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Decision

Matter of: Mountainside Medical Equipment, Inc.

File: B-419839

Date: June 25, 2021

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DIGEST

Protest challenging an agency's decision to make award to a company that the protester alleges is not a verified a service-disabled veteran-owned small business is dismissed where the protester is ineligible for award and therefore lacks the requisite interest to maintain the protest.

DECISION

Mountainside Medical Equipment, Inc., of Marcy, New York, protests the award of a contract to Magellan Solutions USA Inc., of Brisbane, California, under request for quotations (RFQ) No. 36C242-20-Q-0920, issued by the Department of Veterans Affairs (VA) for the provision of telephone switchboard operators at the agency's James J. Peters Medical Center in Bronx, New York. The protester, a service-disabled veteran-owned small business (SDVOSB), argues that the agency has improperly made the award to a company that is not a verified SDVOSB, as required by the solicitation, and that the agency could not meet the "rule of two" requirement for VA small-business set asides.¹

We dismiss the protest on the basis that the protester is not an interested party and the protest does not establish a valid basis for challenging the agency's action.

¹ The protester filed an agency-level protest on March 31, 2021, which the agency dismissed for failure to provide a factual basis for protest and as untimely. Req. for Dismissal, exh. 5, Agency Protest Dismissal, at 3-4.

The RFQ, issued on September 15, 2020, contemplated the award of a contract for “all personnel [and] supervision for the Switchboard Service requirement.” Req. for Dismissal, exh. 1, RFQ, at 3. Among other things, the RFQ required vendors to

[s]ubmit signed and dated offers to the office specified in this solicitation at or before the exact time specified in this solicitation. Offers may be submitted on the SF 1449, letterhead stationery, or as otherwise specified in the solicitation. As a minimum, offers must show—

* * * *

(9) Acknowledgment of Solicitation Amendments[.]

Id. at 56.

The agency twice amended the solicitation, each time extending the quotation submission deadline. The VA states that four vendors, including Mountainside and Magellan, submitted quotations. After the first of the two amendments, Mountainside submitted a timely quotation; however, Mountainside did not sign and return either of the two amendments. Req. for Dismissal, at 2.

In a January 14, 2021 email to the protester, the agency explained that because Mountainside’s quotation did not acknowledge receipt of either of the amendments, the quotation was incomplete and thus could not be considered for award. Req. for Dismissal, exh. 5, Agency Protest Dismissal, at 6.

In its initial protest filing, Mountainside states that its quotation was excluded from the agency’s evaluation process “for reasons not relevant to the present protest.” Protest at 3. However, we find that the agency’s conclusion in this regard--that Mountainside’s failure to acknowledge the amendments rendered its quotation ineligible for award--has direct bearing on the threshold issue of whether the protester has the requisite legal interest to challenge the award.

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. Bid Protest Regulations, 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, because the agency found Mountainside ineligible for award based on its failure to acknowledge the amendments as required by

the solicitation--a determination that Mountainside did not timely challenge--the protester lacks the requisite interest to protest the award.

Mountainside nonetheless asserts that it is an interested party in this instance because if the agency cancelled the solicitation and reissued it, as the protester claims should be required, Mountainside would then be able to compete. Protest at 1. For the reasons discussed below, this argument is unavailing.

The protester alleges that the agency could not meet the VA “rule of two” requirement set forth in the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. § 8127(d), because Magellan allegedly was not a verified SDVOSB (*i.e.*, “an entity identified in the VA’s centralized database as a SDVOSB”). Protest at 3. Mountainside also argues that it “understands” either one or both of the two “arguably valid” SDVOSBs that submitted quotations were not “capable of performing the work at a fair and reasonable price.” Protest at 3-4.

The requirement for the VA to set aside acquisitions for SDVOSBs, often referred to as the VA’s “rule of two,” states, as relevant here, that “a contracting officer of the [VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans . . . with service-connected disabilities if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans . . . with service-connected disabilities will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.” 38 U.S.C. § 8127(d).

Mountainside’s argument that because the agency allegedly did not *receive* two or more compliant quotations from SDVOSBs reflects a fundamental misunderstanding of what the statute requires. In short, 38 U.S.C. § 8127(d)(1) requires an agency to set aside a procurement for certain veteran-owned small businesses or SDVOSBs when the contracting officer has a reasonable expectation that, among other things, it will receive quotations or offers from two or more SBVOSBs and award can be made at a fair and reasonable price. That is to say, the statutory requirements relate to VA’s decision to pursue a set-aside as an initial matter, prior to the receipt of quotations.² Instead, the protester suggests that the reasonableness of the agency’s contemporaneous set-aside decision should be judged on the basis of the quotations that were ultimately submitted, or, stated differently, information that was not available at the time the set-aside decision was made.

We have previously stated that information that first becomes available after issuance of a set-aside solicitation does not demonstrate that a contracting officer’s prior decision

² To the extent Mountainside objects to the agency’s decision to set aside the requirement for SDVOSBs, this concerns the terms of the solicitation, *i.e.*, a matter that could only be timely protested prior to the time for receipt of quotations. See 4 C.F.R. § 21.2(a)(1).

whether to set aside the procurement was unreasonable.³ See, e.g., *Crosstown Courier Serv., Inc.*, B-410936, Mar. 12, 2015, 2015 CPD ¶ 107 at 4; *Jacqueline R. Sims, dba JRS Staffing Servs.*, B-409613, B-409613.2, June 16, 2014, 2014 CPD 181 at 4, *recon. dismissed*, B-409613.3, Feb. 20, 2015.

Our Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3. Here, Mountainside has not alleged a legally cognizable violation of the “rule of two,” nor included sufficient factual or legal bases for its protest, and thus does not meet this standard. Accordingly, Mountainside’s reliance on its rule-of-two argument to establish the firm’s status as an interested party is misplaced. See 4 C.F.R. § 21.5(f).

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

³ Moreover, were we to reach the merits, we note that Mountainside has provided no meaningful support for its allegations. For example, with regard to Magellan’s status as an SDVOSB, the agency has provided documentation from the VA Center for Verification and Evaluation showing the awardee to be a verified SDVOSB, which Mountainside has not refuted. The protester’s speculation that the other two SDVOSB quoters were not capable of performing at a fair and reasonable price is similarly insufficient to support the protest.