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Decision

Matter of: Alphapointe

File: B-417834

Date: September 4, 2019

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Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging award of contract to a service-disabled veteran-owned small business (SDVOSB) concern is dismissed as an untimely challenge to the agency's decision to issue the solicitation as a total SDVOSB set-aside where: (1) the protester alleges that the agency failed to conduct a "Rule of Two" analysis in accordance with the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128, and (2) the protest was filed after closing of the solicitation.

DECISION

Alphapointe, of Kansas City, Missouri, protests the award of a contract to Quality Innovation, Inc., a service-disabled veteran-owned small business (SDVOSB) concern of Austin, Texas, under solicitation No. 36C-25519-Q-00004, issued by the Department of Veteran Affairs (VA), for switchboard telephone operator services for the Kansas City VA Medical Center. The protester argues that the award of the contract to a SDVOSB was improper because the agency failed to conduct a "Rule of Two" analysis to determine where there are two or more qualified SDVOSBs capable of performing the work under the contract in accordance with the Veterans Benefits, Health Care, and

Information Technology Act of 2006 (the Veterans Benefits Act), 38 U.S.C. §§ 8127-8128.¹

We dismiss the protest.

BACKGROUND

The AbilityOne program is administered by the Committee for Purchase from People Who Are Blind or Severely Disabled (Committee), and implements the Javits-Wagner-O'Day (JWOD) Act, 41 U.S.C. §§ 8501-8506 by providing employment opportunities through the award of federal contracts, for people who are blind or have other severe disabilities. 41 C.F.R. § 51-1.3. The JWOD Act grants the Committee the exclusive authority to establish and maintain a procurement list of supplies and services provided by qualified non-profit agencies for the blind or disabled under the AbilityOne program. 41 U.S.C. §§ 8502(a), 8503(a); FAR subpart 8.7. Federal agencies are required to obtain all supplies and services that are on the Procurement List from a central nonprofit agency (CNA) or its designated AbilityOne participating nonprofit agencies (NPA). FAR § 8.705-1(a). Agencies are also "not permitted to purchase commercial items that are essentially the same as commodities on the Procurement List." 41 C.F.R. § 51-6.13(c). National Industries for the Blind (NIB) is designed by AbilityOne as a CNA that is charged with performing various functions in furtherance of the JWOD Act. 41 C.F.R. § 51-6.13(c); 41 C.F.R. § 51-3.1(a). As a CNA, NIB is responsible for distributing orders from federal agencies for products on the Procurement List among NIB's associated state and local nonprofit agencies servicing the blind.² 41 C.F.R. § 51-3.2.

Telephone switchboard operator services for the Kansas City VA Medical Center have been--and still remain--on the Procurement List since 2003. 68 Fed. Reg. 62052 (Oct. 31, 2003). Since 2003 and prior to the issuance of solicitation No. 36C-25519-Q-

¹ Generally, the term "Rule of Two" describes a long-standing regulatory policy applicable to all federal agencies intended to implement provisions in the Small Business Act, 15 U.S.C. § 644(a), requiring that small businesses receive a "fair proportion of the total purchases and contracts for property and services for the Government." 49 Fed. Reg. 40,135 (Oct. 12, 1984). This government-wide Rule of Two requires agencies to set aside for small business participation an acquisition over \$150,000 if there is a reasonable expectation of receiving fair market offers from at least two responsible small business concerns. Federal Acquisition Regulation (FAR) § 19.502-2(b). References to the Rule of Two in our decision refers to the VA's requirement grounded in title 38 which requires acquisitions be set aside for SDVOSB concerns if the VA determines that there is a reasonable expectation that offers will be received by at least two SDVOSB concerns and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d).

² Alphapointe is an NPA associated with the NIB CNA under the AbilityOne program. Protest at 1.

00004, the agency has obtained telephone switchboard operator services for the Kansas City VA Medical Center from Alphapointe through the AbilityOne program. Protest at 5.

The Veterans Benefits Act created the Veterans First Contracting Program and provides the VA with independent authority to set aside contracts for SDVOSB and veteran owned small business (VOSB) concerns. Buy Rite Transport, B-403729, B-403768, Oct. 15, 2010, 2010 CPD ¶ 245 at 2-3; Apex Ltd., Inc., B-402163, Jan. 21, 2010, 2010 CPD ¶ 35 at 2. Under the Veterans First Contracting Program, acquisitions must be set aside for SDVOSB concerns if the VA determines that there is a reasonable expectation that offers will be received by at least two SDVOSB concerns and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d).

