U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: AutoFlex, Inc

File: B-415926

Date: April 19, 2018

Luis D. MacDonald, for the protester.
Aleia Barlow, Esq., Department of Veterans Affairs, for the agency.
Paula J. Haurilesko, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency unreasonably terminated the protester's contract is denied, where the agency reasonably terminated the contract in response to a successful agency-level protest by another vendor.

2. Post-award protest that the agency failed to set the procurement aside for veteran-owned small business concerns is dismissed as untimely, where the solicitation identified the procurement as set aside for small business concerns.

DECISION

AutoFlex, Inc., a service-disabled veteran-owned small business (SDVOSB) of Baltimore, Maryland, protests the termination of its contract and the subsequent award of a contract to District Fleet, LLC, a small business of Thurmont, Maryland, under request for quotations (RFQ) No. 36C10X18Q0041, issued by the Department of Veterans Affairs (VA) for the lease of executive vehicles. AutoFlex contends that the VA unreasonably terminated its contract, failed to conduct the procurement in accordance with the Veterans First Contracting Act,[1] and failed to provide AutoFlex with a debriefing.

[1] Under the Veterans First Contracting program, acquisitions must be set aside for SDVOSB or veteran-owned small business (VOSB) concerns if the VA determines that there is a reasonable expectation, based on market research, that offers will be received from at least two eligible SDVOSB or VOSB concerns and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127; 48 C.F.R. § 819.7006.

We deny the protest in part and dismiss the protest in part.

BACKGROUND

The RFQ was issued on November 30, 2017, as a small business set-aside for the award of a fixed-price contract for the lease of four 2018 Chevrolet Suburbans. Agency Report (AR), Tab 3, RFQ, at 6-7, 14. The RFQ contemplated a period of performance of one base year and four option years. Id. at 7. The RFQ stated that award would be made on a lowest-price, technically acceptable basis. Id. at 26.

As relevant here, the VA amended the RFQ to respond to questions from prospective vendors. AR, Tab 5, RFP amend. 1 at 1. The amendment included the following:

> 4. Is this Veterans Affairs['] Solicitation in accordance with the Veterans First Contracting Act?
>
> - This requirement is being solicited in accordance with the Veterans First Contracting Program.

Id. at 2.

The VA received five quotations in response to the solicitation, including District Fleet's and AutoFlex's. AR, Tab 8, Abstract of Quotations. District Fleet submitted the lowest-priced quotation, which the VA initially found unacceptable.[2] Id.; Contracting Officer's Statement (COS) at 2. Autoflex, the incumbent contractor, provided the next lowest-priced quotation. COS at 3. The VA awarded the contract to Autoflex on December 20, 2017, with an effective date of March 12, 2018. Id.; Protest, attach. 2, Autoflex's Contract, at 1.

District Fleet filed an agency-level protest of the contract award to Autoflex. COS at 3; AR, Tab 11, Agency-Level Protest E-mail. The VA determined that the evaluation of District Fleet's quotation was erroneous, found the quotation to be technically acceptable, terminated Autoflex's contract, and awarded the contract to District Fleet. COS at 3-4; AR, Tab 14, Addendum to Award Decision, at 2.

Upon learning of the termination of its contract, Autoflex protested to our Office.

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[2] Autoflex was not represented by counsel, and therefore could not obtain access to non-public information pursuant to the terms of a protective order, such as the evaluation record of the awardee's proposal. Accordingly, our discussion of some aspects of the procurement record is necessarily general in nature in order to avoid reference to non-public information. Our conclusions, however, are based on our review of the entire record, including the non-public information.

DISCUSSION

Autoflex contends that the VA unreasonably terminated its contract and awarded the contract to a firm that was not a VOSB concern. Protest at 1-2. The protester argues that the VA failed to conduct the procurement in accordance with the Veterans First Contracting program and misled Autoflex into believing that the procurement would be set aside for VOSB concerns. Id.; Comments at 1. Autoflex also argues that the VA failed to provide a required debriefing. Protest at 2.

Generally, we decline to review the termination of contracts for the convenience of the government because such actions are matters of contract administration. Phenix Research Prods., B-292184.2, Aug. 8, 2003, 2003 CPD ¶ 151 at 3. Notwithstanding our practice, we will review the propriety of the termination where the termination flows from a defect the contracting agency perceived in the award process. Fisher-Cal Indus., Inc., B-285150.2, July 6, 2000, 2000 CPD ¶ 115 at 3. In such cases, we examine the award procedures that underlie the termination action for the limited purpose of determining whether the initial award may have been improper and, if so, whether the corrective action taken was appropriate to protect the integrity of the competitive procurement system. Id. We will not object to an agency's corrective action where the agency concludes that the award, because of perceived flaws in the procurement process, was not necessarily made on the basis most advantageous to the government, so long as the corrective action taken is appropriate to remedy the impropriety. Phenix Research Prods., supra.

