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Decision

Matter of: Wakan, LLC

File: B-408535.2

Date: June 19, 2014

Michael J. Gardner, Esq., Erik M. Ideta, Esq., and Jennifer Mouchet Hall, Esq., Troutman Sanders LLP, for the protester.

Stephen E. Ruscus, Esq., Katelyn M. Moscony, Esq., Donna Lee Yesner, Esq., and Jonathan A. Havens, Esq., Morgan, Lewis & Bockius LLP, for Tyson Foods, Inc., the intervenor.

Katherine B. McCulloch, Esq., Defense Logistics Agency; and Laura M. Foster, Esq., Small Business Administration, for the agencies.

Paula J. Haurilesko, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that an agency failed to apply a Historically Underutilized Business Zone (HUBZone) price evaluation preference is denied, where the agency reasonably found that the protester, a certified HUBZone small business, had not agreed to perform certain conditions required by Federal Acquisition Regulation clause 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, that was incorporated into the solicitation.

DECISION

Wakan, LLC, of Ramah, New Mexico, protests the award of a contract to Tyson Foods, Inc., of Springdale, Arkansas, under request for proposals (RFP) No. SPM300-13-R-0014 issued by the Defense Logistics Agency (DLA) for chicken products. Wakan, a Historically Underutilized Business Zone (HUBZone) small business concern, argues that DLA failed to apply the HUBZone price evaluation preference in accordance with the terms of the solicitation.

We deny the protest.

BACKGROUND

The RFP, issued under the commercial acquisition procedures of Federal Acquisition Regulation (FAR) Part 12, provides for the award of two fixed-price, indefinite-delivery/indefinite-quantity contracts for chicken parts for 3 years. One contract (for frozen chicken wings) was set aside for small businesses. The other contract (for various other chicken parts) was unrestricted, and is the subject of this protest. Offerors were informed that the awards would be made on a lowest-priced, technically acceptable basis. With regard to price, offerors were advised that the contracting officer may decide to utilize on-line reverse auctioning as a means of conducting price discussions to establish final offered prices. RFP at 13.

As relevant here, the RFP incorporated by reference FAR clause 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, which provides, in relevant part, that the agency will add a factor of 10 percent to the price of all offerors, except offers from HUBZone small business concerns that have not waived the evaluation preference, and otherwise successful offers from small business concerns.¹ FAR clause 52.219-4(b)(1). The clause further provides that:

(d) Agreement. A HUBZone small business concern agrees that in the performance of the contract, in the case of a contract for

(2) Supplies (other than procurement from a nonmanufacturer of such supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern or other HUBZone small business concerns[.]

FAR clause 52.219-4(d)(2). A HUBZone small business is permitted to waive the evaluation preference, if it does not wish to perform in accordance with the agreements provided in paragraph (d) of this clause. See FAR clause 52.219-4(c).

DLA received nine proposals for the unrestricted contract, including proposals submitted by Tyson and Wakan. DLA decided to conduct discussions and included Tyson's and Wakan's proposals in the competitive range. As relevant here, Wakan identified its place of manufacturing by address and as U.S. Department of Agriculture (USDA) Plant No. [Deleted].² Agency Report (AR), Tab 4, Wakan's

¹ The purpose of the HUBZone program is to provide federal contracting assistance for qualified small business concerns located in historically underutilized business zones, in an effort to increase employment opportunities, investment, and economic development in those areas. FAR § 19.1301(b).

² Place of manufacture is defined by the RFP as "the place where an end product is assembled out of components, or otherwise made or processed from raw materials (continued...)"

Proposal, at 4. In discussions, Wakan confirmed that USDA Plant No. [Deleted] was its intended place of manufacture. See AR, Tab 8, Request for Final Proposal Revision; Tab 9, Wakan Final Proposal Revision Response, Jan. 9, 2014.