On May 20, 2019, the VA's Deputy Senior Procurement Executive issued a class deviation from section 808.002 of the VA Acquisition Regulation (VAAR), Priorities for Use of Government Supply Sources, and VAAR subpart 808.6, Acquisition from Federal Prisons Industries, Inc.³ Class Deviation from VAAR 808.002, Priorities for Use of Government Supply Sources and VAAR Subpart 808.6, Acquisition from Federal Prison Industries, Inc. (Class Deviation). As relevant here, the class deviation revised VAAR § 808.002, Priorities for Use of Government Supply Sources, which implemented for the VA the FAR part 8 mandatory source priority of the AbilityOne Procurement List. The deviation instructs VA contracting officers to “apply the VA Rule of Two” to determine whether a requirement should be awarded to a SDVOSB or VOSB under the SBA prior to considering an award to an AbilityOne NPA. The deviation, further states that “if an award is not made to an eligible . . . SDVOSB or VOSB under VAAR subpart 819.70, the priority use of AbilityOne applies and supplies and services on the Procurement List are mandatory sources.”

On June 11, 2019, the agency issued the solicitation through the Federal Business Opportunities (FBO) website,⁴ seeking telephone switchboard operator services for the Kansas City VA Medical Center pursuant to FAR part 12. Agency Request for Dismissal at 1-2; Id., attach. 2, Solicitation at 1, 29-34, 53-57. The solicitation was set aside for SDVOSB/VOSB concerns and included VAAR clause 852.219-10, VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside (Jul 2016) (Deviation). Solicitation at 38-39. The closing date for the receipt of quotations was set for June 28. Agency Request for Dismissal at 3.

³ As explained in the class deviation, the deviation to the VAAR implements a decision from the U.S. Court of Appeals for the Federal Circuit issued on October 17, 2018, affirming the U.S. Court of Federal Claims decision in PDS Consultants, Inc. v. United States, 132 Fed. Cl. 117 (2017), requiring the VA to give VOSBs first priority before purchasing from the AbilityOne program. Class Deviation at 1-2; see also PDS Consultants, Inc. v. The United States, 907 F.3d 1345 (Fed. Cir. 2018).

⁴ FBO is “the single point where Government business opportunities, greater than \$25,000, including synopsis of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public.” FAR § 2.101.

On July 30, 2019, the VA issued a notice of award to Quality Innovations, Inc., a SDVOSB concern. Protest at 6. This protest followed.

DISCUSSION

Alphapointe argues that “the VA did not meet its obligation to conduct a Rule of Two analysis before setting aside the contract for only VOSBs.” Protest at 7. In support of its argument, the protester points to its exchanges with the VA prior to the issuance of the solicitation and alleges that “[g]iven the actions of the VA from October 2018 through early June 2019, it seems highly unlikely that the VA engaged in any Rule of Two analysis.” Id. Alphapointe also argues, based on a statement allegedly made by the VA in October 2018, that even if the VA performed a Rule of Two analysis, “the evidence strongly suggests that the VA was unable to identify more than one qualified VOSB” to perform the services. Id. at 7-8.

Prior to the agency report due date, the agency and the intervenor requested that our Office dismiss Alphapointe’s protest as untimely because it was filed after the closing time for receipt of proposals.

Alphapointe responds that its protest is timely because it is not challenging improprieties apparent on the face of the solicitation but rather the VA’s decision to ultimately award the contract to a SDVOSB concern because the VA could not satisfy the Rule of Two requirement. In this regard, Alphapointe contends that the VA’s actions prior to the award of the contract led Alphapointe to “believe[] that the VA intended to proceed with the execution of a new five year AbilityOne contract because the VA neither completed its Rule of Two analysis nor concluded there were two or more SDVOSBs to perform the work.” Protester’s Response to Requests for Dismissal at 2.

Specifically, Alphapointe represents that on October 5, 2018, several months prior to the conclusion of its most recent contract with the VA on December 31, 2018, the VA issued a sources sought notice for the purpose of conducting market research.⁵ Id. at 2; Protest at 5. Despite the sources sought notice stating that a total set-aside for SDVOSBs was “anticipated based on the Veterans Administration requirement with Public Law 109-461, Section 8127 Veterans Benefit[s] Act,” Alphapointe contends that the VA assured a NIB representative that the VA anticipated procuring the services through the AbilityOne program. Protest at 5. No solicitation or contract was issued; however, the VA extended Alphapointe’s contract through June 30, 2019. Id.

On April 24, 2019, the contracting officer responsible for the contract informed NIB that the “VA planned to move forward with the Rule of Two for the contract.” Id. However, on May 20, the same contracting office informed NIB that the VA planned on renewing

⁵ The agency does not address its actions between October 5, 2018 and June 11, 2019 in its request for dismissal. Accordingly, this decision relies on the representations made by Alphapointe in its protest.

