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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: The Argos Group, LLC

File: B-406040

Date: January 24, 2012

Dennis Cotto for the protester.
Gary Davis, Esq., General Services Administration, and Sam Q. Le, Esq., Small Business Administration, for the agencies.
Gary R. Allen, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that the 10 percent price evaluation preference in the Historically Underutilized Business Zone Act of 1997, 15 U.S.C. § 657a(b)(3)(B), should be applied in lease procurements by the General Services Administration (GSA) is sustained where the statute, on its face, applies "in any case in which a contract is to be awarded on the basis of full and open competition," and where: (1) the lease that will result from this procurement is a contract, (2) the agency is using full and open competition to award the contract; and (3) there is no language in the statute suggesting that an exception is applicable for GSA lease procurements.

DECISION

The Argos Group, LLC, of Washington, DC, protests the terms of solicitation No. ONY2508 (Hudson Valley), issued by the General Services Administration (GSA) for leased space for the Federal Bureau of Investigation in the vicinity of Hudson Valley, New York. Argos argues that GSA improperly excluded the 10 percent price evaluation preference provision mandated by the Historically Underutilized Business Zone Act of 1997 (HUBZone Act), Pub. L. No. 105-135, §§ 601-607, 111 Stat. 2592, 2627-36 (codified at 15 U.S.C. § 657a (2010), as set forth in Federal Acquisition Regulation (FAR) clause 52.219-4.

We sustain the protest.

BACKGROUND

On May 25, 2011, GSA issued the solicitation, requesting offers to rent approximately 26,300 square feet of space for the Federal Bureau of Investigation in Hudson Valley, New York. The solicitation was for a full and open competition. The solicitation states that GSA will award to the responsible offeror submitting the lowest-priced offer that conforms to the requirements of the solicitation. Solicitation § 2.1. The solicitation describes a price evaluation method in which prices will be adjusted to account for differences in square footage, cost of services, and tenant improvements. Id. § 2.3. The solicitation does not include a price evaluation preference for HUBZone small business concerns.

On October 19, Argos requested that GSA amend the solicitation to provide the 10 percent price evaluation preference provision mandated by the HUBZone Act. Argus specifically requested that GSA provide the preference by including in the solicitation FAR clause 52.219-4, which provides notice of the 10 percent price evaluation preference for HUBZone small business concerns as provided in the Act. GSA replied that the HUBZone price preference was not applicable to leasing. Contracting Officer's Statement at 1. Argos filed this protest with our Office.

DISCUSSION

Argos argues that GSA is required by statute to include the HUBZone price preference in the solicitation. In addition, Argos contends that GSA is required by FAR § 19.1302 and clause 52.219-4 to include the HUBZone price preference language in the solicitation. Protest at 2. GSA responds that HUBZone Act does not apply to lease procurements, and instead applies exclusively to goods and services. GSA Memorandum of Law at 2-6. In addition, GSA contends that the FAR does not apply to leasehold interests in real property.

As a threshold matter, we agree with GSA that the FAR does not apply to the acquisition of real property leasehold interests. The FAR, by its terms, only applies to the acquisition of supplies or services, whereas the subject procurement concerns GSA's acquisition of a real property lease. See FAR §§ 1.104 and 4.601. The inapplicability of the FAR, however, does not end our inquiry.

Under the Competition in Contracting Act of 1984 (CICA) and our Office's Bid Protest Regulations, GAO reviews protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award of contracts for procurement of *property* or services. 31 U.S.C. § 3551(A); 4 C.F.R § 21.1(a).[1]

[1] CICA does not define the term "property," but the statute that authorizes GSA to enter into leases for federal agencies does define "property" (with several exceptions not relevant here) as "any interest in property." 40 U.S.C. § 102(9). We have found (continued...)

Therefore, notwithstanding protester's misplaced reliance upon the FAR, the fundamental issue is whether the HUBZone Act mandates the inclusion of the 10 percent preference in federal procurements that involve full and open competition, including procurements of real property.

In 1997, Congress established the HUBZone program as part of the HUBZone Act, Pub. L. No. 105-135, § 601-607, 111 Stat. 2592, 2627-36. The purpose of the HUBZone program is to:

> [e]ncourage investment in low income metropolitan and rural areas where poverty and unemployment are very important concerns . . . . The goal of HUBZones is to encourage small businesses to relocate and employ people in low income, economically distressed areas by allowing these businesses to receive a special preference or set aside in bidding on federal government contracts.

See S. Rep. No. 105-62, at 67, 105th Cong., 1st Sess. (1997) (statement of Sen. Christopher Bond, Chairman, Senate Committee on Small Business). To be an eligible HUBZone firm, a small business concern must have its principal office located in a HUBZone and at least 35 percent of its employees must be from one or more HUBZones. 15 U.S.C. § 632(p)(5)(A)(i)(I)(aa).

