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Decision

Matter of: Superior Optical Labs, Inc.

File: B-418618; B-418618.2

Date: July 7, 2020

J. Dale Gipson, Esq., Maynard Cooper & Gale, PC, for the protester.
Elizabeth H. Connally, Esq., Connally Law, for the protester.
Emily S. Theriault, Esq., David S. Gallacher, Esq., and Adam Bartolanzo, Esq., Sheppard Mullin Richter & Hampton LLP, for PDS Consultants, Inc., the intervenor.
Natica Chapman Neely, Esq., Department of Veterans Affairs; and Sam Q. Le, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies.
Heather Self, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest arguing that award was improper because the agency knew, or should have known, that the awardee did not qualify as a small business is dismissed because the face of the awardee's proposal did not suggest that it was other than a small business and the protester's allegations otherwise amount to a challenge of the awardee's size status which is a matter reserved for the Small Business Administration.

DECISION

Superior Optical Labs, Inc., a service-disabled veteran-owned small business (SDVOSB) of Ocean Springs, Mississippi, protests the award of a contract on a sole-source basis to PDS Consultants, Inc., an SDVOSB of Sparta, New Jersey, by the Department of Veterans Affairs (VA), for prescription eyeglasses and optician services. The protester contends that PDS was not a responsible source eligible to receive the protested award because PDS does not qualify as a small business concern for purposes of the protested procurement. The protester further argues that the VA failed to conduct adequate market research to determine whether PDS qualified as a small business concern.

We dismiss the protest.

BACKGROUND

On November 27, 2019, the VA issued request for proposals (RFP) No. 36C26120R0003 to PDS Consultants, Inc., with the intention of awarding a fixed-price indefinite-delivery, indefinite-quantity contract on a sole-source basis for prescription eyeglasses and optician services for the VA's Central California Health Care System, which is a part of the VA's Veterans Integrated Service Network (VISN) 21. Request for Dismissal exh. 1, Contracting Officer's Statement of Facts (First COS) at 1; Agency Report (AR), Tab 1, RFP at 1; Memorandum of Law (MOL) at 2 n.1.¹ The solicitation contemplated award of a contract with a 1-year base period and one 6-month option period. RFP at 15. The independent government cost estimate (IGCE) for the 18-month period of performance was \$1,207,074. AR, Tab 2, IGCE. The VA issued the solicitation as a total SDVOSB set-aside under North American Industrial Classification System (NAICS) code² 339115 for ophthalmic goods manufacturing. RFP at 1.

Prior to issuing the RFP to PDS, the VA prepared a justification and approval document for other than full and open competition (J&A), citing 38 U.S.C. § 8127(c) as the authority for its proposed sole-source award.³ First COS at 1-2; AR, Tab 3, J&A at 1. The cited provision authorizes, in part, the Veterans First Contracting Program, which was created by the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128. Under the Veterans First Contracting Program, the VA has authority to award sole-source contracts to SDVOSBs when:

- (1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;
- (2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold . . . but will not exceed \$5,000,000; and

¹ Citations to the record utilize the uniform pagination applied by the VA in its submissions to our Office.

² The NAICS code system is used by the federal government to identify and classify specific categories of business activity that represent the lines of business a firm conducts. See Federal Acquisition Regulation (FAR) 19.102; *Triad Isotopes, Inc.*, B-411360, July 16, 2015, 2015 CPD ¶ 220 at 6 n.6

³ The VA also cited 41 U.S.C. § 3304(a)(5), which permits agencies to use other than competitive procedures when "a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source[.]" See AR, Tab 3, J&A at 1.

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(c); see *Crosstown Courier Serv., Inc.*, B-405492, B-405493, Nov. 8, 2011, 2011 CPD ¶ 248 at 3.

