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# Decision

**Matter of:** Ranger American of the Virgin Islands, Inc.

**File:** B-418539; B-418539.2

**Date:** June 11, 2020

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Jonathan D. Shaffer, Esq., Mary Pat Buckenmeyer, Esq., and Todd M. Garland, Esq., Smith Pachter McWhorter PLC, for the protester.

Kenneth A. Martin, Esq., The Martin Law Firm, PLLC, for Falken USVI, LLC, the intervenor.

Bruce James, Esq., and Matthew Lane, Esq., Department of Homeland Security, for the agency.

Lois Hanshaw, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest challenging agency's conclusion that the awardee was eligible for award as a business residing or primarily doing business within the designated disaster area, as required by the solicitation, and under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207, is denied where the agency's determination was reasonable, and the record shows that the vendors were treated in a fair and equitable manner.

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## DECISION

Ranger American of the Virgin Islands, Inc. (Ranger), of St. Thomas, U.S. Virgin Islands, protests the award of a contract to Falken USVI, LLC (Falken), a small business of St. Thomas, U.S. Virgin Islands, under request for quotations (RFQ) No. 70FBR220Q00000014, issued by the Department of Homeland Security, Federal Emergency Management Agency (FEMA), for armed guard services across the U.S. Virgin Islands. Ranger contends that the agency improperly evaluated Falken's quotation regarding its eligibility under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act). See 42 U.S.C. §§ 5121-5207. The protester also contends that the agency engaged in unequal discussions.

We deny the protest.

## BACKGROUND

FEMA is authorized to provide disaster assistance to individuals and households for emergencies, major disasters, and incidents of national significance under the Stafford Act. Contracting Officer's Statement (COS) at 1; 42 U.S.C. §§ 5121-5207. On September 20, 2017, the President of the United States issued a major disaster declaration under the authority of the Stafford Act for the territory of the Virgin Islands as a result of the devastating effects from Hurricane Maria. COS at 1; see Disaster Declaration, 82 Fed. Reg. 46,813-14 (Oct. 6, 2017).

On February 5, 2020, FEMA issued the RFQ via the Unison Marketplace website<sup>1</sup> pursuant to the commercial item and simplified acquisition procedures of Federal Acquisition Regulation (FAR) parts 12 and 13. COS at 2. The RFQ sought armed guard services to safeguard federal employees, visitors, and property at both temporary and fixed facilities in St. Croix, St. John, and St. Thomas during the disaster and emergency declaration. Agency Report (AR), Tab F, RFQ at 3; Tab G, Statement of Work (SOW) at 1. The RFQ was issued as both a Stafford Act set-aside for firms in the disaster-affected areas, and a set-aside for small businesses. RFQ at 2-3.

The solicitation contemplated the award of a fixed-price contract to the vendor offering the lowest-priced, technically acceptable quotation. COS at 2; AR, Tab H, Evaluation Criteria at 1. The RFQ provided for a contract with a period of performance of a base year and four 1-year options. AR, Tab L, Award Memorandum (Memo) at 1.

With respect to the Stafford Act set-aside, the RFQ provided as follows: “[t]he area covered in this contract is: The Territory of the United States Virgin Islands Disaster Declaration (DR 4340) which includes the islands of St. Croix, St. John and St. Thomas.” RFQ at 3. The RFQ required each vendor to represent that it does, or does not, reside or primarily do business in the designated set-aside area pursuant to FAR provision 52.226-3--Disaster or Emergency Area Representation. *Id.* This provision of the FAR states, in relevant part:

(c) An offeror is considered to be residing or primarily doing business in the set-aside area if, during the last twelve months[:]

(1) The offeror had its main operating office in the area; and

(2) That office generated at least half of the offeror's gross revenues and employed at least half of the offeror's permanent employees.

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<sup>1</sup> Unison Marketplace, formerly known as FedBid, Inc., is a commercial online procurement services provider that operates a website, which, among other things, hosts reverse auctions. <https://www.unisonglobal.com/product-suites/acquisition/marketplace/> (last visited June 4, 2020).

