

Matter of: Software Engineering Services Corporation

B-411739

Comptroller General of the United States

2015 U.S. Comp. Gen. LEXIS 305

October 8, 2015

CONTRACT:

[*1] RFP No. FA9101-15-F-0001

HEADNOTES:

Protest that the ordering contracting officer for a task order issued under a multiple-award, government-wide acquisition contract failed to verify the awardee's small business status is denied, where the Small Business Administration, in ruling on a size status protest, found that the solicitation did not require recertification of size status at the order level, and the record shows that the awardee had small business status on the date of proposal submission.

COUNSEL:

John M. Heida, Esq., Heida Law Firm, LLC, for the protester.

Isaias Alba, IV, Esq., Michelle E. Litteken, Esq., Ambika J. Biggs, Esq., and Jacqueline K. Unger, Esq., Piliero Mazza PLLC, for OBXtek, Inc., the intervenor.

William M. Lackermann Jr., Esq., and Capt. Tamberneshia Willis, Department of the Air Force; Michael J. Noble, Esq., General Services Administration; and John W. Klein, Esq., and Alison M. Mueller, Esq., Small Business Administration, for the agencies.

Paula J. Haurilesko, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

OPINION BY: POLING

OPINION:

DECISION

Software Engineering Services Corporation (SES), of Bellevue, Nebraska, protests the Department of the Air Force's issuance of a task order to OBXtek, Inc., of Tysons Corner, Virginia, under request for proposals (RFP) No. FA9101-15-F-0001, for network-centric information technology (IT), networking and security, voice, video and data communications, information and applications management, system solutions, and related services. n1 SES primarily argues that the agency failed to verify OBXtek's small business [*2] size status.

n1 The estimated value of the task order is approximately \$ 46.5 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award indefinite-delivery/indefinite-quantity contracts valued in excess of \$ 10 million. *10 U.S.C. § 2304c(e)(1)(B); 41 U.S.C. § 4106(f)(1)*.

We deny the protest in part and dismiss it in part.

BACKGROUND

The RFP, issued on November 18, 2014, provided for issuance on a best-value basis of a fixed-price task order for network-centric IT, networking and security, voice, video and data communications, information and applications management, system solutions, and related services. The procurement was set-aside for service-disabled, veteran-owned small business (SDVOSB) holders of indefinite-delivery/indefinite-quantity contracts under the General Services Administration's (GSA) Alliant small business government-wide acquisition contract [*3] (GWAC). The base period of the Alliant contracts ran from February 3, 2009 to February 2, 2014, with a 5-year option period. GSA Comments at 2. Effective February 3, 2014, GSA exercised the 5-year option on the Alliant small business GWAC contracts. The GSA contracting officer modified OBXtek's Alliant contract on February 27 to recognize the concern's representation (in connection with the exercise of the Alliant option) as a small business. GSA Comments at 3, Attachs. 3, Mod. PO13, and 4, Mod. PA14. n2

n2 OBXtek had acquired some of the assets of PSI International, and on November 7, 2013, OBXtek and PSI signed a novation agreement with GSA transferring the Alliant small business GWAC to OBXtek. GSA Comments, Attach. 1, PSI-OBXtek Novation Agreement.

As relevant here, in response to questions from prospective offerors, the Air Force stated that "[a]ccording to the Small Business Administration the Contracting Officer is to rely on the Service Disabled Veteran Owned Small Business status contained [*4] in the System for Award Management (SAM). SAM status will be reviewed upon receipt of proposals." Agency Report (AR), Tab 5, Industry Questions & Answers, at 14, 17.

The RFP informed offerors that the task order was for services in the area of Base Communications and Information Technology Services (BCITS), one of six areas performed under the predecessor contract. The RFP advised offerors of the high potential for organizational conflicts of interest (OCI) between firms providing services in the BCITS area and firms providing services in two other areas performed under the predecessor contract (Test Operations and Sustainment (TOS), and Technical and Management Advisory Services (TMAS)). The RFP further stated that in order to avoid OCIs, contractors that participate in the BCITS contract could not participate in the TOS or TMAS efforts. RFP at 1-2.

The Air Force received 5 proposals, including SES's and OBXtek's, by the initial due date of December 19, 2014. While OBXtek had been listed in SAM as a small business when it submitted its proposal, on February 3, 2015, OBXtek changed its size status in SAM to "other than small". Subsequently, the contracting officer issued [*5] an evaluation notice requesting OBXtek to complete RFP section K, Representations and Certifications, which included the following:

Small business concern. The offeror represents as part of its offer that it [] is, [] is not a small business concern.

