



## Decision

**Matter of:** Commandeer Construction Company LLC

**File:** B-405771

**Date:** December 29, 2011

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### DIGEST

Protest alleging that agency improperly rejected protester's bid in violation of a solicitation clause is sustained where the clause contained a latent ambiguity, the protester reasonably concluded that the clause at issue allowed for an expedited verification review of "the apparently successful offeror's" status for inclusion in the Department of Veterans Affairs Vendor Information Pages database of eligible service-disabled veteran-owned small business concerns, and the protester had no basis to be aware of the agency's contrary interpretation of the clause.

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### DECISION

Commandeer Construction Company LLC (CCC), of Twinsburg, Ohio, protests the rejection of its bid under Department of Veterans Affairs (VA) invitation for bids (IFB) No. VA-250-11-IB-0191, issued as a set-aside for service-disabled veteran-owned small businesses (SDVOSB), for renovation of an existing medical facility in Chillicothe, Ohio. CCC asserts that the VA improperly rejected its bid on the basis that the firm was not listed as an SDVOSB in the agency's Vendor Information Pages (VIP).

We sustain the protest.

### BACKGROUND

The Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, provides the VA with independent authority to restrict competition to SDVOSB concerns under certain circumstances. 38 U.S.C. § 8127(d)

(2006 & Supp. 2011). In this regard, 38 U.S.C. § 8127(e) states that a small business concern may be awarded a contract under an SDVOSB set-aside only if the concern and the veteran owner of the concern are listed in a database of veteran-owned small businesses (VOSB), which the Act requires the Secretary to maintain. The VA has designated the VIP as the database of businesses approved to participate in the VA's VOSB program, and [www.VetBiz.gov](http://www.VetBiz.gov) as the web portal that hosts the VIP. See 38 C.F.R. § 74.1 (2011).

In implementing the Act, the agency promulgated VA Acquisition Regulation (VAAR) § 804.1102, which provides that prior to January 1, 2012, all VOSB and SDVOSB concerns must be "listed" (but not necessarily verified) in the VIP database to receive contract awards, and after December 31, 2011, all VOSB and SDVOSB concerns must be "listed as verified" in the VIP database in order to receive new contract awards under the Veterans First program. Initially, a firm could self-certify its status as a VOSB or SDVOSB to be listed in the VIP database (and therefore be eligible for award). Memorandum from VA Acting Associate Deputy Assistant Secretary for Procurement Policy, Systems and Oversight and Accompanying Class Deviation from VA Acquisition Regulation (VAAR) § 804.1102 (VA Memorandum), at 1-3.

Due to instances of fraud in some firms misrepresenting their status, self-certification is no longer accepted. Id. Instead, to meet VA's statutory requirement to verify a firm's VOSB or SDVOSB status before the firm can be listed in the VIP database and receive a set-aside award, 38 U.S.C. § 8127(f)(4), the agency issued a "class deviation" from VAAR § 804.1102 requiring that the VA's Center for Veterans Enterprise (CVE) verify the status of any "apparently successful offeror" if that offeror is not already listed as verified. VA Memorandum, at 3.

This deviation also requires that all solicitations issued under the Veterans First program on or after October 1, 2010, include a provision outlining an expedited verification process for these firms.<sup>1</sup> Id. at 4. In pertinent part, this solicitation clause provided that:

(a) the apparently successful offeror, unless currently listed as verified in the Vendor Information Pages (VIP) at: [www.vetbiz.gov](http://www.vetbiz.gov) database, shall submit to Department of Veteran Affairs' (VA) Center for Veterans Enterprise (CVE) within five business days of receipt of written notice of its status as the apparently successful offeror, a

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<sup>1</sup> As of September 15, 2011, all remaining self-certified companies listed in the VIP were either verified or denied SDVOSB status. Supplemental Agency Report at 3 n.3. Since the deviation has now been discontinued, id., fast track verification only applies to apparent successful offerors under solicitations that contain the deviation clause.

verification application in accordance with 38 Code of Federal Regulations (CFR) Part 74 with such reasonably adequate documentary material, as necessary, establishing [that veteran status, ownership, and control requirements are met].