(d) If the offeror does not meet the criteria in paragraph (c) of this provision, factors to be considered in determining whether an offeror resides or primarily does business in the set-aside area include[:]

- (1) Physical location(s) of the offeror's permanent office(s) and date any office in the set-aside area(s) was established;
- (2) Current state licenses;
- (3) Record of past work in the set-aside area(s) (e.g., how much and for how long);
- (4) Contractual history the offeror has had with subcontractors and/or suppliers in the set-aside area;
- (5) Percentage of the offeror's gross revenues attributable to work performed in the set-aside area;
- (6) Number of permanent employees the offeror employs in the set-aside area;
- (7) Membership in local and state organizations in the set-aside area; and
- (8) Other evidence that establishes the offeror resides or primarily does business in the set-aside area. For example, sole proprietorships may submit utility bills and bank statements.

(e) If the offeror represents it resides or primarily does business in the set-aside area, the offeror shall furnish documentation to support its representation if requested by the Contracting Officer. The solicitation may require the offeror to submit with its offer documentation to support the representation.

FAR provision 52.226-3; RFQ at 3.

FEMA received six quotations in response to the solicitation, including Falken's and Ranger's. AR, Tab L, Award Memo at 1. As relevant here, Falken represented in its quotation that it was eligible for the Stafford Act set-aside because it resides and primarily does business in the Virgin Islands. AR, Tab N, Falken Quotation at 12. Falken's quotation offered the following documentation in support of this assertion: a certificate of membership for the St. Thomas-St. John Chamber of Commerce; U.S. tax forms (W-2s) from the Virgin Islands for 2018 and 2019; tax returns for 2018 and 2019; and a Virgin Islands driver's license from Falken's owner. *Id.* at 12-21. Additionally, the quotation also identified [DELETED] current active permanent employees that Falken intended to employ for the contract. *Id.* at 30-31.

The agency reviewed each offeror's disaster area representation to determine Stafford Act set-aside eligibility. COS at 3. Between February 20 and 25, the agency requested additional documentation from Falken to support its representations regarding the Stafford Act set-aside eligibility requirements.<sup>2</sup> See AR, Tab R, Emails between FEMA and Falken. In response, Falken provided bank records, contracts performed in the set-aside area, and an organizational chart for Falken and an affiliated business. *Id.* On February 25, the agency concluded that Ranger and Falken were local vendors and technically acceptable. AR, Tab L, Award Memo at 1, 3. The contracting officer concluded that award should be made to Falken in the amount of \$5,071,331.<sup>3</sup> *Id.* at 5.

On February 28, Ranger was notified of the agency's decision to make award to Falken. AR, Tab S, Notice of Award at 1. As relevant here, on March 4, after making award to Falken, the contracting officer documented her rationale for determining that Falken met the Stafford Act set-aside eligibility requirements under FAR provision 52.226-3(d). AR, Tab K, Falken Locality Determination at 2-3; FEMA Response to GAO Request for Clarification at 2. On March 5, Ranger protested to our Office.

## DISCUSSION

Ranger raises two primary challenges. The protester first contends that the agency improperly determined that Falken met the Stafford Act set-aside eligibility requirements. Protest at 9. Ranger also asserts that the agency engaged in unequal discussions when it requested that Falken provide documentation to support its Stafford Act eligibility. Comments and Supp. Protest at 3. We have reviewed the protester's challenges and find no basis to sustain the protest.<sup>4</sup>

### Interested Party

As a preliminary matter, the agency requested dismissal of the protest on May 14, nearly 70 days after the protest was filed, asserting that Ranger is not an interested party to challenge the procurement because the Small Business Administration (SBA) determined that Ranger is not a small business for the size standard applicable to this

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<sup>2</sup> The agency states that the contracting officer elected not to also request additional information from Ranger because it was the incumbent contractor and had previously demonstrated that it met the requirements of FAR provision 52.226-3. Memorandum of Law (MOL) at 4 n.1.

<sup>3</sup> Ranger provided a price quotation of \$6,034,759. AR, Tab L, Award Memo at 4.

