



Decision

Matter of: SHABA Contracting

File: B-417934

Date: December 3, 2019

Hadley Gross, for the protester.
Azine Farzami, Esq., Department of Agriculture, for the agency.
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participated in the preparation of the decision.

DIGEST

Protest challenging terms in solicitation requiring offerors that propose to employ H-2B nonimmigrant workers to submit temporary employment certificates at the time of proposal submission is denied where the protester fails to establish that the solicitation terms are inconsistent with law or regulation.

DECISION

SHABA Contracting, a small business of Robbinsville, North Carolina, challenges the terms of solicitation No. 12455019R0025, issued by the Department of Agriculture, Forest Service, for tree cutting services in the Croatan National Forest in North Carolina. The protester contends that the terms of the solicitation are inconsistent with certain labor laws and regulations and are unreasonable.

We deny the protest.

BACKGROUND

On August 5, 2019, the agency issued the solicitation for manual crop tree release on 184 acres in Croatan Ranger District, New Bern, North Carolina. Agency Report (AR), Tab 7, Request for Proposals (RFP), at 1. The period of performance will be from the date of award to December 31. Id. The RFP includes an attachment titled "Employment of Eligible Workers and Workforce Certification," which sets forth requirements for offerors that will employ nonimmigrant workers under the Department

of Labor's (DOL) H-2B¹ temporary nonimmigrant program. RFP, attach. 6, at 1. The attachment states that "[c]ontractors are required to provide certification of employment status as part of their representations, certifications, and acknowledgements at the time of submission of proposals/offers/quotes." Id. at 6 (emphasis added). The certification of employment status set forth in the attachment requires offerors to "describ[e] the workforce they will utilize to fulfill the contract requirements under this solicitation and any resulting contract. If the Contractor will supply workers under the H-2B Program, the Contractor is required to provide a copy of the Temporary Employment Certificate issued by DOL." Id.; see also id. at 2 ("The Contractor shall provide applicable H-2B Temporary Employment Certificate and/or Farm Labor Contractor Certificate as part of their representations, certifications, and acknowledgements.").

On August 15, prior to the proposal due date, SHABA filed an agency-level protest alleging, among other things, that the solicitation's provisions requiring a temporary employment certificate for H-2B workers at the time of offer are inconsistent with the applicable DOL regulations at 20 C.F.R. §§ 655.11 and 655.12. AR, Tab 8, Agency-Level Protest, August 15, at 1-2.² The agency denied the agency-level protest and SHABA timely filed this protest with our Office.

DISCUSSION

The protester alleges that the solicitation's requirement for certifications by employers of H-2B workers is inconsistent with DOL's registration requirement under 20 C.F.R. §§ 655.11 and 655.12.³ Protest at 2. Specifically, the protester contends that a potential H-2B employer would not be able to obtain and submit with the offer a valid

¹ The solicitation defined an H-2B worker as "a nonimmigrant holding a visa authorizing the individual to legally work in the US to perform temporary labor or services." RFP, attach. 6, at 2.

² On June 17, 2019, the agency awarded a contract under solicitation No. 12455019R0017 for these same services. AR, Tab 1, Memorandum of Law (MOL), at 2. SHABA filed an agency-level protest challenging several aspects of the solicitation and award, including the omission of provisions requiring contractors to comply with the H-2B visa program in the solicitation and the awarded contract. Id.; AR, Tab 5, Agency-Level Protest, June 25, 2019, at 2. The agency took corrective action, terminated the awarded contract, and resolicited the requirement under solicitation No. 12455019R0025. AR, Tab 6, Response to Agency-Level Protest, July 15, 2019, at 1.

³ SHABA also challenged the agency's failure to include a requirement for workers compensation insurance. Protest at 3. However, because the agency substantively responded to this basis of protest, MOL at 6, and the protester did not further address this issue in its comments on the agency report, we consider the protester to have abandoned this issue and we will not consider it. Analex Space Sys., Inc.; PAI Corp., B-259024, B-259024.2, Feb. 21, 1995, 95-1 CPD ¶ 106 at 9.

temporary employment certificate from DOL for the work required under the solicitation during the time the solicitation would be open--32 days. Id. According to SHABA, the application and approval process set out in the regulations governing the issuance of those certificates requires a period of 120 days. Id.

The agency responds that the protester's allegations should be dismissed for failing to state a valid basis of protest because SHABA has not alleged the agency violated a procurement law or regulation. MOL at 3-4. The agency further argues that the terms of the solicitation, specifically the parts requiring temporary employment certificates from employers of H-2B workers, are not in conflict with applicable DOL regulations because potential employers of H-2B workers could obtain the certificates through business planning. Agency Response to Request for Additional Information at 1.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act (CICA) of 1984, 31 U.S.C. §§ 3551-3557. Our Office reviews alleged violations of procurement laws and regulations to ensure that the statutory requirements for full and open competition are met. 31 U.S.C. § 3552(a); Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. Although our Office's bid protest jurisdiction arises under CICA, we have reviewed protests alleging that the terms of solicitations conflict with laws other than CICA, where those laws have specific procurement-related provisions. See, e.g., Stone Hill Park, LLC, B-414555.4, July 18, 2017, 2017 CPD ¶ 226 at 1 (addressing provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207). Because the protester argues that the terms of the solicitation are inconsistent with DOL regulations such that offerors will be unable to meet the solicitation's requirements, we conclude this is a matter within our bid protest jurisdiction.