(b) CVE will examine the business documents to determine if they establish appropriate ownership and control of the business from which an offer has been received. Within 21 business days, CVE shall determine whether the firm can or cannot be verified as a SDVOSB or VOSB, as appropriate, and issue its decision thereon to the vendor in accordance with 38 CFR 74.11(e) and to the CO. The CO will use CVE's decision in making the source selection decision.

VAAR § 804.1102, Verification Of Status Of Apparently Successful Offeror (Oct. 2010) (Deviation).<sup>2</sup>

At issue in this protest is the application of the phrase “apparently successful offeror, unless currently listed as verified in the [VIP],” in determining eligibility for the fast track verification process. The VA later issued a clarification of the deviation which provides in part that “[i]f a company is not visible [listed] in the VIP database, it is not eligible for either award or Fast Track Verification. Companies in this category must undergo normal verification procedures.” VA Acquisition Policy Flash.

The VA issued the IFB on July 14, 2011, as an SDVOSB set-aside and provided that any award would be made to an SDVOSB concern that had “been verified for ownership and control and [was] so listed in the [VIP] database.” IFB at 35. The IFB also included the class deviation clause discussed above. IFB at 12. However, neither the VA Memorandum accompanying the deviation when issued, nor the above subsequent clarification of the deviation was included in the IFB here.

Prior to submitting its bid, on August 8, 2011, CCC submitted an application to the CVE for inclusion in the database. On August 30, CCC submitted its bid, which, at \$9,151,000, was the lowest received. Since CCC was not listed in the VIP, the contract specialist began taking steps to notify the firm about its need to submit a verification application under the expedited verification provisions of the deviation clause. Email from Contract Specialist, Aug. 31, 2011. However, before doing so, she “came across” the clarification and sought guidance from another VA official who advised that CCC was “ineligible” to submit an offer or receive awards because it was not verified and not in “public view.” *Id.*; Email from Mr. E, Aug. 31, 2011.

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<sup>2</sup> VA regulations otherwise provide 60 days, “when practicable,” for the CVE to process an application for verified status. 38 C.F.R. § 74.11(a). If the application is approved, a firm’s status must be verified on a yearly basis for the firm to remain listed in the VIP database. *See* 38 C.F.R. § 74.15(a).

By letter of August 31, the contracting officer advised CCC that it was not eligible because it was not visible in the VIP database; however, CCC did not receive the letter until it was later forwarded on September 13. In the meantime, by email of September 1, CVE notified the protester that the firm had provided “sufficient supporting documentation” and was “currently in the examination stage of the process” for determining whether it would be verified. CVE Email, Sept. 1, 2011. After receiving the agency’s bid rejection notice, CCC filed this protest. VA has stayed the award, pending this decision.

## DISCUSSION

CCC asserts that the agency improperly rejected its bid without reviewing its SDVOSB status under the fast track verification process set forth in the deviation clause included in the solicitation. In addition, CCC contends that it was misled into participating in this procurement by the solicitation clause, which indicates, in CCC’s view, that any apparent successful offeror—even those not currently listed in the VIP database—would be eligible for fast track verification of its status.

The VA disagrees, arguing that it issued additional guidance about its solicitation clause to address this issue. Specifically, the VA argues that the deviation clause was not intended to apply to firms not already listed in the VIP database. Thus, according to the agency, CCC is ineligible for fast track verification. We conclude that the agency’s position is inconsistent with the terms of the solicitation.

Although procuring agencies have broad discretion regarding selection of the evaluation criteria to be applied, they are required to disclose all evaluation factors and significant subfactors in order for offerors to meaningfully compete on an equal basis. An agency may not induce offerors to prepare and submit proposals based on one premise, then make source selection decisions based on another. See Hattal & Assocs., B-243357, B-243357.2, July 25, 1991, 91-2 CPD ¶ 90 at 7.

