishing a competitive range. The statement that, upon completion of discussions, the offerors remaining in the competitive range would submit revised proposals makes clear that the agency would first establish the competitive range. Moreover, the procurement was conducted in accordance with FAR subpart 15.3, RFP at 67, which requires an agency to establish a competitive range prior to holding discussions. *See* FAR 15.306(d) ("When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions"). The RFP established that, consistent with the FAR, the agency would conduct discussions only after the establishment of a competitive range. Because the protester's argument is based on an unreasonable interpretation of solicitation language, we dismiss it as failing to state a legally sufficient basis for protest. 4 C.F.R. §§ 21.1(c)(4) and (f).

Evaluation of Protester's Proposal

The protester contends that the Army's pre-award notice clearly indicates that the agency eliminated the protester's proposal from the competitive range because the Army evaluated ISC's proposal as unacceptable under the staffing plan subfactor. Response to Request at 2, *citing* Protest, attach. 4, Pre-Award Notice at 1. ISC challenges this determination, asserting that the Army's assessment of the protester's proposal relied on an unstated minimum staffing requirement. *See* Protest at 8.

HSB argues that, under the requirements of the RSA, "[e]ven if ISC were included in the competitive range, the Army was still required to award the contract to [HSB] pursuant to the Randolph-Sheppard Act, so long as the SLA can provide comparative quality food to that currently provided at a reasonable cost." Intervenor's Response at 2. Thus, HSB asserts, the protester could not demonstrate prejudice, even if its proposal had been unreasonably evaluated and, thus, unreasonably excluded from the competitive range. *Id*.

Competitive prejudice is an essential element of every viable protest. *MCS Mgmt., Inc.*, B-285813, B-285882, Oct. 11, 2000, 2000 CPD ¶ 187 at 9. Where the record does not demonstrate that, but for the agency's actions, the protester would have had a reasonable chance of receiving the award, our Office will not sustain a protest, even if a deficiency in the procurement is found. *Id*.

As discussed above, the SLA was identified as within the competitive range. As a consequence, it was automatically entitled to the priority for the award, with the next step in the process a determination by DOE whether the SLA should receive the award. Because of the priority given to the SLA under the RSA, whether ISC's proposal should have also been included in the competitive range is irrelevant; the agency would have to provide the SLA with the RSA priority notwithstanding the inclusion of any other offeror's proposal in the competitive range. For that reason, we agree with the intervenor that, even if the agency unreasonably excluded ISC's proposal from the competitive range, the protester cannot demonstrate that it was prejudiced by this alleged procurement error. The allegation that the agency unreasonably excluded ISC's proposal from the competitive range is therefore dismissed. *Id*.

The protest is dismissed.

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