

Decision

Matter of: M&C Venture Group, LLC

File: B-419870

Date: July 28, 2021

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William B. Blake, Esq., Department of the Interior, and Edmund Bender, Esq., Small Business Administration, for the agencies.
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DIGEST

Protest challenging the agency's decision to amend the solicitation from a set-aside for service-disabled veteran-owned small business concerns to a 100% small business set-aside is dismissed for failing to state a legally sufficient basis of protest.

DECISION

M&C Venture Group, LLC, a service-disabled veteran-owned small business (SDVOSB), of Bellport, New York, protests the terms of a solicitation under request for proposals (RFP) No. 140G0121R0008, issued by the Department of the Interior, U.S. Geological Survey (USGS), for parking lot, roadway, and sidewalk renovations at the USGS National Center Campus in Reston, Virginia. The protester contends that the agency was required to seek approval from the Small Business Administration (SBA) prior to removing the requirement from the SDVOSB set-aside program, and argues that the agency's issuance of a new solicitation as a total small business set-aside was improper.

We dismiss the protest.

BACKGROUND

On September 21, 2017, USGS awarded contract No. G17PC00037 to M&C, as an SDVOSB set-aside. Contract at 2; Protest at 1. That contract was awarded as an indefinite-delivery, indefinite-quantity (IDIQ) contract with fixed-price and time-and-materials contract line item numbers (CLIN) for the replacement of surface materials on USGS parking lots, roadways, and sidewalks. The term of the contract was five years. *Id.* at 3. USGS issued the current solicitation on April 6, 2021, seeking proposals for

construction involving the replacement of damaged and deteriorated surfaces of USGS parking lots, roadways, walkways, sidewalks, and curbs at the USGS National Center Campus. Request for Proposals (RFP) at 1, 3.¹ The current RFP anticipates awarding multiple award IDIQ contracts, with fixed-price CLINs, for a 1-year base period and four 1-year options. *Id.* at 5, 87. The current RFP, as issued, set aside the procurement for SDVOSB concerns. *Id.* at 1. On April 6, the same day the solicitation was issued, the agency amended the RFP, notifying offerors that the procurement would, instead, be totally set aside for small business concerns. *Id.* at 127. Proposals were due on July 1. *Id.* at 132. M&C filed this protest with our Office on May 28, challenging the terms of the solicitation.

DISCUSSION

M&C raises two interrelated challenges to USGS's decision to not set the solicitation aside for SDVOSB concerns. First, the protester argues that the agency needed SBA approval prior to removing the requirement from the SDVOSB program. Second, M&C contends that the agency improperly amended the solicitation from a procurement set aside for SDVOSB concerns to one totally set aside for small businesses. Protest at 3-6. For the reasons below, we dismiss the protest.

SBA Approval

M&C contends that the current solicitation is a follow-on requirement to the contract awarded to M&C in 2017. The protester asserts that because the original requirement was awarded as an SDVOSB set-aside, USGS was required to seek approval from SBA before issuing a new solicitation for the same requirements as a total small business set-aside. Protest at 3-4. The protester argues that the Federal Acquisition Regulation (FAR) and SBA's regulations, as well as GAO's prior decisions, support this contention. *Id.*

Before the agency report due date, USGS submitted a request for dismissal to our Office stating that this protest ground was legally insufficient. Req. for Dismissal at 1. USGS notes that the protester's argument incorrectly conflates the SDVOSB program with SBA's 8(a) program, which requires permission from SBA to remove a follow-on requirement from the 8(a) program.² *Id.* at 2. Additionally, the agency contends that the protester "fabricated or else grossly misinterpreted" a GAO decision because the text,

¹ The agency provided an Adobe PDF file containing the RFP and amendments. For clarity, we identify the page numbers by the sequential numbering of the PDF document.

² Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. FAR 19.800. This program is commonly referred to as the 8(a) Business Development program (or simply "8(a) program").

which the protester parenthetically inserted into the otherwise correct quote from our decision in *Eminent IT, LLC*, B-418570, June 23, 2020, 2020 CPD ¶ 222, does not appear in either of the cited regulations or the *Eminent IT* decision. *Id.*

At our Office's invitation, SBA provided its views on the protest. We accord great weight to SBA's interpretation of its regulations, unless the interpretation is unreasonable. *NANA Servs., LLC*, B-297177.3; B-297177.4, Jan. 3, 2006, 2006 CPD ¶ 4 at 10. SBA states that, contrary to the protester's assertions, the provisions of section 19.815 of the FAR and SBA's own regulation, 13 C.F.R. § 124.504(d), apply exclusively to SBA's 8(a) program and do not apply to set-asides for SDVOSBs. SBA Comments at 2 (explaining "this rule only applies to 8(a) and any application of this rule to SDVO SBC [service-disabled veteran-owned small business concern] set-asides or other SBA program is incorrect"). SBA notes that the protester's argument is not supported by either SBA's regulatory scheme or the plain language of the regulations. *Id.*

In its protest, M&C makes the following assertion:

Both FAR 19.815 and 13 CFR 124.504(d) state that when a procurement is awarded as an 8(a) (*or other qualifying small business programs such as SDVOSB*), its follow-on or renewable acquisition must remain in the program unless the SBA agrees to release it for other competition. *Eminent IT, LLC*, 2020 CPD 222 at 3.

Protest at 3 (emphasis added). A review of the cited regulations and our *Eminent IT* decision clearly reveals that the highlighted phrase "(or other qualifying small business programs such as SDVOSB)" was inserted by the protester, and does not exist anywhere in the text of either of the regulatory provisions cited, or in the *Eminent IT* decision issued by our Office.

The actual language of the relevant FAR provision states the following:

Release for non-8(a) procurement. (a) Once a requirement has been accepted by SBA into the 8(a) program, any follow-on requirements shall remain in the 8(a) program unless there is a mandatory source (see 8.002 or 8.003) or SBA agrees to release the requirement from the 8(a) program in accordance with 13 CFR 124.504(d).

FAR 19.815(a). Similarly, the cited SBA regulation provides:

Release for non-8(a) or limited 8(a) competition. (1) Except as set forth in paragraph (d)(4) of this section, where a procurement is awarded as an 8(a) contract, its follow-on requirement must remain in the 8(a) BD [Business Development] program unless SBA agrees to release it for non-8(a) competition. . . . If a procuring agency would like to fulfill a follow-on requirement outside of the 8(a) BD program, it must make a

written request to and receive the concurrence of the AA/BD [Associate Administrator for Business Development] to do so.

13 C.F.R. § 124.504(d).

As SBA notes, these provisions only mention requirements within the 8(a) program, and do not include any discussion of a general rule that applies to requirements outside of the 8(a) program.³ See SBA Comments at 3. SBA indicates that the agency created a distinct regulatory framework, with separate parts assigned to each socioeconomic set-aside program.⁴ *Id.* at 4. Thus, “[u]nless explicitly stated, these individual program requirements apply only to the specific program addressed within the regulation.” *Id.* The protester cites to no SDVOSB set-aside rule--and SBA indicates no such rule exists--that requires SBA approval to “release” a follow-on requirement from a contract that had previously been set aside for SDVOSB concerns. *Id.* at 5 (“Unlike 8(a), there is no corresponding SDVO SBC rule to accept and then if necessary, approve the removal of a requirement in SBA’s regulations. . . .”). Based on the plain reading of the text and the regulatory framework of the regulations, it is clear that SBA approval for release, discussed in the cited regulations, applies only to the 8(a) program.⁵ See FAR 19.815; 13 C.F.R. § 124.504(d).

³ Under the 8(a) program, agencies can submit a procurement to SBA for inclusion in the 8(a) program. Once a requirement has been accepted by SBA into the 8(a) program, any follow-on requirements must remain in the 8(a) program unless there is a mandatory source or SBA agrees to release the requirement from the 8(a) program. FAR 19.815; 13 C.F.R. § 124.504(d). This is commonly referred to as the “once 8(a), always 8(a)” rule and, according to SBA, exists to further the statutory goals of the 8(a) program by ensuring that prime federal contract support is available to SBA and 8(a) participants as a form of business development assistance. SBA Comments at 2.