The HubZone Act provides three mutually exclusive measures to assist HUBZone businesses with obtaining federal contracts: (1) HUBZone sole source awards; (2) HUBZone set-asides; and (3) HUBZone price evaluation preferences in full and open competitions. HUBZone Act, 15 U.S.C. §§ 657a(b)(2)(A), 657a(b)(2)(B) and 657a(b)(3)(B). The last of these states that:

> (B) . . . [I]n any case in which a contract is to be awarded on the basis of full and open competition, the price offered by a qualified HUBZone small business concern shall be deemed as being lower than the price offered by another offeror (other than another small business concern), if the price offered by the qualified HUBZone small business

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(...continued)
that neither the language nor the history of CICA provides a basis for us to exclude a contract for the procurement of real property from this definition. See e.g., RJP Limited, B-246678, Mar. 27, 1992, 92-1 CPD ¶ 310 at 3. We have also determined that a lease qualifies as "property" under the Federal Acquisition Streamlining Act, 41 U.S.C. § 254c. See National Transportation Safety Board-Application of Section 1072 of the Federal Acquisition Streamlining Act (41 U.S.C § 254c) to Real Property Leases, B-316860, Apr. 29, 2009. Based upon the foregoing, we find that leases qualify as the acquisition of "property" as that term is used in CICA.

> concern is not more than 10 percent higher than the price offered by the otherwise lowest, responsive, and responsible offeror.

15 U.S.C. § 657a(b)(3)(B).

We note first that the HUBZone Act, on its face, does not limit the type of "contract" to which it applies. As a result, we conclude that the Act broadly applies to all federal contracts that involve full and open competition. 15 U.S.C. § 657a.

Secondly, there is little dispute that a real property lease is a "contract." The Supreme Court has viewed a lease as a "contract or other obligation" that is subject to the Antideficiency Act. Leiter v. United States, 271 U.S. 204, 206-07 (1926). In addition, under the Contract Disputes Act, 41 U.S.C. § 602, the boards of contract appeals, the Court of Federal Claims, and the Federal Circuit have held that disputes arising from federal property leases fall within the jurisdiction of those courts and boards of contract appeals over contracts for the "procurement of property other than real property in being." See, e.g., Forman v. United States, 767 F.2d 875,879 n.4 (Fed. Cir. 1985); Jackson .v USPS, 799 F.2d 1018, 1022 (5th Cir. 1986); Modeer v, United States, 68 Fed. Cl. 131, 136 (2005); 801 Market Street Holdings v. GSA, CBCA No. 425, 08-1 B.C.A. ¶ 33853 (2008).[2]

Finally, we see no affirmative authority that omits HUBZone Act requirements from procurements of leasehold interests in real property. Therefore, we find that the HUBZone Act applies to acquisition of leasehold interests in real property.[3]

While the analysis above answers GSA's contention that the HUBZone Act applies only to procurements of goods and services, GSA also contends that the price preference section of the HUBZone Act applies only to sealed bid procurements because of the inclusion of the word "responsive" in the statute. In this regard, GSA notes that the HUBZone Act requires a price preference when the price of the HUBZone offeror is not more than 10 percent higher than the price of the otherwise "lowest, responsive, and responsible offeror." Memorandum of Law at 4. GSA's argument is not persuasive.

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[2] 40 U.S.C. § 585(a) authorizes GSA to enter into "lease agreements" for the accommodation of Federal agencies for not more than 20 years, and GSA regulations for acquiring leasehold interests in real property define leases as "contracts." 48 C.F.R. § 570.102.

[3] During the course of this protest, we asked the Small Business Administration (SBA) for its views about the applicability of the HUBZone Act, which SBA administers, to GSA leases. SBA advised our Office that it agrees with the protester that the 10 percent price preference found in the HUBZone Act should be included in lease procurements by GSA.

While GSA is correct that the statute uses the term "responsive," and correct in noting that the term "responsive" is often used in the context of sealed bid procurements, GSA's argument overlooks the statute's use of the term "offeror" within the same phrase. The term "offeror" is generally not used in sealed bid procurements, and is generally used in connection with procurements conducted using negotiated procedures.[4] Moreover, implementing regulations and case law have widely applied the price preference in the HUBZone Act to negotiated procurements. See, e.g., FAR § 19.1307(b); 13 C.F.R. §126.613(a)(1); Explo Systems, Inc., B-404952, B-404952.2, July 8, 2011, 2011 CPD ¶ 127 at 9; Delaney Constr. Corp. v. United States, 56 Fed. Cl. 470 (2003). Finally, nothing in the legislative history of the HUBZone Act suggests that Congress intended to limit the application of the HUBZone Act to sealed bids.

RECOMMENDATION

As stated above, we sustain the protest because the 10 percent price evaluation preference in the HUBZone Act is applicable and should be considered in procurements of leases by GSA. We recommend that the solicitation be amended to include the HUBZone Act 10 percent price evaluation preference. We also recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (2011). Protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn Gibson
General Counsel

[4] The HUBZone Act states that for eligible contracts, qualified HUBZone small businesses submit "offers," not bids. 15 U.S.C. § 657a(b)(2)(A)(i). Although the FAR notes that "offeror" can mean offeror or bidder, Part 14 (Sealed Bidding) specifically refers to "bidders," not offerors, and its overall definitional section defines responses to invitations for bids as "bids." See FAR Part 14; § 2.101.