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Decision

Matter of: Tactical Shipping, LLC.

File: B-416223.4; B-416223.5

Date: September 5, 2018

Frank V. Reilly, Esq., Frank V. Reilly Attorney at Law, for the protester.
Colonel C. Taylor Smith, Christopher S. Cole, Esq., Robert Bowers, Esq., and Peter Ries, Esq., Department of the Air Force, for the agency.
Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency's rejection of offeror's proposal because offeror did not have a Voluntary Intermodal Sealift Agreement (VISA) was a negative responsibility determination that the agency was required to refer to the Small Business Administration under its certificate of competency procedures is denied where participation in VISA program is not a matter of responsibility.

DECISION

Tactical Shipping, LLC, a small business of Greenwich, Connecticut, protests the rejection of its proposal, submitted in response to request for proposals (RFP) No. HTC711-18-R-W002, which was issued by the United States Transportation Command (USTRANSCOM) for sealift transportation services. Tactical asserts that the agency rejected its proposal because Tactical was not a Voluntary Intermodal Sealift Agreement (VISA) participant, which, according to Tactical, is a responsibility determination that had to be referred to the Small Business Administration (SBA) for a certificate of competency (COC) review.

We deny the protest.

BACKGROUND

The agency posted the solicitation, a small business set-aside, on the federal business opportunities website on March 6, 2018. Contracting Officer's Statement (COS) at 7. The closing date for the receipt of proposals was April 5. Agency Report (AR), Tab 19, RFP, at 1. The solicitation provided that the contract would be awarded to the offeror

that submitted the lowest-priced, technically acceptable proposal. Id. at 23. The solicitation included three non-price factors, each of which would be rated acceptable or unacceptable: VISA participation; technical capability; and past performance. Id. The solicitation explained that a VISA participant is an entity that is enrolled with the Maritime Administration (MARAD) in the VISA program and holds a fully executed VISA contingency contract with USTRANSCOM. Id. at 24. The solicitation explained that in evaluating proposals, the agency would first validate an offeror's VISA participation status with MARAD, and confirm with the USTRANSCOM VISA contracting officer that the offeror has an active VISA contingency contract. Id. If the offeror was not enrolled with MARAD and did not have a current VISA contingency contract, the proposal would not be evaluated under the price, technical, or past performance factors. Id. at 23-24.

On April 4, Tactical filed a protest with our Office and argued that the requirement for offerors to have a VISA enrollment and contingency contract in place at the time of proposal submission was unnecessary to meet the agency's needs, restrictive of competition, and inconsistent with the agency's Justification for Other than Full and Open Competition. GAO dismissed that protest on June 19 because Tactical failed to file substantive comments in response to the agency report, which rebutted each of the protestor's allegations in detail. Tactical Shipping, LLC, B-416223, June 19, 2018 (unpublished decision).

Tactical also submitted an offer prior to the April 5 due date for proposals. COS at 13. On April 9, MARAD confirmed that Tactical was not a VISA participant. Id. As a result, the agency did not evaluate Tactical's proposal under the price, technical capability, and past performance factors. Id. at 14. The agency notified Tactical on June 5 that its proposal was rejected. Id. On June 11, Tactical filed this protest with our Office.

DISCUSSION

Tactical asserts that USTRANSCOM rejected its proposal because Tactical was not a VISA participant, which, according to Tactical, is a responsibility determination that USTRANSCOM was required to refer to the SBA for a COC review. We find that VISA participation is not a matter of responsibility and USTRANSCOM was not required to refer the matter to the SBA for a COC determination.

Responsibility is a term used to describe an offeror's ability to meet its contract obligations. See generally Federal Acquisition Regulation (FAR) subpart 9.1. In most cases, responsibility is determined on the basis of general standards of responsibility such as business integrity, adequacy of financial resources, ability to meet delivery schedules, and a satisfactory record of past performance. FAR § 9.104-1. Generally, the contracting agency determines in the first instance whether a business is responsible; a business that is found not responsible is not eligible for award. Id. § 9.103(b).

Where a small business is concerned, the agency must refer any nonresponsibility determination to the SBA under its COC procedures; the SBA has the authority to review an agency's negative determination of responsibility and to finally determine the responsibility of a small business concern by issuing or refusing to issue a COC. 15 U.S.C. § 637(b)(7); 13 C.F.R. § 125.5; FAR § 9.103(b); FAR subpart 19.6. The SBA's regulations require a contracting officer to refer a small business concern to SBA for a COC determination when the contracting officer has refused to consider a small business concern for award of a contract or order "after evaluating the concern's offer on a non-comparative basis (e.g., pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance)." 13 C.F.R. § 125.5(a)(2)(ii). The SBA is then empowered to certify the responsibility of the small business concern to the agency. 15 U.S.C. § 637(b)(7)(A). Where an agency rejects a proposal as unacceptable on the basis of factors not related to responsibility, however, referral to the SBA is not required. See Tyonek Worldwide Servs., Inc.; DigiFlight, Inc., B-409326 et al., Mar. 11, 2014, 2014 CPD ¶ 97 at 12-13; Light-Pod, Inc., B-401739, B-401739.2, Nov. 12, 2009, 2009 CPD ¶ 238 at 5.