Here, the solicitation’s deviation clause provided an opportunity for “the apparent successful offeror, unless currently listed as verified in the [VIP],” to have its SDVOSB status reviewed under the fast track process. While the agency asserts that this language was only intended to apply to firms already listed in the VIP, but not yet verified, the solicitation clause does not, on its face, indicate that qualification. Indeed, as discussed above, based on the language of the clause, even the contract specialist was prepared to include CCC in the fast track process.<sup>3</sup>

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<sup>3</sup> We also see no other solicitation provisions that support the agency’s interpretation. For example, the agency notes that the IFB included VAAR § 852.219-10 (VA Notice of Total SDVOSB Set-Aside), which defines an SDVOSB as a firm that “has been verified for ownership and control and is so listed in the [VIP] database.”

(continued...)

We agree with CCC's contention that the language "unless currently listed as verified" could mean either: (1) firms that are listed, but not verified; or (2) firms that are not listed at all. Thus, under the solicitation clause, either of these types of firms is entitled to a fast track verification review. Since CCC is not yet listed as verified, and since CCC is the low bidder here (i.e., is "the apparently successful offeror," in the terms of the clause), CCC is entitled to the expedited verification review. Accordingly, we find the agency's refusal to consider CCC's bid under the fast track process to be inconsistent with the IFB's evaluation criteria, and we sustain the protest on this basis.

As a final matter, we disagree with the VA's contention that this outcome is inconsistent with our decision in FedCon RKR JV LLC, B-405257, Oct. 4, 2011, 2011 CPD ¶ 205. While we acknowledge that the situation here and the situation addressed in FedCon are similar, we think the posture of these two protesters is slightly different. FedCon argued in its filing that it was advised by VA representatives that it was listed in the VIP database, and that the contracting officer was ignoring its listing and improperly refusing to provide the company an expedited review. FedCon, supra at 3, and 4 n.7. As a result, our decision addressed the factual dispute, concluded that FedCon was not listed in the VIP database, and applied the clause as the VA argued it was intended to be applied, an interpretation to which FedCon did not object.

In contrast, CCC acknowledges that it is not yet listed, that its application is complete but pending, and that it reads the solicitation clause to provide for an expedited verification review, so long as it is "the apparently successful offeror." We think CCC has proffered a reasonable reading of the clause, and that the VA has not shown how the bidders here could have known of the agency's different reading. In this regard, we are concluding that the clause contained a latent ambiguity about how the agency would treat bidders who were not currently listed as verified. See Ashe Facility Servs., Inc., B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 10-12. We are also concluding that CCC's view is as reasonable as the agency's interpretation, and is not contradicted by other provisions of the solicitation.

For the record, we note that the problem arising from this ambiguity in the solicitation's deviation clause will be short-lived. As mentioned above, after December 31, 2011, all VOSB and SDVOSB concerns must be "listed as verified" in

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(...continued)

In the agency's view, the references to "verified" and "listed" make clear that both elements are required of an apparently successful offeror. However, the purpose of the solicitation's deviation clause was to address the situation where firms cannot be viewed as listed and verified. This decision addresses only the meaning of the solicitation clause.

the VIP database to receive awards under the Veterans First program. VAAR § 804.1102. As also mentioned above, all remaining self-certified companies listed in the VIP database were either verified or denied SDVOSB status as of September 15, 2011. Supp. Agency Report at 3 n.3. In addition, the VA advises that it stopped using the solicitation deviation clause at issue in this case as of September 15. Id.

#### RECOMMENDATION

We recommend that the agency review CCC's SDVOSB status to determine whether the company can be verified. If the protester is properly verified at the end of this review, and if the protester is otherwise found to be responsible, the agency, consistent with the terms of the solicitation clause, should award it the contract. We also recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson  
General Counsel