⁴ Other socioeconomic set-aside programs include historically underutilized business zone (HUBZone) and women-owned small business (WOSB) concerns. There are separate rules for each of the 8(a), HUBZone, WOSB, and SDVOSB programs. SBA Comments at 4.

⁵ The protester also cites to our decision in *Eminent IT* in an attempt to support its contention. In *Eminent IT*, the original requirement was established within the 8(a) program, and the agency argued that the follow-on solicitation was a “new requirement” that did not qualify as a removal from the 8(a) program. *Eminent IT, supra* at 2-4. Here, the protester states--and the agency does not dispute--that the contract awarded to M&C in 2017 was set aside for SDVOSBs and not an 8(a) set-aside. Protest at 1; see *generally* Contract. Because the original requirement here was not within the 8(a) program, our *Eminent IT* decision is inapplicable to the facts here, and the decision provides no legal support for the protester’s assertion that the agency was required to obtain SBA approval to “release” this requirement from a previous one that was set aside for SDVOSB concerns.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Cybermedia Techs., Inc.*, B 405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, 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, the protester fails to state a valid basis of protest because the allegation, as asserted, does not establish the likelihood the agency violated applicable procurement laws or regulations, because there are no such laws or regulations related to this type of set-aside. Therefore, this allegation is dismissed. 4 C.F.R. §§ 21.1(f), 21.5(f).

Rule of Two

Next, M&C argues that the agency was required to set aside the procurement for SDVOSB concerns “before considering a general ‘small business’ set-aside” because the “rule of two” applies. Protest at 4-6. The protester further contends that even if the “rule of two” does not apply to this procurement, USGS “opted-into” the SDVOSB set-aside program, and “[m]odification” of the type of set-aside from an SDVOSB to a total small business set-aside was “arbitrary and capricious.” Resp. to Req. for Dismissal at 2.

The agency responds that it was not required to follow the Veteran Affairs (VA) “rule of two,” which requires, in relevant part, the VA to set aside procurements for SDVOSBs if there is a reasonable expectation that two or more SDVOSB concerns will submit offers, because USGS, not the VA, is the agency procuring the services. *Id.* at 4. In its comments, SBA agreed that the VA “rule of two” does not apply here because the “mandatory application of SDVO SBC set-asides is limited to VA procurements.” SBA Comments at 5. SBA further asserts that the protester conflates application of the VA’s statutory “rule of two” with the Small Business Act’s regulatory “rule of two,” which is set forth in section 19.502-2(b) of the FAR and 13 C.F.R. § 125, neither of which is applicable in this procurement. *Id.*

The VA’s statutory “rule of two” derives from the Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 VA Act), with the relevant provision codified at section 8127 of title 38 of the United States Code. 38 U.S.C. § 8127(d). The 2006 VA Act, among other things, requires the VA, but not other agencies, to set aside acquisitions for SDVOSBs whenever it determines that there is a reasonable expectation that offers will be received from at least two SDVOSB concerns and that award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d). Our Office has consistently found that this VA “rule of two” requirement applies only to VA procurements. *American Relocation Connections, LLC*, B-416035, May 18, 2018, 2018

CPD ¶ 174 at 5 (“[T]he VA Rule of Two under the 2006 VA Act . . . applies only to the VA.”); *Cross & Co., LLC*, B-417971, Dec. 20, 2019, 2019 CPD ¶ 429 at 5 (“While the plain language of the statute establishes a mandatory preference for . . . SDVOSBs, it also limits the application of the mandatory preference in subsection 8127(d) to when the VA conducts the procurement.”). Thus, the VA’s “rule of two” plainly does not apply to this procurement because USGS, not the VA, is the procuring agency.⁶

Finally, the protester attempts to use our prior decisions, discussing the regulatory small business “rule of two,” to support its assertion that USGS should have set aside this procurement for SDVOSBs. Protest at 5. SBA explains that the protester conflates the application of the regulatory small business “rule of two” with the statutory VA “rule of two,” and that the decisions discussing the small business “rule of two” are inapplicable to the procurement here. We agree.