Prior to submitting the J&A for approval, the contracting officer performed market research to determine whether PDS was eligible to receive a sole-source award under 38 U.S.C. § 8127(c). AR, Tab 9, Second COS at 1. Among other things, the contracting officer considered prior capabilities statements of PDS, and personal knowledge of prior contracts awarded to PDS within VISN 21 and other VISN components of the VA's healthcare system under which PDS supplied eyeglasses manufactured by Korrekt Optical. *Id.* at 1; attach. 1, PDS Capabilities Statement, June 27, 2018, at 4. Additionally, the contracting officer considered an email from PDS, and a phone conversation with a principal for PDS from September 2019 indicating that PDS had acquired its prescription eyeglass manufacturer, Korrekt. Second COS at 1-2; attach. 3, Email from PDS to Contracting Officer, Sept. 10, 2019, at 17. Based on the email and phone call, the contracting officer "concluded that the manufacturing capability that Korrekt Optical had previously demonstrated in VISN 21 was now possessed by PDS." Second COS at 2. As a result of the market research, the contracting officer issued the RFP to PDS under 38 U.S.C. § 8127(c). *Id.* at 1.

As relevant here, the RFP included VA Acquisition Regulation (VAAR) clause 852.219-10 *Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside*, which imposes a subcontracting limitation on manufacturers or, for nonmanufacturers, requires compliance with the so-called nonmanufacturer rule. RFP at 58-60. The RFP required PDS to explain how it would comply with the subcontracting limitation if it intended to manufacture the required prescription eyeglasses, or how it would comply with the nonmanufacturer rule if it intended to purchase the required prescription eyeglasses. *Id.* at 79.

PDS submitted a proposal providing, in relevant part, that PDS would "use its own optical labs and equipment to meet production requirements," that the required eyeglasses would be manufactured "at PDS's Kentucky lab," and that contingency production would be available "at PDS's Florida lab." AR, Tab 4, PDS Final Revised Proposal at 2, 35-37, 62-63, 76. The proposal further provided that PDS "fabricates eyewear" and "manufactures approximately 1,200,000 pairs of eyeglasses annually for VA customers." *Id.* at 2, 35, 37. In its proposal, PDS represented that it would "fully comply with VAAR [clause] 852.219-10," and that "over 51% of the work on this contract will be performed by PDS." *Id.* at 35. Elsewhere in the proposal, PDS indicated that for purposes of the solicited requirement it would "use the optical labs of the company's wholly-owned subsidiary, Korrekt Optical, to meet production requirements." *Id.* at 37. Additionally, the proposal provided a Korrekt website--<https://va.korrektlab.com/frames--> as the online portal through which customers would be notified of any backorders or discontinuations. *Id.* at 70-71.

The contracting officer entered into negotiations with PDS, which submitted final revised pricing on February 28, 2020. First COS at 2. The contracting officer concluded that PDS's proposal was technically acceptable and that its proposed price was fair and reasonable. *Id.* at 4; AR, Tab 5, Award Decision at 4. The contracting officer also determined that PDS was a responsible source based on a review of PDS's registration in the System for Award Management (SAM), Dun & Bradstreet reports, and a check of PDS's verified status in the VA's Vendor Information Pages (VIP) database.⁴ AR, Tab 6, Responsibility Determination at 2, 4.

On March 18, the contracting officer made award to PDS in the amount of \$1,030,399.80. First COS at 4; AR, Tab 7, Contract No. 36C26120D0043 at 1, 48. Also on March 18, the contracting officer posted a notice of the award on the government-wide point of entry, beta.SAM.gov, and attached the J&A. AR, Tab 8, Award Notice at 1-2.

After learning of the VA's March 18 award to PDS for prescription eyeglasses and optician services for the VA's Central California Health Care System, Superior timely submitted the above-captioned protest to our Office.

DISCUSSION

Superior argues that the VA ignored information indicating that PDS was not in fact a small business because it fails to meet the applicable size standard, and that the VA was required to refer PDS to the Small Business Administration (SBA) for a size status review.⁵ Protest at 6; Protester's Response to Request for Dismissal at 1, 3; Protester's

⁴ The VIP database is a list of businesses approved to participate in the VA's veteran-owned small business programs. See 38 C.F.R. § 74.1; *MCI Diagnostic Center, LLC*, B-417901.3, Mar. 25, 2020, 2020 CPD ¶ 112 at 4 n.2.

