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Decision

Matter of: Georgia Business Enterprise Program-Vocational Rehabilitation Agency

File: B-416182.2

Date: November 23, 2018

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DIGEST

Government Accountability Office will not consider protest by state licensing agency (SLA) challenging the elimination of its proposal from the competitive range under a solicitation issued pursuant to the Randolph-Sheppard Act (RSA) because mandatory binding arbitration procedures by the Department of Education are provided for under the RSA to resolve the SLA's complaint.

DECISION

The Georgia Business Enterprise Program-Vocational Rehabilitation Agency (GVRA) of Tucker, Georgia, protests the elimination of its proposal from consideration under request for proposals (RFP) No. W911SF-18-R-0001, issued by the Department of the Army for full food service at various dining facilities located on Fort Benning, Georgia. The protester asserts that its proposal was improperly excluded from the competitive range.

We dismiss the protest.

The RFP, issued on February 15, 2018, contemplated the award of a single indefinite-delivery, indefinite-quantity contract with fixed-priced task orders and a 5-year

ordering period. Request for Summary Dismissal, Tab 1, RFP at 65, 88.¹ Award was to be made on a lowest-priced, technically acceptable basis, considering technical capability, past performance and price.² Id. at 88. The solicitation stated that this procurement would be conducted pursuant to the Randolph-Sheppard Act (RSA), which establishes a priority for blind persons represented by state licensing agencies (SLA) under the terms of the RSA, in the award of contracts for, among other things, the operation of cafeterias in federal buildings. Id.; 20 U.S.C. § 107; 34 C.F.R. § 395.33(a). Thus, while the RFP generally provided for the procurement to be set aside for service-disabled veteran-owned small business concerns, it indicated that the designated SLA would also be able to submit a proposal. RFP at 50, 68. Under the RSA's implementing regulations, if a designated SLA submits an offer found to be within the competitive range for the acquisition, the agency will enter into negotiations solely with the SLA, in an effort to obtain the services at a reasonable cost. 34 C.F.R. § 395.33; Army Regulation 210-25 P. 6.b(1)(b).

On March 22, GVRA, the designated SLA, filed a protest with our Office contesting the terms of the solicitation. GVRA Protest (B-416182), Mar. 22, 2018. On May 2, GVRA withdrew its protest. GVRA-Confirmation of Withdrawal (B-416182), May 2, 2018.

On August 17, the agency notified GVRA that its proposal had been excluded from the competitive range because it was "not one of the most highly rated proposals and does not have a realistic chance of receiving contract award." Protest, Exh. 1, Agency Competitive Range Determination and Debriefing for GVRA (Aug. 17, 2018), at 1. This protest followed on August 22, in which GVRA argues that its proposal was improperly excluded from the competitive range.

This procurement was conducted pursuant to the RSA which establishes a priority for blind persons recognized and represented by SLAs, such as GVRA, in the operation of vending facilities, including cafeterias, in federal buildings. 20 U.S.C. § 107; 34 C.F.R. § 395.33(a). The RSA has the stated purpose of "providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self supporting." 20 U.S.C. § 107(a). The RSA directs the Secretary of Education to designate state agencies responsible for training and licensing blind persons, 20 U.S.C. § 107a(a)(5), and provides that "[i]n authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency." 20 U.S.C. § 107(b). For purposes of the case here, the RSA includes cafeterias, snack bars, shelters and counters within the definition of a "vending facility." 20 U.S.C. § 107e(7). With respect

¹ Citations to the RFP are to the conformed copy provided by the agency. Request for Summary Dismissal, Tab 1, RFP.

² The solicitation was amended three times. Of relevance to this protest, amendment No. 3 extended the due date for proposals to March 26. Request for Summary Dismissal, Tab 4, Amend. No. 3 at 1.

to the operation of cafeterias at federal facilities, the act directs the Secretary of Education to issue regulations to establish a priority for blind licensees whenever “such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees, whether by contract or otherwise.” 20 U.S.C. § 107d-3(e).