<sup>4</sup> The protester also raises collateral issues that do not provide a basis to sustain the protest. For example, the protester alleges that a 2017 contract performed by a business affiliated with Falken shows that Falken cannot perform the requirements of the SOW. See Protest at 10; Supp. MOL at 5. In this regard, because the protester failed to provide sufficient facts to support this contention, its argument fails to state a valid basis of protest and is dismissed. 4 C.F.R. § 21.5(f).

solicitation. Request for Dismissal at 1. As support, the agency provided an SBA size determination letter associated with a different procurement than the one protested here. Request for Dismissal, exh. A, SBA Size Determination at 1. The letter stated that the SBA determined Ranger's size status as of March 12, the date that Ranger submitted its proposal for that procurement. *Id.* at 5. SBA concluded, and Ranger did not dispute--in the letter or any of its filings with our Office--that it was other than small as of March 12. *Id.* at 1, 6. Although the size standard applicable to this solicitation is the same as the size standard in the SBA's letter, we denied the request for dismissal because the SBA's letter was not issued for the procurement at issue here. GAO Ruling on Request for Dismissal at 1.

Our Bid Protest Regulations require that a protester be 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). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. *Latvian Connection, LLC*, B-410147, B-410149, Sept. 4, 2014, 2014 CPD ¶ 266 at 4. Our determination of whether a protester is an interested party is a matter of our Office's own jurisdiction, which is necessarily distinct from the SBA's jurisdiction to determine an offeror's size status. *The First Choice, LLC*, B-417196 *et al.*, Mar. 25, 2019, 2019 CPD ¶ 158 at 7.

Because a large business is generally not an interested party to challenge a procurement set aside for small businesses, we requested that Ranger brief its interested party status for purposes of our Office's jurisdiction. GAO Request for Interested Party Briefing at 1. In response, the protester represents that when quotations for this procurement were due in February 2020, Ranger identified itself as a small business in its System for Award Management listing.<sup>5</sup> Protester's Response to Request for Interested Party Briefing at 2. An offeror's size status is determined at the time that it submitted its proposal, not at the time that it is issued a contract. *Software Eng'g Servs. Corp.*, B-411739, Oct. 8, 2015, 2015 CPD ¶ 315 at 5.

The agency's request for dismissal and the SBA's size letters related to this procurement suggest that the agency and Falken had concerns regarding Ranger's small business status. However, neither these concerns, nor the SBA size letters in the

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<sup>5</sup> Ranger also offered two SBA size determination letters related to this procurement. In the first letter, the SBA dismissed Falken's challenge to Ranger's size status as untimely because it was not filed in accordance with the SBA's timeliness rules. Supp. Comments, exh. 1, SBA Size Determination at 1 (March 20, 2020). In the second letter, the SBA dismissed the agency's challenge to Ranger's size status as premature because Ranger was not the apparent successful offer, or in line for an award. Supp. Comments, exh. 2, SBA Size Determination at 1 (March 30, 2020). This letter also stated "with the pending GAO ruling, [Ranger] is not the apparent successful offeror at this time, any protest against [Ranger] will be deemed as premature." *Id.* at 2.

record conclusively show that Ranger was not a small business at the time it submitted its quotation in response to the RFQ. Thus, based on the protester's representations and the record currently before us, we find no basis to conclude that the protester is not a small business for purposes of this procurement and therefore find Ranger to be an interested party eligible to pursue its protest.

### Stafford Act Eligibility

We next address the protester's contention that the agency erred in determining Falken met the Stafford Act set-aside eligibility requirements.<sup>6</sup>

The Stafford Act authorizes agencies to provide a preference to, or set aside disaster relief recovery contracts for, individuals or firms residing or doing business primarily in the designated disaster area. 42 U.S.C. § 5150. The Stafford Act provides in relevant part:

#### Use of local firms and individuals

##### (a) Contracts or agreements with private entities.

(1) In general. In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency.

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(3) Specific geographic area. In carrying out this section, a contract or agreement may be set aside for award based on a specific geographic area.

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<sup>6</sup> In its protest, Ranger essentially contends that because GAO previously concluded in *Falken USVI, LLC*, B-416581.2, Jan. 2, 2019, 2019 CPD ¶ 49, that FEMA reasonably determined that Falken did not meet Stafford Act set-aside eligibility requirements with respect to a separate procurement, we should conclude similarly here because “[b]ased on Ranger[’s] industry and local knowledge,” Falken’s status has not materially changed since our 2019 decision. Protest at 9. It is well-established, however, that each procurement stands on its own, and the fact that Falken did not meet the eligibility requirements under a previous competition has no bearing on the reasonableness of the agency’s conclusion here. See *Rollout Sys., LLC*, B-414145, Feb. 24, 2017, 2017 CPD ¶ 104 at 5 n.4.

