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Decision

Matter of: Dehler Manufacturing Co., Inc.

File: B-416963

Date: December 20, 2018

Kristi Morgan Aronica, Esq., and Mark A. Weitz, Esq., Weitz Morgan PLLC, for the protester.

James W. Kim, Esq., and Llewelyn M. Engel, Esq., McDermott Will & Emery LLP, for Chicago American Manufacturing LLC, the intervenor.

Garry L. Brewer, Esq., and Barbara Hebel, Esq., Department of the Army, and Sam Q. Le, Esq., Small Business Administration, for the agencies.

Louis A. Chiarella, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that Small Business Administration (SBA) improperly failed to follow its own regulations in connection with deciding whether protester was a small business concern, and thus eligible for the Certificate of Competency program, is dismissed because protest essentially challenges SBA's determination of protester's small business size status, which is within SBA's exclusive statutory authority to determine and not for review under Government Accountability Office Bid Protest Regulations.

2. Protester is not an interested party to challenge substance of contracting agency's evaluation of its quotation where record shows that protester is not a small business, and procurement is set aside for exclusive small business participation.

DECISION

Dehler Manufacturing Co, Inc., of San Antonio, Texas, protests the issuance of a delivery order to Chicago American Manufacturing LLC, of Chicago, Illinois, under request for quotations (RFQ) No. W912DY-18-T-0241, issued by the Department of the Army, Corps of Engineers, Huntsville Army Engineering & Support Center (Corps), for the provision and installation of furnishings. Dehler argues the Small Business Administration (SBA) erred in denying Dehler a Certificate of Competency (COC) review based on an allegedly incorrect size status determination of the vendor.

We dismiss the protest.

BACKGROUND

The RFQ was issued as a small business set-aside to holders of General Services Administration Federal Supply Schedule contracts for furniture, pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 8.4. Agency Report (AR), Tab 1, RFQ, at 1; Army Contracting Officer's Statement (COS)/Memorandum of Law (MOL) at 2. The solicitation contemplated the issuance of a fixed-price order for the delivery and installation of specified furnishings (*i.e.*, beds, wardrobes, refrigerator/freezers) for unaccompanied personnel housing at Fort Benning, Georgia. RFQ at 2-3. Award was to be made on a lowest-priced, technically acceptable basis using three nonprice factors: technical, schedule, and past performance. *Id.* at 10.

Five vendors, including Dehler and Chicago American, submitted quotations by the RFQ closing date. The agency evaluated Dehler's quotation and found the vendor's past performance to be unacceptable.¹ Army COS/MOL at 2. The contracting officer then referred the matter to the SBA under the SBA's COC procedures.² AR, Tab 5, Dehler COC Referral, at 1-2.

The SBA undertook a size determination of Dehler in conjunction with the vendor's COC application.³ AR, Tab 6, SBA Letter to Dehler, Sept. 19, 2018, at 1-3. The SBA subsequently concluded that Dehler was not a small business for the subject

¹ The contracting officer found Dehler had received "Unsatisfactory" or "Marginal" ratings on multiple contractor performance assessment reports within the past 3 years, and that the Corps' Huntsville Engineering and Support Center furniture program had experienced "significant performance issues" with Dehler on other recent delivery orders. AR, Tab 5C, Abstract of Quotations, at 2.

² Under the SBA's COC program, agencies must refer to the SBA a determination that a small business is not responsible if that determination would preclude the small business from receiving an award. 15 U.S.C. § 637(b)(7); 13 C.F.R. § 125.5; FAR subpart 19.6. Additionally, the SBA's regulations specifically 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); see also *AttainX, Inc.; FreeAlliance.com, LLC*, B-413104.5, B-413104.6, Nov. 10, 2016, 2016 CPD ¶ 330 at 4.

³ The SBA's regulations require that an offeror qualify as a small business concern under the applicable size standard to be eligible for a COC. 13 C.F.R. § 125.5(b).

procurement, and therefore not eligible for a COC.⁴ AR, Tab 7A, SBA Letter to Dehler, Sept. 26, 2018. Having been notified by SBA that Dehler was not eligible for a COC, the Corps then issued the delivery order to Chicago American. AR, Tab 4, Award Determination Memorandum, at 2-3; Tab 7, SBA Letter to Contracting Officer, Sept. 27, 2018. This protest followed.