The regulatory small business “rule of two” describes a long-standing regulatory policy set forth in the FAR to implement provisions in the Small Business Act, 15 U.S.C. § 644(a). This government-wide rule requires agencies to set aside for small business participation a procurement valued over the simplified acquisition threshold if market research shows there is a reasonable expectation of receiving fair market offers from at least two responsible small business concerns. FAR 19.502-2(b); 13 C.F.R. §125.2(f)(2). Our Office has issued several decisions discussing the FAR’s small business “rule of two,” including the following two decisions cited by the protester as support for its arguments. In *DNO Inc.*, B-406256, B-406256.2, Mar. 22, 2012, 2012 CPD ¶ 136, our Office sustained a protest challenging the agency’s decision not to set aside a procurement for small business concerns where the agency’s decision was based on insufficient efforts to ascertain small business capabilities to perform the contract. Similarly, in *CEPEDA Assocs., Inc.*, B-418284, Feb. 24, 2020, 2020 CPD ¶ 86, we denied a protest challenging the agency’s decision not to set aside a procurement for small business where the agency concluded there was not a reasonable expectation of receiving offers from two or more small business concerns at fair market prices.

These decisions discuss whether to set aside a procurement for small businesses generally--not whether an agency should set aside a procurement for a specific socioeconomic program like the SDVOSB program. Compare FAR 19.502-2(b), with 38 U.S.C. § 8127(d). The decisions clearly reference and discuss the applicability of the small business “rule of two” as implemented by section 19.502-2(b) of the FAR. The

⁶ We also find no legal support for the protester’s contention that USGS “opted-into” the VA’s “rule of two” because USGS had previously set-aside the procurement for SDVOSB concerns. The FAR states that an agency “may” set aside acquisitions restricted to SDVOSB concerns if certain conditions are met. FAR 19.1405(a)(2). Other than the single bald assertion that USGS was required to follow the VA’s “rule of two” because USGS had “opted-into” the rule, the protester does not cite a regulation, statute, or decision to support its theory. As such, this allegation is similarly dismissed for failing to state a legally sufficient basis of protest. 4 C.F.R. §§ 21.1(f), 21.5(f).

decisions neither reference the requirements of the VA “rule of two” nor do they discuss any relationship of the small business “rule of two” to the requirements of other socioeconomic programs, such as SDVOSBs.

In short, the two decisions cited by the protester are inapplicable to the facts here, and provide no support for the protester’s assertion that the agency was required to set aside this procurement for SDVOSB concerns. Despite multiple attempts by M&C to make variations of this same argument, the allegation simply does not include sufficient information to establish the likelihood that the agency in this case violated any applicable procurement laws or regulations. 4 C.F.R. §§ 21.1(c)(4), 21.1(f). Accordingly, this allegation is dismissed.⁷ 4 C.F.R. § 21.5(f); see *Midwest Tube Fabricators, Inc.*, *supra*.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

⁷ The protester additionally attempts to argue that it was “arbitrary and capricious,” or unreasonable, for the agency to amend the solicitation and change the set-aside type from SDVOSB to small business. Resp. to Req. for Dismissal at 2. The protester provides no legal authority or factual support in its original protest for this assertion. An agency has the discretion to determine its needs and the best way to meet those needs. *Trademasters Serv., Inc.*, B-418522, June 3, 2020, 2020 CPD ¶ 185 at 4 (denying protester’s challenge to the reasonableness of the agency’s acquisition methodology). Further, an agency is allowed to amend a solicitation before the closing of proposals, so long as certain requirements are met. See FAR 15.206. M&C has presented no factual information indicating that USGS violated this, or any other regulation or statute, in amending the solicitation from an SDVOSB to a small business set-aside. This allegation is, likewise, dismissed. 4 C.F.R. §§ 21.1(c)(4), 21.1(f).