



Decision

Matter of: TEC/WEST-TEC JV

File: B-402573.3

Date: July 30, 2010

Zachary Holliday for the protester.
William L. Bruckner, Esq., Bruckner & Walker, LLP, for the intervenor.
Candice Cornish, Esq., Department of Veterans Affairs, for the agency.
Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest of awardee's status as a service-disabled veteran-owned small business concern (SDVOSBC) with respect to a procurement under the Veterans First Contracting Program is dismissed because authority to determine SDVOSBC status under that program is vested in the Department of Veterans Affairs.

DECISION

TEC/WEST-TEC JV (TWT) protests the award of a contract to KEVCON-TTP, JV by the Department of Veterans Affairs (VA) under solicitation No. VA-101-10-RP-0013, a set-aside for competition limited to service-disabled veteran-owned small business concerns (SDVOSBC) under the Veterans First Contracting Program, for construction services at the Fort Rosecrans National Cemetery.

We dismiss the protest.

TWT presents several arguments concerning the agency's award to KEVCON-TTP. All of TWT's arguments concern issues of SDVOSBC status not for review by our Office, or otherwise fail to state a valid basis for protest.

TWT first argues that KEVCON-TTP is not an eligible SDVOSBC because the service-disabled managing partner does not have day-to-day operational control of the joint venture, and because the component firms of the joint venture have exceeded limitations on contract awards set out in 13 C.F.R. § 121.103(h). As explained below, this issue is not for our review as the authority to determine the awardee's SDVOSBC eligibility is vested in the VA, not our Office.

The procurement here is being conducted pursuant to the Veterans First Contracting Program, created by the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 3127-3128. The program provides the VA with independent authority to restrict competition to SDVOSBCs under certain circumstances. 38 U.S.C. § 3127(d).

With respect to a firm's eligibility for procurements restricted to SDVOSBCs under the authority of this program, 38 U.S.C. § 8127(e) states that "a small business concern may be awarded a contract under this section only if the small business concern and the veteran owner of the small business concern are listed in the database of veteran-owned businesses maintained by the Secretary [of the VA] under subsection (f)." The referenced provision, 38 U.S.C. § 8127(f), states, in relevant part:

(1) Subject to paragraphs (2) through (6), the Secretary shall maintain a database of small business concerns owned and controlled by veterans and the veteran owners of such business concerns.

(2) To be eligible for inclusion in the database, such a veteran shall submit to the Secretary such information as the Secretary may require with respect to the small business concern or the veteran.

* * * * *

(4) In maintaining the database, the Secretary shall carry out at least the following two verification functions:

(A) Verification that each small business concern listed in the database is owned and controlled by veterans.

(B) In the case of a veteran who indicates a service-connected disability, verification of the service-disabled status of such veteran.

As the relevant statutes state that SDVOSBC eligibility is to be determined on the basis of a list maintained in a VA-controlled database, and that eligibility for inclusion on that list is to be determined and verified by the VA, we conclude that the VA is vested with the authority to determine a firm's eligibility for SDVOSBC set-aside procurements conducted under the Veterans First Contracting Program.¹

¹ The implementing regulation states that the VA's Executive Director, Office of Small and Disadvantaged Business Utilization, "shall decide all protests on service-disabled veteran-owned or veteran-owned small business status whether raised by

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In the context of small business set-aside procurements under the Small Business Act, we will not review protests of an awardee's small business size status because the Act, 15 U.S.C. § 637(b)(6), gives the SBA, not our Office, the conclusive authority to determine matters of small business size status for federal procurements. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1) (2010); Randolph Eng'g Sunglasses, B-280270, Aug. 10, 1998, 98-2 CPD ¶ 39 at 3. Here, similarly, the applicable statute and regulation vest the VA, not our Office, with the conclusive authority to determine matters of SDVOSBC eligibility for SDVOSBC set-aside procurements under the Veterans First Contracting Program. We therefore will not review the protester's challenge to the awardee's SDVOSBC eligibility for this award.

TWT next argues that the award was improper because KEVCON-TTP failed to register with the Central Contractor Registration (CCR) system and complete all ORCA representations prior to submitting its proposal. Contrary to the protester's assertion, the solicitation did not require CCR registration and ORCA representations to be completed prior to submission of proposals. Rather, the solicitation stated that "[a]ward cannot be made until the contractor has registered," and "encouraged" contractors to register prior to submitting their proposals. Solicitation at 6. In any event, the record shows that KEVCON-TTP was in fact registered in the CCR database prior to submitting its proposal, and submitted its ORCA representations at the time it submitted its proposal. Intervenor's Comments, July 16, 2010, Attach. A, Decl. of Managing Venturer of KEVCON-TTP, JV, at 2; Attach. B (ORCA representations); Attach. C (CCR registration). Accordingly, TWT's argument fails to establish any likelihood that the agency acted improperly in this area. See Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f); Pacific Photocopy and Research Servs., B-278698, B-278698.3, Mar. 4, 1998, 98-1 CPD ¶ 69 at 4.

Finally, TWT argues that the award was improper because KEVCON-TTP failed to submit a VETS 100 report prior to receiving the award. The solicitation stated as follows:

VETS 100: Title 38, USC Section 4212(d) and Public Law 105-339, requires that federal contractors report, at least annually, the number and category of veterans who are within their workforce. Submission of the VETS 100 reporting information can be done electronically at: <<http://vets100.cudenver.edu>>. **For procurement awards in excess**

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the contracting officer or an offeror." VA Acquisition Regulation (VAAR) § 819.307(c). We note, however, that the regulations also anticipate that the Small Business Administration (SBA) will assume responsibility to decide such protests, upon execution of an interagency agreement between the VA and the SBA. See VAAR § 819.307(a).

of \$25,000, this report must be completed and accepted prior to any Federal contract award. Therefore, all potential contractors are encouraged to file every year.

Solicitation at 8 (emphasis in original).

VETS 100 reporting requirements are only applicable to firms that held a covered federal contract² in the preceding year. See 41 C.F.R. § 61-300.10(c); 41 C.F.R. § 61-300.11(c).³ KEVCON-TTP was formed on January 1, 2010 and, as it held no covered contracts in 2009, the statutory and regulatory VETS 100 reporting requirements are not currently applicable to KEVCON-TTP, and KEVCON-TTP thus is not yet required to file any report. Because the VETS 100 reporting requirement does not apply to the awardee, the protester's contention—that the award is improper because the awardee has not filed the report—fails to state a valid basis of protest.

The protest is dismissed.

Lynn H. Gibson
Acting General Counsel

² Under 38 U.S.C. § 4212(a), the reporting requirements apply to contractors and subcontractors for personal property and nonpersonal services in the amount of \$100,000 or more.

³ Specifically, both of these provisions require that the report “be submitted no later than September 30 of each year following a calendar year in which the contractor or subcontractor held a covered contract or subcontract.” These provisions reflect the limitation established by 31 U.S.C. § 1354(a)(1), which prohibits the use of appropriated funds to enter into a contract described in 38 U.S.C. § 4212(a) if the contractor did not submit a report required under 38 U.S.C. § 4212(d) “with respect to the preceding fiscal year.”