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Decision

Matter of: Bluewater Management Group, LLC

File: B-418831

Date: September 2, 2020

Daniel Strouse, Esq., John J. O'Brien, Esq., and Laurel Hockey, Esq., Cordatis Law LLP, for the protester.

Jason A.M. Fragoso, Esq., Department of Veterans Affairs, for the agency.

Kasia Dourney, Esq., and Evan Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest filed by a small business concern, contending that an agency improperly entered into discussions only with a service-disabled veteran-owned small business is dismissed where the solicitation clearly provided for a tiered evaluation of offers, and where the protester is not an interested party to challenge the conduct of the procurement with regard to first-tier offerors.

DECISION

Bluewater Management Group, LLC, a small business of Norfolk, Virginia, protests the Department of Veterans Affairs's (VA) decision to enter into discussions only with Brian Hall Properties, a service-disabled veteran-owned small business (SDVOSB), under request for proposals (RFP) No. 36C10X20R0019, for offsite student lodging for the VA law enforcement training center in Little Rock, Arkansas. Bluewater alleges that the VA improperly deviated from the solicitation's tiered evaluation method, and that entering into discussions only with Brian Hall amounted to conducting a sole-source procurement.

We dismiss the protest because Bluewater is not an interested party.

BACKGROUND

The RFP, issued on April 16, 2020, sought proposals to provide a facility, labor, materials, insurance, licenses and equipment required to offer lodging for students within a 7-mile radius of the training center. Req. for Dismissal, exh.1, RFP, amend. 1 at 8. The solicitation anticipated award of a fixed-price contract for a 1-year base and

one 1-year option period, on a best-value basis, considering technical approach, performance risk, and price. *Id.* at 42.

As relevant to this protest, the RFP provided for a total set-side award based on a tiered evaluation method, modeled after the order of priority set forth in 38 U.S.C. § 8127. *Id.* at 1, 48. The tiers were as follows:

- Tier 1--Service-Disabled Veteran-Owned Small Business (SDVOSB) Concerns
- Tier 2--Veteran-Owned Small Business (VOSB) Concerns
- Tier 3--Small Business Concerns, with HUBZone [Historically Underutilized Business Zone] Small Business Concerns and 8(a) Participants Having Priority.

Id. at 48.¹

The solicitation advised that “[e]ach tier represents a distinct set-aside and will be evaluated in isolation.” *Id.* at 49. The tiered evaluation method was described as follows:

- I. Tier 1 proposals will be evaluated first. After review of Tier 1 proposals, if award can be made at a fair and reasonable price that offers best value to the United States, no additional tiers will be reviewed. If no offers are submitted at Tier 1 or if none of the Tier 1 proposals would result in award at a fair and reasonable price that offers best value to the United States, the Government will evaluate Tier 2 proposals for award.
- II. After review of Tier 2 proposals (if needed), if award can be made at a fair and reasonable price that offers best value to the United States, no additional tiers will be reviewed. If no offers are submitted at Tier 2 or if

¹ The contracting officer states that the tiered evaluation method in the RFP was established in accordance with the VA Procurement Policy Memorandum (PPM) 2018-04, Guidance and Procedures regarding the Use of Tiered Evaluations (Cascading) for Use in Solicitations Set-Aside in Accordance with the VA Rule of Two (VAIQ #7819747). Response to Opp. to Req. for Dismissal, exh. 2, Decl. of Contracting Officer at 1. Specifically, the PPM states that:

if a Contracting Officer determines that award within a tier is not possible for any reason, including but not limited to lack of responsiveness to the solicitation . . . the Contracting Officer shall fully document the basis for that conclusion in the contract file, follow any required procedures, indicate that the set-aside at that tier is being withdrawn, and then consider offers received at the next set-aside tier.

PPM 2018-04 at 4.

none of the Tier 2 proposals would result in award at a fair and reasonable price that offers best value to the United States, the Government will evaluate Tier 3 proposals for award.

III. If no offers are submitted at Tier 3 or if none of the Tier 3 proposals would result in award at a fair and reasonable price that offers best value to the United States, solicitation will be cancelled, and the requirement resolicited.

Id. at 48.

The RFP also included the Federal Acquisition Regulation (FAR) clause 52.212-1, Instructions to Offerors--Commercial Items, which provides in section (f):

the Government reserves the right to conduct discussions if . . . determined by the Contracting Officer to be necessary.

Id. at 40 (citing FAR clause 52.212-1).