⁵ Initially, Superior argued that the VA's J&A failed to include pricing information necessary to establish that use of the cited authority, 38 U.S.C. § 8127(c), was appropriate. Protest at 6. The VA represents that it incorrectly posted the J&A with the pricing information redacted, but subsequent to the filing of the protest reposted the J&A with the pricing information included. Request for Dismissal at 7; exh. 2, J&A; exh. 3, Reposting of J&A at 2.

Superior also initially argued that the VA could not justify the protested sole-source award on the basis of unusual or compelling need. Protest at 7. The VA explained that it did not rely on the unusual and compelling need exception to full and open competition to justify the protested sole-source award. Request for Dismissal at 8. Rather, the VA's J&A cites 38 U.S.C. § 8127(c) as the authority for the protested sole-source award. *Id.*, exh. 2, J&A at 1. In its response to the VA's request for dismissal, Superior provided that it was "relieved to know that the Agency did not, in

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Comments at 4, 6. According to Superior, PDS is not a manufacturer of prescription eyeglasses, rather it intends to obtain the required eyeglasses from its wholly-owned subsidiary Korrekt. *Id.* Superior maintains that PDS and its affiliate Korrekt together have more than 500 employees, which Superior contends exceeds the applicable size standard for a nonmanufacturer such as PDS. Protest at 4-6; Supp. Protest at 2. Superior further argues that the VA failed to conduct adequate market research to determine whether PDS would qualify as a small business concern under the applicable size standard. Protest at 4-5; Protester's Response to Request for Dismissal at 3; Protester's Comments at 5-6. For the reasons set forth below, we dismiss the protest.

As noted above, the VA issued the RFP using a manufacturing NAICS code; specifically NAICS code 339115 for ophthalmic goods manufacturing. RFP at 1. In order to qualify as a small business for this procurement, an offeror must either be the manufacturer or producer of the end products being procured, or, if it does not manufacture the products being purchased, the offeror must comply with what is known as the nonmanufacturer rule. 15 U.S.C. §§ 637(a)(17); 657s(a)(2), (a)(4); 13 C.F.R. §§ 121.406(a), 125.6(a)(2); FAR 19.505(a)(2), (c); *Walker Development & Trading Group, Inc.*, B-414365, May 18, 2017, 2017 CPD ¶ 151 at 3 (“Ordinarily, in order to qualify as a small business concern to provide manufactured products or other supply items, an offeror must either be the manufacturer or producer of the end item being procured, or if it does not manufacture the item being purchased, the offeror must comply with what is known as the nonmanufacturer rule.”).

If the offeror is the manufacturer of the products, the firm must comply with the limitation on subcontracting requirement. 15 U.S.C. § 657s; 13 C.F.R. § 125.6(a)(2); FAR 19.505(a)(2); VAAR clause 852.219-10. This requirement specifies that a small business awardee will not pay subcontractors more than 50 percent of the amount paid to the awardee by the government. *Id.*

In contrast, if an offeror is not the manufacturer of the items, the offeror must comply with the nonmanufacturer rule. Under this rule, a nonmanufacturer small business can provide products that it has not manufactured, so long as the firm does not exceed 500 employees and represents that it will supply the products of a domestic small business

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fact, intend to rely on FAR 6.302-2.” Protester's Response to Request for Dismissal at 4.

Superior did not affirmatively withdraw these protest arguments, but also did not

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substantively address these arguments further in either its response to the VA's request for dismissal or its comments on the agency's report. Accordingly, we consider these protest arguments to have been abandoned and will not address them further. See *Quantech Servs., Inc.*, B-417347, B-417347.2, May 29, 2019, 2019 CPD ¶ 203 at 6.

manufacturer or processor, or that a waiver of this requirement has been granted by the SBA. 15 U.S.C. § 637(a)(17); 13 C.F.R. § 121.406(b); FAR 19.505(c); *Sourcelinq, LLC*, B-417279.2, June 17, 2019, 2019 CPD ¶ 274 at 6.