DISCUSSION

Dehler alleges the SBA erred in denying Dehler a COC review because of the SBA's allegedly incorrect size determination of the vendor. Specifically, the protester contends "[t]he SBA indicated Dehler was not a small business and therefore ineligible for a COC because it could not comply with the nonmanufacturer rule Dehler challenges this determination and argues the SBA failed to follow its regulations." Protest at 4. We dismiss this protest ground because our Office has no jurisdiction to review size determinations.

The Small Business Act, 15 U.S.C. § 637(b)(6), gives the SBA, not our Office, the conclusive authority to determine matters of small business size status for federal procurements. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1); Mark Dunning Indus., Inc., B-405417.2, Nov. 19, 2013, 2013 CPD ¶ 267 at 5; The Holiday Inn North Raleigh, B-276389.2, July 8, 1997, 97-2 CPD ¶ 8 at 2. We therefore will not review a protester's challenge to another company's size status, nor will we review a decision by the SBA that a company is, or is not, a small business for purposes of federal procurements. Platinum Business Servs., LLC, B-413947, Dec. 23, 2016, 2016 CPD ¶ 377 at 6; Mark Dunning Indus., Inc., *supra*. The protest here involves the issue of whether the SBA based its size determination on a proper application of its regulations. The question of whether the SBA followed its own regulations when making the size determination is inextricably linked to the size determination itself; thus, SBA's authority, to be conclusive in this area, must encompass the determination of what regulations are applicable. See R4 Integration, Inc., B-414592, June 30, 2017, 2017 CPD ¶ 211 at 1 n.1; The Holiday Inn North Raleigh, *supra*, at 2. Accordingly, this issue, and the issue of whether Dehler qualifies as a small business for purposes of this procurement are not for our review. The Holiday Inn North Raleigh, *supra*.

Citing Section 21.5(b)(2) of our Bid Protest Regulations, the protester contends that it is appropriate for us to review the protest because it is based on the allegation that SBA failed to follow its own regulations (as part of the size determination) and because this then resulted in the SBA denying Dehler a COC review. Protest at 4. We find Dehler's position reflects a misunderstanding of our Regulations. While we will review SBA's decision whether to issue a COC under certain circumstances--which we "will interpret narrowly out of deference to the role of the SBA in this area"--including where there is a

⁴ Dehler sought appellate review of this size determination with the SBA Office of Hearings and Appeals (OHA), which was denied on December 13. SBA MOL at 1-2; OHA Notice of Size Appeal Decision (Dehler), Dec. 13, 2018, at 1-6.

showing of failure to follow its own regulations, 4 C.F.R. § 21.5(b)(2), this exception does not apply where, as here, the protest relates to the SBA's determination as to the protester size status. Rather, as noted above, in recognition of the conclusive statutory authority vested in SBA over size status issues, our Regulations state that we will not review challenges to the size status of particular firms. 4 C.F.R. § 21.5(b)(1); see The Holiday Inn North Raleigh, supra.

Dehler also protests the Corps' evaluation of its past performance and responsibility. Protest at 2-4. Under our Bid Protest Regulations, only an "interested party" may maintain a protest; an interested party is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract, or the failure to award a contract. 4 C.F.R. §§ 21.0(a)(1), 21.1 (a); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1. Where a firm would not be in line for award in the event its protest is sustained, that firm lacks the direct economic interest necessary to maintain a protest. Creative Computing Solutions, Inc., B-408704, B-408704.2, Nov. 6, 2013, 2013 CPD ¶ 262 at 3; PAE Gov't Servs., Inc., B-407818, Mar. 5, 2013, 2013 CPD ¶ 91 at 3. Because Dehler is no longer a small business, and because the procurement here was set aside for small businesses, Dehler is ineligible for issuance of the delivery order even if its challenges to the agency's evaluation were upheld. Creative Computing Solutions, Inc., supra, at 4 (finding protester is not an interested party where acquisition is set aside for small businesses, and evidence in the record is that protester is not a small business and would therefore not have been eligible for award). Accordingly, Dehler is not an interested party to pursue these protest allegations.

The protest is dismissed.

Thomas H. Armstrong
General Counsel