*Id.* The legislative history of the Stafford Act makes clear that the congressional intent was to benefit local people and businesses in disaster-affected areas. *Executive Protective Sec. Serv., Inc.*, B-299954.3, Oct. 22, 2007, 2007 CPD ¶ 190 at 8.

Here, the RFQ was set aside under the Stafford Act for vendors residing or primarily doing business in the Virgin Islands, the disaster-affected area. RFQ at 2. To be eligible for award, FAR provision 52.226-3 requires a vendor to meet the requirements of either paragraph (c) or (d). Specifically, FAR provision 52.226-3(c) requires an agency to consider whether, in the last 12 months, an offeror had its main operating office in the set-aside area and employed at least half of the offeror's permanent employees. Comparatively, under FAR provision 52.226-3(d)(1) and (6), the agency need only consider whether Falken had a permanent office in the Virgin Islands and the number of permanent employees in that office.

Ranger contends that Falken did not meet the Stafford Act eligibility requirements under FAR provision 52.226-3(c) or (d) because Falken's main operating office is in Virginia, rather than St. Thomas, and the St. Thomas office employs only one third, rather than one half, of Falken's permanent employees. Comments and Supp. Protest at 9-10. In this regard, Ranger's arguments focus solely on the location of Falken's main operating office and the number of employees working at this location. *Id.* That is, Ranger does not challenge the agency's findings under the other six factors listed under FAR provision 52.226-3(d). Instead, Ranger asserts that the agency should have found that Falken's main operating office was in Virginia and its St. Thomas office did not employ at least half of its permanent employees. *Id.* at 10.

The record shows that the agency's Stafford Act eligibility determination was reasonably based on the eight factors under FAR provision 52.226-3(d).<sup>7</sup> See AR, Tab K, Falken Locality Determination at 1. Accordingly, because the Stafford Act considers whether an offeror is eligible under either paragraph (c) or (d), we need not address Ranger's

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<sup>7</sup> Despite the contemporaneous record showing that the agency determined that Falken met the Stafford Act eligibility requirements under FAR provision 52.226-3(d), FEMA takes the position that GAO should first consider the agency's arguments that Falken met the requirements under paragraph (c). AR, Tab K, Falken Locality Determination at 1; MOL at 9 n.6. We disagree. While we consider the entire record in resolving a protest, including statements and arguments in response to a protest, in determining whether an agency's actions are reasonable, we give little weight to *post-hoc* statements that are inconsistent with the contemporaneous record. *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Here, the contemporaneous record is devoid of any conclusions with respect to Falken's Stafford Act eligibility under paragraph (c). As a result, our conclusions here are based on the agency's contemporaneous representations that Falken met the eligibility requirements under paragraph (d).

allegations that the agency's conclusions under FAR provision 52.226-3(c) were unreasonable.

As stated above, under FAR provision 52.226-3(d)(1) and (6), the agency need only consider whether Falken had a permanent office in the Virgin Islands and the number of permanent employees in that office. Here, the contemporaneous record shows that under FAR provision 52.226-3(d)(1), the agency found that Falken's main headquarters was in Virginia, and that Falken had a permanent office in St. Thomas. AR, Tab K, Falken Locality Determination at 1. Similarly, under FAR provision 52.226-3(d)(6), the agency concluded that Falken's quotation identified [DELETED] permanent employees in the set-aside area. *Id.* at 2; AR, Tab N, Falken Quotation at 30-31. Ranger's assertions that the St. Thomas office neither represents Falken's main operating office, nor employs at least half of Falken's permanent employees does not show that the agency unreasonably concluded that the St. Thomas office was a permanent office with [DELETED] employees. Additionally, Ranger's failure to challenge the agency's conclusions regarding the remaining factors under paragraph (d) provides us with no basis to object to the agency's conclusions regarding these factors. On these facts, we find the agency's determination that Falken met the Stafford Act eligibility requirements under FAR provision 52.226-3(d) to be unobjectionable.

#### Agency Exchanges with Falken

Ranger also contends that the agency conducted unequal discussions when it requested documentation from Falken regarding its Stafford Act eligibility. Comments and Supp. Protest at 4. Ranger asserts that the contracting officer's communications allowed Falken to submit extensive materials supporting the acceptability of its quotation. *Id.* In this regard, the protester alleges that "the record shows the agency concluded it could not find Falken acceptable but for the communications . . . [between the agency and Falken]." Supp. Comments at 6, *citing* AR, Tab R, Emails between FEMA and Falken.