According to the agency, pursuant to the solicitation, if an offeror intends to utilize H-2B workers, the offeror must provide a temporary employment certification issued by DOL. Agency Response to Request for Additional Information at 1; RFP, attach. 6, at 1. DOL regulations provide that employers that desire to hire H-2B workers must first establish their temporary need for the services or labor by filing an H-2B registration with the DOL's national processing center (NPC). 20 C.F.R. § 655.11. This registration filing must be accompanied by documentation evidencing: the number of positions that will be sought in the first year of registration; the time period of need for the workers requested; and that the nature of the need for the services or labor is non-agricultural and temporary, and is justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security regulations.⁴ Id. § 655.11(a). The registration filing must be received by the NPC by no less than 120 calendar days and no more than 150 calendar days before the employer's date of need. Id. § 655.11(c). The regulations further provide that an NPC

⁴ The applicable Department of Homeland Security regulations, in relevant part, define "seasonal need" as "services or labor . . . traditionally tied to a season of the year by an event or pattern and is of a recurring nature." 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

certifying officer will review the H-2B registration and accompanying documentation and make a determination based on a number of factors, including whether the request represents a bona fide job opportunity. Id. § 655.11(e). Once the H-2B registration is approved, the employer is then authorized for a specified period of up to three consecutive years from the date of approval to file an application for temporary employment certification. Id. §§ 655.11(h)(1) and 655.12(a). If there is a material change in the circumstances of the employer's need as stated in its registration--such as an increase in the number of needed employees by more than 20 percent or a change in the dates needed for the job opportunity by more than 30 days--the employer must file a new H-2B registration before applying for temporary employment certification. Id. § 655.12(a).

The agency argues that nothing in the solicitation precludes an offeror proposing to employ H-2B workers from obtaining a valid temporary employment certificate in accordance with the regulations at 20 C.F.R. §§ 655.11 and 655.12 in sufficient time to submit it with the offeror's proposal. Agency Response to Request for Additional Information at 1. The agency explains that it "does this type of work every year at the same time of year thus creating a pattern of need." Id. The agency also explains that because of the repetitive (and seasonal) nature of the work, a potential offeror could establish a bona fide job opportunity by "reviewing the previous years, identifying the needs' requirement, and applying for H-2B workers based on the pattern of need." Id. Therefore, the agency argues, with prudent business planning, an offeror planning to use H-2B workers could submit an H-2B registration for this work on October 1, 2018, when DOL opens the application process each year, and obtain a temporary employment certification in sufficient time for submission with its proposal that was due on September 6, 2019. Id. The agency also notes that it publishes in October of each year its advanced acquisition plan, identifying the types of projects forecasted for the year, which would further aid potential offerors with the necessary advance planning as to their need to hire H-2B workers. Id.; see e.g., Forest Service 2020 Forecast of Contracting Opportunities, <https://www.dm.usda.gov/smallbus/forecast.htm>. We find the agency's explanations reasonable.

As noted, the protester here appears to base its arguments on the premise that the agency must first issue a solicitation for a particular opportunity before a potential offeror proposing to employ H-2B workers can file an H-2B registration with DOL and obtain a valid temporary employment certificate for that opportunity. Comments at 1. However, the agency's explanations contradict that premise and the protester does not provide any evidence or substantive arguments to the contrary. Agency Response to Request for Additional Information at 1; see Protester Responses to Request for Additional Information, Electronic Protest Docketing System (EPDS) Docket Entry Nos. 8-22, 26. Specifically, we find that the agency reasonably explains the procedural requirements of the registration and issuance of the temporary employment certificate by DOL, such that an offeror proposing to use H-2B workers to perform on the contract would be able to obtain such certification in time to submit it before the deadline for receipt of proposals. Therefore, we deny the protest allegations.

To the extent SHABA is arguing that potential offerors will present “out-of-status” or invalid H-2B certifications, and the agency would accept such invalid certifications, such allegations are speculative and premature as they merely anticipate improper action by potential offerors and the agency. See GC Servs. Ltd. P’ship, B-416443, B-416443.2, Sept. 5, 2018, 2018 CPD ¶ 313 at 9; Booz Allen Hamilton, Inc., B-414822.5, Oct. 13, 2017, 2017 CPD ¶ 315 at 4. In addition, to the extent SHABA argues that potential offerors will fail to perform in accordance with their representations and certifications, such allegations would be a matter of contract administration, which is not subject to review by our Office. 4 C.F.R. § 21.5(a); see The Galveston Aviation Weather Partnership, B-252014.2, May 5, 1993, 93-1 CPD ¶ 370 at 3.

The protest is denied.

Thomas H. Armstrong
General Counsel