Following receipt of revised proposals, DLA stated that it would conduct a reverse auction, and advised the offerors that, if a price preference was applicable, it would be applied after the reverse auction to determine the lowest evaluated aggregate price.³ AR, Tab 11, Wakan Reverse Auction Letter. Tyson's and Wakan's reverse auction prices were as follows:

| | Total Annual Price | Total 3-Year Price |
|-------|---------------------------|---------------------------|
| Tyson | \$51,549,579.66 | \$154,648,738.98 |
| Wakan | \$55,612,794.00 | \$166,841,382.00 |

AR, Tab 12, Price Negotiation Memorandum, at 5.

Although Wakan confirmed that it was a certified HUBZone small business, see AR, Tab 4, Wakan's Proposal, at 2, DLA found that Wakan had provided for performance of the contract at a facility owned by [Deleted], a small business that was not a HUBZone certified small business. AR, Tab 6, USDA Meat, Poultry and Egg Product Inspection Directory, at 7; Tab 12, Price Negotiation Memorandum, at 5. The contracting officer concluded that Wakan had not agreed that it or another HUBZone small business would perform at least 50 percent of the cost of performing the contract (excluding the cost of materials), and that therefore Wakan was not eligible for the price evaluation preference. AR at 4.

Award was made to Tyson, a large business, as the lowest-priced, technically acceptable offeror, AR, Tab 16, Source Selection Decision, at 4, and this protest followed a debriefing.

(...continued)

into the finished product that is to be provided to the Government." RFP at 42, setting out FAR clause 52.212-3 (a), Offeror Representations and Certifications-- Commercial Items, Alternate 1.

³ Aggregate evaluated price was calculated by multiplying the offered unit prices by the estimated quantities for each line item, then summed. See RFP amend. 3, at 27.

DISCUSSION

Wakan complains that DLA did not apply the HUBZone price evaluation preference in its favor as required by FAR § 19.307 and FAR clause 52.219-4. Wakan states that the agency confirmed during the evaluation of proposals that Wakan was a certified HUBZone small business and was aware that Wakan was relying upon receiving the evaluation preference. Wakan Comments at 2. Wakan contends that, had the preference been applied, Wakan would have been the lowest-priced offeror and thus been awarded the contract. Protest at 5-6.

In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals, but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. An agency must follow the ground rules of the competition set forth in a solicitation. General Dynamics Info. Tech., B-299873, Sept. 19, 2007, 2007 CPD ¶ 194 at 6.

Here, the solicitation provided for a 10-percent evaluation preference for HUBZone small business concerns by incorporating FAR clause 52.219-4. That clause required, however, that a HUBZone small business would receive the evaluation preference only where it also agreed to certain conditions, such as applicable here in a contract for supplies, that at least 50 percent of the cost of manufacturing (excluding the cost of supplies) would be performed by the HUBZone small business or other HUBZone small business concerns. See FAR clause 52.219-4(d)(2). DLA found that Wakan had not agreed to this condition and was thus not eligible to receive the evaluation preference.⁴

Wakan disagrees that its proposal indicated that Wakan or another HUBZone small business concern would not perform at least 50 percent of the cost of manufacturing. In this regard, Wakan states that its proposal did not indicate that [Deleted], a small business, would be Wakan's subcontractor, only that the place of performance would be at [Deleted] plant. See Wakan Comments at 2, 5. In this

⁴ Although DLA argues in response to the protest that Wakan may not be a qualified HUBZone small business concern, see AR at 5-8, the contemporaneous record shows that the contracting officer accepted Wakan's status as a certified HUBZone small business but concluded that it nonetheless was not eligible for the evaluation preference because it had not satisfied the condition in paragraph (d) of FAR clause 52.219-4. See AR, Tab 12, Price Negotiation Memorandum, at 5; see also Tab 14, Post-Award Debriefing Memorandum, at 2.

regard, Wakan argues that it was merely leasing a portion of [Deleted] facilities and employees to perform the contract.⁵ Wakan Comments at 2.

DLA responds that Wakan's identification of [Deleted] plant as the place of performance indicated to the agency that Wakan was proposing to supply the products of a non-HUBZone small business.⁶ See AR at 4-5; see also DLA Response to Small Business Administration (SBA) Views, at 3 n.2. DLA also notes that Wakan's proposal provided no information concerning its purported business arrangement with [Deleted], other than the identification of [Deleted] plant as the place of performance. AR at 7.