Based on the record before us, we find no basis to object to the agency's termination of Autoflex's contract. As discussed above, the VA terminated Autoflex's contract as part of the corrective action in response to an agency-level protest. The VA concluded that it misevaluated District Fleet's quotation and corrected the error. COS at 3-4; AR, Tab 14, Addendum to Award Decision, at 2. As a result, the VA found that District Fleet offered the lowest-priced, technically-acceptable quotation, terminated the contract with Autoflex, and made a new award to District Fleet. Id. The protester has not demonstrated that the agency's actions are in error.[3] Accordingly, we deny this protest ground.

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[3] In its comments, Autoflex essentially argues that District Fleet should have been found nonresponsible because it has less than one year of commercial leasing experience. Comments at 4. We generally do not review affirmative determinations of responsibility, except in circumstances not demonstrated here. See Bid Protest Regulations, 4 C.F.R. § 21.5(c). Moreover, because District Fleet is a small business, any issue concerning the awardee's responsibility is a matter for the Small Business Administration under its certificate of competency program. SoniTech NDT, B-407115, Nov. 2, 2012, 2012 CPD ¶ 311 at 4. To the extent that Autoflex is challenging District Fleet's small business status, Comments at 4, GAO generally has no jurisdiction to review size determinations. In this regard, the Small Business Act, 15 U.S.C. § 637(b)(6), gives the Small Business Administration, not our Office, the conclusive authority to determine matters of small

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Autoflex also argues that the VA failed to conduct the procurement in accordance with the Veterans First Contracting program and misled Autoflex into believing that the procurement would be set aside for VOSB concerns. Protest at 1-2. Autoflex contends that had the VA complied with the Veterans First Contracting program, as the agency indicated in its response to industry questions on the RFQ, the agency would not have terminated its contract and issued the award to a firm that was not a VOSB. Comments at 1-2.

The VA maintains that this protest ground is an untimely challenge to the terms of the solicitation. Memorandum of Law (MOL) at 2. The VA explains that the RFQ clearly stated that the procurement was set aside for small business concerns and did not include any provisions setting the procurement aside for VOSB concerns. Id.; COS at 6.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. CI Filing Sys., LLC, B-411012, Apr. 17, 2015, 2015 CPD ¶ 131 at 4.

Autoflex's challenge to the agency's determination to set the procurement aside for small business concerns constitutes an untimely challenge to the terms of the solicitation. The notice posted to the Federal Business Opportunities (FBO) web site (www.FBO.gov) stated that "This requirement is a Firm Fixed Price, 100% Small Business Set-aside." AR, Tab 2, FBO Combined Synopsis/Solicitation Notice, at 2. Moreover, the solicitation incorporated by reference Federal Acquisition Regulation clause 52.219-6, Notice of Total Small Business Set-Aside. AR, Tab 3, RFQ, at 14. Thus vendors were on notice that the solicitation was set aside for small business concerns. Because Autoflex did not protest the set-aside status of the RFQ until after the closing date for receipt of quotations, this protest ground is untimely.

To the extent that Autoflex maintains that the agency's response to industry questions misled it into believing that the procurement was set aside for VOSB concerns, we find no basis in the record to conclude that the VA's response was misleading. Here, as discussed above, both the FBO notice and the solicitation indicated that the solicitation was set aside for small business concerns. Moreover, the VA did not amend the RFQ to change the set-aside designation of the solicitation, nor did it add VA Acquisition Regulation clauses 852.219-11, VA Notice of Total Veteran-Owned Small Business Set-

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business size status for federal procurements. 4 C.F.R. § 21.5(b)(1); Mark Dunning Indus., Inc., B-405417.2, Nov. 19, 2013, 2013 CPD ¶ 267 at 5.

Aside, or 852.219-10, VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside to the RFQ. Viewing the matter in a manner most favorable to the protester, the inclusion of the question and response concerning the Veterans First Contracting program could be construed as a patent ambiguity. A patent solicitation ambiguity exists where the solicitation contains an obvious, gross, or glaring error that is apparent from the face of the solicitation, and must be protested prior to the closing time for receipt of proposals or quotations to be considered timely. See Office Design Grp., B-415411, Jan. 3, 2018, 2018 CPD ¶ 43 at 3-4; 4 C.F.R. § 21.2(a)(1). Because Autoflex did not raise this protest ground prior to the due date for receipt of quotations, we dismiss this protest ground as untimely.[4]

Finally, we also dismiss Autoflex's contention that the VA failed to provide it with a required debriefing. The adequacy and conduct of a debriefing, or even the failure to provide a debriefing, are procedural matters that do not involve the validity of an award, and they are therefore not for our consideration. Delaware Res. Grp. of Okla., LLC, B-412617, B-412617.2, Apr. 14, 2016, 2016 CPD ¶ 118 at 7 n.3.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel

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[4] In its comments, Autoflex challenged the soundness of the VA's market research. Comments at 2-3. However, because we dismissed its challenge to the agency's set-aside determination as untimely, we also find this protest ground to be untimely. See, e.g., Bart & Associates, Inc., B-414234; B-414234.2, Feb. 24, 2017, 2017 CPD ¶ 75 at 5-6 (supplemental protest grounds found untimely because the arguments were based on information contained in the agency's report in response to an untimely initial protest).