The size standard for NAICS code 339115 is 1,000 employees. See RFP at 1. Prior to making award, the contracting officer reviewed PDS's registration in SAM, in which PDS certified that it meets the 1,000 employee size standard for the applicable NAICS code. AR, Tab 6, Responsibility Determination at 2, 12. Superior does not allege that PDS fails to meet the 1,000 employee size standard, or that PDS will not comply with the solicitation's limitations on subcontracting requirement.⁶ Rather, Superior argues that 500, rather than 1,000, employees is the applicable size standard because PDS will not manufacture the required eyeglasses, and that PDS cannot comply with the 500 employee size threshold set out in the nonmanufacturer rule (and thus, cannot qualify as a small business here). Protest at 4-6; Supp. Protest at 2. Among other things, Superior points to PDS's own proposal to support its argument, contending that the agency "ignored the plain statement in PDS'[s] proposal that it would rely on Korrekt for manufacturing," and that this statement indicates that PDS is a nonmanufacturer. Protester's Comments at 6.

The VA argues that the nonmanufacturer rule does not apply because PDS will manufacture the required prescription eyeglasses itself, and that, accordingly, the applicable size standard is 1,000 employees, which PDS meets. MOL at 11-13, 18-19. The VA cites to multiple instances in PDS's proposal where PDS represents that it will manufacture the required prescription eyeglasses at its ophthalmic laboratory in Kentucky, and that it will comply with the solicitation's limitations on subcontracting. *Id.* at 5-6.

We requested the SBA's views on this protest. The SBA advised that PDS's representations in its proposal support the conclusion that PDS properly represented itself as the manufacturer of the required prescription eyeglasses. The SBA rejected the protester's contention that PDS's proposed use of Korrekt's manufacturing facilities meant that PDS did not qualify as the manufacturer of the eyeglasses. The SBA explained that "using another firm's facilities does not by itself trigger the nonmanufacturer rule." SBA Comments, June 15, 2020, at 3. In accordance with its interpretive decisions, "a manufacturer can use third-party facilit[ies][.]" *Id.*, citing *Size*

⁶ When an offeror submits a proposal in response to a solicitation that incorporates a limitations on subcontracting clause, the offeror agrees to comply with the limitation, and in the absence of any contradictory language, the agency may presume that the offeror will comply with the subcontracting limitations. *Dorado Servs., Inc.*, B-411691.4, Nov. 18, 2016, 2016 CPD ¶ 337 at 3. This presumption may be rebutted, but it is the protester that bears the burden to affirmatively demonstrate that the awardee's proposal takes exception to the limitations on subcontracting. *Id.* Here, Superior has not demonstrated, or even alleged, that PDS's proposal takes exception to the limitations on subcontracting requirement.

Appeal of Mistral, Inc., SBA No. SIZ-5877, Jan. 9, 2018. The SBA also noted that PDS proposed to perform its own manufacturing, that its proposal explicitly refers to the limitations on subcontracting, and that its proposal “does not at any point refer to the nonmanufacturer rule” or “suggest that the VA should apply the rule to exempt PDS from the limitations on subcontracting.” SBA Comments, June 15, 2020, at 3. The SBA concluded that PDS is the manufacturer and that the 500 employee size limit under “the nonmanufacturer rule does not apply here.” *Id.* at 1-2.