Alphapointe's contract and to continue to procure switchboard telephone operator services through the AbilityOne program.⁶ Id. As a result, Alphapointe submitted a new pricing proposal to the VA on May 29. Id. On June 3, the VA issued another modification to Alphapointe's contract to extend it to September 30, 2019. Id.

The protester contends that because the VA was simultaneously working with Alphapointe to execute a new contract and given the AbilityOne contracting process, it was not until the VA issued an actual notice of award to Quality Innovations that Alphapointe realized that the VA had no intention of awarding Alphapointe the contract. Protester's Response to Requests for Dismissal at 2. In this regard, Alphapointe argues that neither it nor any other AbilityOne NPA had any reason to monitor the solicitation or notifications of federal procurements on FBO due to the manner in which the AbilityOne program operates.⁷ Id. at 2 n.2. We disagree.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These 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. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 3-4. Our timeliness rules 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); see AmaTerra Envtl. Inc., B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3. Additionally, our Office has consistently explained that protesters are charged with constructive notice of the contents of procurement actions published on the FBO website. Boswell & Dunlap, LLP, B-416623, Oct. 10, 2018, 2018 CPD ¶ 351 at 3. The doctrine of constructive notice creates a presumption of notice in law that cannot be rebutted. Id. By definition, the doctrine imputes knowledge to a party without regard to the party's actual knowledge of the matter at issue. Id.

While we agree that the agency's actions and communications, as represented by Alphapointe, with regard to the VA's follow-on contract to Alphapointe's most recent

⁶ Alphapointe represents that this is also the same day that the VA issued its Class Deviation. Protest at 4.

⁷ Specifically, Alphapointe alleges that:

Under JWOD, once a product or service is added to the Procurement List, executive agencies, including the VA, generally have no discretion regarding the purchase of the product or service. 41 U.S.C. § 8504. Under the AbilityOne Program, contracts are not subject to the Competition in Contracting Act or the Federal Acquisition Regulation, and contracting officer's do not engage in a competitive procurement process typical of the federal procurement process.

Protester's Response to Requests for Dismissal at 2 n.2.

contract were less than clear--and possibly contradictory--Alphapointe was put on notice as early as October 5, 2018, when the agency issued a sources sought notice, that the agency contemplated awarding a contract outside of the AbilityOne program. Further, while the agency may have communicated that it intended on procuring the services through the AbilityOne program, the agency issued the Class Deviation and a temporary rule in the Federal Register implementing the deviation on June 24, 2019, that contradicted that communication. See Department of Veterans Affairs, Issuance of Class Deviation From VA VAAR Part 808-Required Sources of Supplies and Services and Conforming Amendments, 84 Fed. Reg. 29389 (June 24, 2019). Moreover, while Alphapointe may have been accustomed to a different procurement process, we do not find that its prior experience provides an exception to our timeliness rules or our constructive notice rules.

Here, the solicitation, posted on FBO with closing date of June 28, clearly stated that it was set-aside for SDVOSBs. To the extent that Alphapointe wished to challenge the agency's decision to set-aside the procurement for SDVOSBs it was required to do so prior to the solicitation closing date. Therefore, Alphapointe's August 9, 2019 protest--filed after the closing time for submission of quotations--is untimely. 4 C.F.R. § 21.2(a)(1); see AutoFlex, Inc., B-415926, Apr. 19, 2018, 2018 CPD ¶ 145 at 4 (dismissing as untimely a post-award protest challenging agency's failure to set procurement aside for VOSBs where the solicitation clearly stated that the procurement was set aside for small business concerns and did not include any provisions for setting the procurement aside for VOSB concerns).

The protest is dismissed.⁸

Thomas H. Armstrong
General Counsel

⁸ Quality Innovations, the intervenor, also requested that our Office dismiss the protest on grounds that Alphapointe, a non-SDVOSB, is not an interested party to challenge the award to Quality Innovations under a solicitation set-aside for SDVOSBs. Intervenor's Request for Dismissal at 1-3. The protester maintains that it is an interested party with a direct economic interest because if there are not two or more qualified SDVOSBs capable of performing the work under the contract, the contract must remain under the purview of the AbilityOne program, and as the incumbent AbilityOne NPA designated to perform the services, it would be the presumptive awardee of the contract at issue. Protester's Response to Requests for Dismissal at 3. Because we dismiss the protest as untimely, we do not separately address the intervenor's alternate ground for dismissal.