Here, the agency rejected Tactical's proposal because Tactical was not a VISA participant. The VISA program is authorized in accordance with MARAD's authorities under the Defense Production Act of 1950 and the Maritime Security Act of 2003, and was approved as a Department of Defense (DoD) commercial sealift readiness program on January 30, 1997. COS at 3; AR, Tab 6, VISA Brochure, at 2; see also <https://www.marad.dot.gov/search/VISA/> (last visited August 29, 2018). The program is a partnership between the U.S. Government and the maritime industry to provide DoD with assured access to commercial sealift and intermodal capacity to support a significant portion of surge and sustainment requirements in the deployment of U.S. military forces during war or other national emergencies. AR, Tab 4, 79 Fed. Reg. 64462, 64464 (Oct. 29, 2014); AR, Tab 15, 83 Fed. Reg. 4552 (Jan. 31, 2018). The VISA participant assures access to its vessels and intermodal systems capacities in return for priority for DoD business during peacetime. 83 Fed. Reg. 4552-4553, 4554.¹

To become a VISA participant, an entity submits a VISA application to MARAD, independent of any specific solicitation, which is reviewed to determine whether the entity is eligible to be a VISA participant. 83 Fed. Reg. 4552, 4554. If MARAD determines that the entity is eligible to be a VISA participant, MARAD will approve the applicant by signing the VISA application document, which completes the eligibility phase of the VISA enrollment process. Id. The eligible applicant then submits a VISA

¹ The VISA program can be activated in three stages as determined by DoD with each stage representing a higher level of capacity commitment in the event of war or national emergency. 79 Fed. Reg. 64462, 64465; see also 83 Fed. Reg. 4552, 4553. When it is activated by the Secretary of Defense, it provides for a seamless, time-phased transition from peacetime to wartime operations, creating a risk to VISA participant's day-to-day commercial operations. Id.; see also COS at 5.

contingency contract proposal to USTRANSCOM, which initiates an evaluation and VISA contract award process. See id. USTRANSCOM cannot take action on a VISA contingency contract proposal until it receives written notification of VISA eligibility from MARAD. COS at 18; see also 83 Fed. Reg. 4552, 4554 (“After VISA eligibility is approved by MARAD, approved applicants are required to execute a VISA Contingency Contract with USTRANSCOM.”).

USTRANSCOM included the requirement to be a VISA participant in its solicitation in accordance with this government priority, a potential need that is separate and independent from the need for transportation services that are to be met to be eligible for award under the instant solicitation. In addition, MARAD is the agency that reviews and approves VISA applications. When USTRANSCOM rejected Tactical’s offer because Tactical was not a VISA participant, USTRANSCOM was not determining Tactical’s responsibility, that is, whether Tactical had the capacity or experience or ability to perform the contract, and meet USTRANSCOM’s need for transportation services. Rather, USTRANSCOM simply confirmed Tactical’s VISA participant status. Accordingly, we conclude that the requirement to be a VISA participant is not a matter of responsibility, and the agency was not required to refer the matter to the SBA for a COC upon rejecting Tactical’s offer. See Tyonek Worldwide Servs., Inc.; DigiFlight, Inc., supra. We therefore find no basis to sustain the protest.

De Facto Sole-Source Award

After receiving the agency report, Tactical filed a timely supplemental protest with our Office alleging that the procurement is a de facto sole-source award. Specifically, the protester asserts that since only one company was found acceptable under the VISA requirement and thus eligible for award, the agency conducted a sole-source procurement without obtaining a justification and approval to do so.

We find that Tactical is not an interested party to raise this challenge. Under the provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a).

Here, Tactical is not a current VISA participant.² Given that we dismissed Tactical’s initial protest challenging the solicitation’s terms, as Tactical admitted, Tactical would not have been eligible for award since it was unable to submit a responsive offer, that is, an offer that demonstrated that Tactical was a VISA participant when its proposal was

² In addition, to our knowledge, Tactical has not filed an application with MARAD to become a VISA participant. The agency has reported, and Tactical has not disputed, that as of June 27, Tactical was not enrolled in the VISA program and had not submitted a VISA application to MARAD. COS at 5-6.

submitted. See DAI, Inc., B-408625, B-408625.2, Nov. 6, 2013, 2013 CPD ¶ 259 at 5. Thus, Tactical is not an interested party to challenge the agency's alleged determination to proceed on a de facto sole-source basis. Id.

The protest is denied.

Thomas H. Armstrong
General Counsel