We agree with DLA that Wakan's proposal reasonably indicated that Wakan was proposing to supply the products of [Deleted], a non-HUBZone small business. Although Wakan disagrees with this judgment, it is an offeror's responsibility to submit a well-written proposal with adequately detailed information to demonstrate compliance with the solicitation and to allow for a meaningful review by the procuring agency. Mike Kesler Enters., B-401633, Oct. 23, 2009, 2009 CPD ¶ 205 at 2-3. Here, literally the only information in Wakan's proposal addressing its performance of the contract was that performance would occur at [Deleted] plant; no further explanation of that performance at [Deleted] was provided. We find that the identification of [Deleted] plant as the place of performance without further information reasonably led DLA to conclude that Wakan was proposing to supply the products of a non-HUBZone small business.⁷ On this basis, DLA reasonably concluded that Wakan was not entitled to application of the HUBZone evaluation preference.

During the development of the protest record, we sought SBA's views concerning the protest. SBA contends that DLA violated the Small Business Act and the FAR by failing to apply the HUBZone 10-percent evaluation preference. See SBA Views,

⁵ We express no opinion regarding the effect of this arrangement on Wakan's status as a HUBZone small business for this procurement.

⁶ DLA explains that the USDA plant number (also known as the establishment number) is specific to each person conducting operations at an establishment whether a tenant or otherwise, and that Wakan would require its own USDA plant number to manufacture poultry items in compliance with solicitation and USDA requirements. AR at 6; see also Intervenor's Comments, attach. 4, Decl. of Dr. Barbara J. Masters, DVM.

⁷ Although Wakan contends that DLA could have clarified Wakan's arrangement with [Deleted], offerors have no automatic right to clarifications regarding proposals. See A. G. Cullen Constr., Inc., B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 45 at 5-6. Wakan does not argue that the agency was required to raise this concern with Wakan in discussions or that DLA failed to conduct meaningful discussions.

Apr. 24, 2014, at 1. SBA argues that the Small Business Act requires the application of the 10-percent evaluation preference in any instance where a contract will be awarded on the basis of full and open competition.⁸ Id. at 3. SBA further argues that neither the Small Business Act nor the FAR allow a contracting officer to determine whether HUBZone small businesses are “entitled” to application of the evaluation preference.⁹ Id. at 2-3.

Although we accord considerable deference to SBA’s views concerning the application of the HUBZone evaluation preference, we do not agree that Wakan was entitled to the benefit of the preference here. As noted above, the solicitation incorporated by reference FAR clause 52.291-4, which required that HUBZone small businesses perform in accordance with certain requirements. This condition of the application of the evaluation preference, which was not timely challenged, is a material part of the solicitation, with which a HUBZone offeror must comply to receive the evaluation preference in this procurement. Here, as noted above,

⁸ The Small Business Act provides, in relevant part, that “in any case in which a contract is 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 concern is not more than 10 percent higher than the price offered by the otherwise lowest, responsive, and responsible offeror.” See 15 U.S.C. § 657a(b)(3)(A).

⁹ SBA also contends that any concerns with Wakan’s “ability to comply with contractual requirements” should have been submitted to SBA under that agency’s certificate of competency (COC) program. See SBA Views, Apr. 24, 2014, at 3. The requirement to submit questions concerning the responsibility of a small business to SBA under that agency’s COC procedures does not apply here. DLA’s determination that Wakan was not entitled to the HUBZone evaluation preference did not concern Wakan’s ability to perform in accordance with the solicitation requirements (that is, the firm’s responsibility). Rather, DLA reasonably found that Wakan had not promised to perform in accordance with the condition stated in the standard FAR clause incorporated by the solicitation. See e.g., TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 6 (proposal that on its face does not satisfy a solicitation’s limitation on subcontracting clause concerns the acceptability of the proposal, and not an offeror’s responsibility).

Wakan's proposal did not demonstrate its agreement to perform in accordance with this solicitation condition.

The protest is denied.

Susan A. Poling
General Counsel