Pursuant to this authority, the Secretary of Education has promulgated regulations addressing the RSA’s requirements. Among the matters covered by these regulations are rules governing the relationship between the SLAs and blind vendors, rules for becoming a designated SLA within the meaning of the act, procedures for the oversight of SLAs by the Secretary, and rules governing the relationship between SLAs and other federal agencies. 34 C.F.R. part 395. With respect to disputes between SLAs and federal agencies, both the statute and the regulations provide for the filing of complaints with the Secretary, which are then to be resolved by binding arbitration. 20 U.S.C. § 107d-1(b); 34 C.F.R. § 395.37. Specifically, the regulation, which closely tracks the language of the statute, provides as follows:

Whenever any [SLA] determines that any department, agency, or instrumentality of the United States which has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of the Act or of this part and all informal attempts to resolve the issues have been unsuccessful, such licensing agency may file a complaint with the Secretary.

34 C.F.R. § 395.37(a). An arbitration panel would then be established to resolve such SLA complaints, and its decision will be “final and binding,” subject to appeal and review. 34 C.F.R. § 395.37(b).

We have interpreted the RSA and its implementing regulations as vesting authority with the Secretary of Education regarding SLA complaints concerning a federal agency’s compliance with the RSA. Louisiana State Dept. of Social Servs. Louisiana Rehabilitation Servs., B-400912.2, July 1, 2009, 2009 CPD ¶ 145 at 2; Washington State Dept. of Servs. for the Blind, B-293698.2, Apr. 27, 2004, 2004 CPD ¶ 84 at 3-5; Mississippi State Dept. of Rehabilitation Servs., B-250783.8, Sept. 7, 1994, 94-2 CPD ¶ 99 at 3. In our view, this means that such complaints are subject to the RSA’s binding arbitration provisions and are not for consideration by our Office under its bid protest jurisdiction. Maryland State Dept. of Education, B-400583, B-400583.2, Nov. 7, 2008, 2008 CPD ¶ 209 at 5. Our view in this regard reflects our more general view that where, as here, Congress has vested oversight and final decision-making authority in a particular federal official or entity, we will not consider protests involving issues subject to review by that official or entity. Washington State Dept. of Servs. for the Blind, *supra*; *see, e.g., High Point Sec., Inc.--Recon. and Protest*, B-255747.2, B-255747.3, Feb. 22, 1994, 94-1 CPD ¶ 169 at 2 (determinations by the Small Business Administration under the certificate of competency program pursuant to 15 U.S.C. § 637(b)(7)); ARA Envtl. Servs., Inc., B-254321, Aug. 23, 1993, 93-2 CPD ¶ 113 at 2 (protest of award under the Javits-Wagner-O’Day Act, 41 U.S.C. §§ 8501-8506).

Here, GVRA argues that the agency's evaluation of its price was flawed in several material respects. For example, the protest contends that the agency mechanically compared GVRA's price to the independent government cost estimate, and failed to consider its unique approach to performing the work. Protest at 7. The protester also maintains that the offerors in the competitive range, whose prices were "significantly" lower than GVRA's, proposed insufficient staffing levels. Id. at 9. The protester argues that its protest grounds concern procurement violations, and does not concern a violation of the RSA and therefore our Office should consider its protest. Protester Response to Summary Dismissal Request at 4. In this regard, the protester argues that it did not mention the RSA in its protest. Id.

Essentially, the protester argues that its proposal was improperly excluded from the competitive range because the contracting agency determined that its price was too high as compared to the proposals found to be in the competitive range, and that it was prejudiced as a result. We recognize that, like in the Maryland case, the protester did not specifically assert a violation of the RSA or its implementing regulations. Maryland State Dept. of Education, supra. However, similar to Maryland, the resolution of the SLA's protest of its exclusion from the competitive range has specific consequences set forth in the RSA's implementing regulations, which provide that if its proposal was included in the competitive range, the agency would enter into negotiations solely with the SLA, in an effort to obtain the services at a reasonable cost. 34 C.F.R. § 395.33(d). Through its allegation that the Army's allegedly improper elimination of the SLA's proposal from the competitive range, GVRA's protest implicates a potential violation of the RSA, which, as stated above, provides for binding arbitration. See 34 C.F.R. § 395.37(a). Accordingly, the matter is not for consideration by our Office under our bid protest function.

The protest is dismissed.

Thomas H. Armstrong
General Counsel