In response, the agency asserts that it did not conduct discussions because Falken was not permitted to revise its quotation and the request for documentation was permitted by FAR provision 52.226-3(e), which states that "[i]f the offeror represents it resides or primarily does business in the set-aside area, the offeror shall furnish documentation to support its representation if requested by the [c]ontracting [o]fficer." Supp. MOL at 2, *citing* FAR provision 52.226-3(e). We agree with the agency.

As relevant here, although an agency is not required to conduct discussions under simplified acquisition procedures, exchanges that do occur with vendors in FAR part 13 procurements, like all other aspects of such procurements, must be fair and equitable. *Northstate Heavy Equipment Rental*, B-416821, Dec. 19, 2018, 2018 CPD ¶ 430 at 5. Our Office has looked to FAR part 15 as guidance in making this determination. See *ERIE Strayer Co.*, B-406131, Feb. 21, 2012, 2012 CPD ¶ 101 at 4-5.



Clarifications are “limited exchanges” between an agency and an offeror for the purpose of clarifying certain aspects of a proposal, and do not give an offeror the opportunity to revise or modify its proposal. FAR 15.306(a)(2); *L&G Tech. Servs., Inc.*, B-408080.2, Nov. 6, 2013, 2014 CPD ¶ 47 at 6. Discussions, on the other hand, occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. See *M. Matt Durand, LLC*, B-401793, Nov. 23, 2009, 2009 CPD ¶ 241 at 5; see also FAR 15.306(d). In situations where there is a dispute regarding whether an exchange between an agency and an offeror constituted discussions, the acid test is whether an offeror has been afforded an opportunity to revise or modify its proposal. *Evergreen Helicopters of Alaska, Inc.*, B-409327.3, Apr. 14, 2014, 2014 CPD ¶ 128 at 6.

We find that the agency’s exchanges with Falken here did not constitute discussions. FEMA’s communications were undertaken pursuant to FAR 52.226-3(e), which requires an offeror to provide documentation supporting its Stafford Act eligibility if requested by the contracting officer.<sup>8</sup> Nothing about this regulatory scheme suggests that the contracting officer had to contact all offerors to obtain supporting documentation. Additionally, contrary to the protester’s assertions, the record does not show that the agency either found Falken’s quotation unacceptable or requested documentation to permit Falken to revise its quotation in order to become acceptable. Instead, the record shows that the agency sought to verify the Stafford Act eligibility representations made by Falken in its quotation. In our view, because the exchanges, and supporting documentation, were not undertaken to modify or revise the quotation, to cure a deficiency or material omission, or to determine the acceptability of Falken’s quotation, the communications did not constitute discussions.

Even if we were to conclude that the agency’s exchanges here constituted discussions, the protester has not established that the discussions would have been unequal or prejudicial. Competitive prejudice is an essential element of every viable protest; where the protester fails to demonstrate that, but for the agency’s actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. *Presidio Networked Sols. Inc., et al.*, B-408128.33 *et al.*, Oct. 31, 2014, 2014 CPD ¶ 316 at 8-9 (an agency need not engage in discussions with an offeror regarding an area of its proposal that cannot be further improved). In this regard, nothing in the RFQ

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<sup>8</sup> In addition, we find unsupported the protester’s contention that FEMA improperly permitted Falken to provide documentation because the solicitation explicitly required offerors to submit sufficient documentation with their quotations to confirm their Stafford Act eligibility. See Comments and Supp. Protest at 4. Although the solicitation included FAR clause 52.226-3(e), which states that a solicitation may require an offeror to submit with its offer documentation to support its Stafford Act eligibility representation, the protester has not identified where the solicitation here specifically required that supporting documentation be submitted with a vendor’s quotation.

prohibited the agency from conducting discussions, and the agency determined that the protester's quotation met the Stafford Act eligibility requirements, thus rendering unnecessary the need for discussions with Ranger regarding its Stafford Act eligibility. See MOL at 4 n.1; *M. Matt Durand, supra* at 5.

The protest is denied.

Thomas H. Armstrong  
General Counsel