By the solicitation closing date of April 28, 2020, the VA received proposals from offerors qualified under tier 1 (SDVOSB), including Brian Hall; tier 2 (VOSB); and tier 3 (small business concerns), including Bluewater. Response to Opp. to Req. for Dismissal, exh. 2, Decl. of Contracting Officer at 2. The contracting officer established a competitive range based on proposals from tier 1 offerors, and initiated discussions with Brian Hall.² *Id.*; see Protest, exh. 1, Letter to Brian Hall Properties.

On June 15, this protest followed.

DISCUSSION

Bluewater argues that by entering into discussions only with Brian Hall, the agency improperly deviated from the RFP's tiered evaluation method. Specifically, Bluewater asserts that after evaluating Brian Hall's proposal and finding it technically unacceptable, the VA should have evaluated proposals submitted by offerors in tiers 2 and 3. According to the protester, the solicitation did not contemplate discussions until after all offerors had been evaluated, and only if no proposal met the requirements of the solicitation at a fair and reasonable price. Hence, Bluewater asserts that the discussions that the agency held with Brian Hall amounted to conducting an improper sole-source procurement. Protest at 8-10.

² The contracting officer stated in a letter to Brian Hall that the firm was included in the competitive range and therefore had "a high potential for award of the contract"; in addition, the letter provided that "[f]ollowing completion of negotiations and evaluations of any revisions, the [g]overnment intends to make award." Protest, exh. 1, Letter to Brian Hall Properties at 1.

The agency asks our Office to dismiss the protest, arguing that Bluewater is not an interested party to challenge the conduct of the procurement with regard to tier 1.³ Req. for Dismissal at 3-5. Here, the RFP established that each tier represented a distinct set-aside, and would be evaluated in isolation; and that the agency reserved the right to conduct discussions. RFP, amend. 1 at 40, 49. The VA explains that at the time the protest was filed, the evaluation process was restricted to tier 1 offers, *i.e.*, those received from SDVOSBs. Req. for Dismissal at 3. Thus, the contracting officer's evaluation of proposals from SDVOSBs, and conduct of discussions solely with tier 1 offerors, was consistent with the RFP's tiered evaluation scheme. *Id.* Only in the event that the contracting officer determined that no SDVOSB proposal met the requirements of the solicitation at a fair and reasonable price, would the contracting officer dissolve the tier 1 restriction and evaluate proposals received at the next tier, *i.e.*, from VOSBs. RFP, amend. 1 at 49; Req. for Dismissal at 3-5; Response to Opp. to Req. for Dismissal, exh. 2, Decl. of Contracting Officer at 2-3. The VA maintains that Bluewater, a small business concern, is not eligible to compete in the same tier as Brian Hall, nor as a tier 2 competitor, and therefore lacks the requisite direct legal interest to challenge the agency's actions with regard to tier 1 offerors. Req. for Dismissal at 3-5.

On this record, we agree. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557, only an "interested party" may protest a federal procurement. That is, a protester must 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. See 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. *RELM Wireless Corp.*, B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. A protester is not an interested party where it would not be in line for contract award, were its protest to be sustained. *Id.*

Here, Bluewater, a small business concern, eligible to compete only in tier 3, is not in line for award because there are other, intervening tiers--SDVOSBs and VOSBs--whose proposals would have to be evaluated and found ineligible for award before the agency could proceed to evaluate tier 3 proposals. Under this RFP's evaluation scheme, only if the agency concluded that none of the tier 1 or tier 2 proposals would result in award at a fair and reasonable price could the VA proceed to evaluate tier 3 proposals, including

³ The VA also asserts that the protest is legally insufficient, *i.e.*, fails to state a valid basis of protest; and fails to request relief which can be granted by our Office. Req. for Dismissal at 1. We need not resolve those issues because we conclude below that Bluewater is not an interested party to challenge the agency's actions with regard to tier 1 offerors.

Bluewater's. Accordingly, the protester lacks the direct economic interest required to maintain a protest challenging the agency's actions with regard to the tier 1 offerors.⁴

The protest is dismissed.

Thomas H. Armstrong
General Counsel

⁴ Bluewater also lacks the requisite status as an interested party to challenge the agency's alleged conduct of discussions only with Brian Hall. Moreover, to the extent Bluewater is asserting that the agency was required to evaluate all three tiers before it could conduct any discussions, this assertion is inconsistent with the plain language of the solicitation and therefore fails to state a valid basis for protest. The RFP here stated that the agency reserved the right to conduct discussions, and that each tier represented a distinct set-aside, which would be evaluated in isolation. RFP, amend. 1 at 40, 49. Accordingly, this basis for protest is also dismissed.