Ultimately, whether PDS qualifies as a small business manufacturer or, if not a small business manufacturer, is capable of complying with the nonmanufacturer rule, relates to PDS’s size status. See *e.g. DynaLantic Corp.*, B-402326, Mar. 15, 2010, 2010 CPD ¶ 103 at 4 (noting that to be considered a small business concern under a set-aside procurement for supplies an offeror must either manufacture its own product or it must comply with the nonmanufacturer rule). Determining PDS’s size status, however, is a matter reserved exclusively for the SBA.⁷ See FAR 19.307; 13 C.F.R. §§ 125.24-27; *Fiskars Brands, Inc., d/b/a Gerber Legendary Blades*, B-412730, B-412730.2, May 20, 2016, 2016 CPD ¶ 139 at 8. Because the SBA, and not our Office, is the designated authority for determining whether a firm is an eligible small business concern, we generally will dismiss a protest challenging a firm’s small business or socio-economic status. See 4 C.F.R. § 21.5(b)(1); see *e.g. DynaLantic Corp.*, *supra* at 5 (“[T]he SBA, not our Office, has conclusive authority to determine the size status of an offeror for federal procurement purposes, including whether the offeror is a manufacturer under the small business size standards.”).

A limited exception applies, however, when a protester argues, as Superior does here, that the awardee’s offer shows on its face that it is not eligible for award as a small business, or here as an SDVOSB. In such instances, we will review the reasonableness of the contracting officer’s decision not to refer the matter to the SBA. See *Hydroid LLC*, B-299072, Jan. 31, 2007, 2007 CPD ¶ 20 at 3.

To the extent Superior seeks to invoke the limited exception discussed above, its efforts are misplaced. We agree with the SBA that there are no concerns about PDS’s size status stemming from the face of its proposal. Contrary to Superior’s contention, PDS’s

⁷ The intervenor advised our Office that Superior filed a protest with the SBA’s Office of Hearing and Appeals challenging PDS’s status as a manufacturer in connection with a different procurement--solicitation No. 36C24919R0105. See Intervenor’s Request for Authorization to Use Protected Material in SBA OHA Docket No. CVE-2020-01-21-32-P. Like the solicitation at issue here, the VA issued solicitation No. 36C24919R0105 under NAICS code 339115 for ophthalmic goods manufacturing. Agency Request for Leave to Amend the Record, June 26, 2020, at 1-2. In the size challenge under solicitation No. 36C24919R015, the SBA found that PDS qualified as a small business concern under NAICS code 339115, that PDS was an eyeglass manufacturer, and, therefore, that PDS was not subject to the nonmanufacturer rule. *Id.* at 2, *citing* size determination issued in SBA Case No. 1-SD-2020-24, June 23, 2020.

proposal does not represent that it will rely on Korrekt to perform the manufacturing of the required prescription eyeglasses. Rather, PDS's proposal provides that it will "use the optical labs" of Korrekt to meet the solicitation's production requirements. AR, Tab 4, PDS Final Revised Proposal at 37. As explained by the SBA, PDS's representation that it will use Korrekt's facilities can be read consistently with PDS's representations that it will manufacture the required prescription eyeglasses. According to the SBA, a firm's use of another firm's facilities does not, by itself, prevent the firm from being considered a manufacturer, thereby triggering the 500 employee size limit under the nonmanufacturer rule. In sum, there is no basis for Superior's contention that PDS's proposal, on its face, calls into question its status as the manufacturer for the procurement; therefore, there was no reason for the contracting officer to refer the matter of PDS's size status to the SBA.⁸ Accordingly, we dismiss Superior's protest. See e.g., *Kodiak Base Operations Servs., LLC*, B-414966 et al., Oct. 20, 2017, 2017 CPD ¶ 323 at 4-5 (dismissing protester's argument that the agency unreasonably failed to refer awardee to the SBA for a size determination because the facts alleged did not support a basis for concluding that the agency's actions were unreasonable.").

The protest is dismissed.

Thomas H. Armstrong
General Counsel

⁸ Superior also contends that the VA should have found PDS's proposal technically unacceptable because it contained material misrepresentations regarding its status as a manufacturer. Superior bases its contentions on information other than that contained on the face of PDS's proposal. As noted above, the Small Business Act, 15 U.S.C. § 657f(d), gives the SBA conclusive authority to determine SDVOSB status for federal procurements. See e.g. *Fiskars Brands, Inc., d/b/a Gerber Legendary Blades*, supra at 8 n.10.