AR, Tab 10, OBXtek Evaluation Notice, at 3, 8. OBXtek then completed section K, indicating that it was a small business concern. OBXtek advised the Air Force that its response was current, accurate, and complete as of OBXtek's offer of December 19, 2014. Id.

On May 26, the Air Force issued a pre-award notice announcing its intention to issue the task order to OBXtek. As relevant here, the notice stated:

No response to this notification is required unless a basis exists to challenge the service-disabled veteran-owned status of the apparently successful offeror.

* * * *

This letter satisfies the pre-award notification requirement found in FAR [Federal Acquisition Regulation] 15.503(a)(2).

Protest, Exh. C, Preaward Notice.

On May 29, SES filed a protest with the contracting officer concerning the SDVOSB status of OBXtek. Protest, Exh. D, Size Status Protest Letter. The contracting [*6] officer forwarded the protest to the Small Business Administration (SBA), which dismissed the protest as untimely. In this regard, the SBA concluded that the solicitation did not require recertification at the task order level, and therefore any size status protest was required to be filed at the time the underlying GWAC was awarded. Id., Exh. E, SBA Response to Size Protest, June 15, 2015, at 1. On June 19, the Air Force issued the task order to OBXtek. SES did not appeal the SBA's decision and, after receiving a debriefing, protested to our Office.

DISCUSSION

SES argues that (1) the contracting officer failed to exercise due diligence with respect to verifying OBXtek's SDVOSB status; (2) the agency failed to ensure that the OCI provisions of the task order RFP were complied with; (3) the pre-award notice failed to include all of the required elements of *FAR* § 15.503(a)(2); and (4) the agency provided a flawed debriefing, in that it failed to address SES's concerns about OCIs and fair opportunity violations. As discussed below, we deny SES's first argument, and dismiss the remainder.

OBXtek's Eligibility for Award

SES raises multiple arguments concerning OBXtek's [*7] eligibility to receive the task order after its changed size status. n3 In this regard, SES primarily argues that the contracting officer failed to exercise due diligence with respect to verifying OBXtek's status as a small business in view of OBXtek's changed size status after the submission of its initial task order proposal. Protest at 8; SES Response to SBA & GSA Comments at 9.

n3 We address only SES's most significant arguments, but have considered all of SES's arguments, and find that none furnish a basis for sustaining the protest.

Because the protester's arguments raise legal questions related to the Small Business Act, and the SBA regulations implementing it, our Office solicited and obtained the views of SBA on matters raised in this protest. n4 As a general rule, our Office will defer to SBA's judgment in matters such as this, which fall squarely within its responsibility for administering the Small Business Act. *CMS Info. Servs., Inc., B-290541, Aug. 7, 2002, 2002 Comp. Gen. Proc. Dec. P 132 at 3 n. [*8]* 6.

n4 We also solicited and received the views of the General Services Administration.

SBA explains that an agency's decision to request--or not to request--recertification at the task order level is at the discretion of the contracting officer. The SBA states that, since OBXtek certified as small at the time the option on the un-

derlying GWAC was exercised, OBXtek should be treated as small for the remainder of the Alliant GWAC or, as relevant here, until the contracting officer requests recertification in connection with an order. With respect to the instant RFP, the SBA concludes that the solicitation did not require offerors to recertify their small business status. SBA Comments at 6.

Section 19.301-1(b) of the FAR states in relevant part that "the contracting officer shall accept an offeror's representation in a specific bid or proposal that it is a small business unless (1) another offeror or interested party challenges the concern's small business representation or (2) the contracting officer [*9] has a reason to question the representation. Challenges of and questions concerning a specific representation shall be referred to the SBA." *FAR § 19.301-1(b); Reliable Builders, Inc., B-402652, B-402652.3, June 28, 2010, 2010 Comp. Gen. Proc. Dec. P 260 at 6 n.7*. Even where a contracting officer's research gives reason to question the representation by a firm that it is a small business, that research is not an adequate substitute for referral to the SBA. *Marcola Meadows VA LLC, B-407078.2 et al., June 4, 2013, 2013 Comp. Gen. Proc. Dec. P 141 at 9*.

Here, even if we were to agree with the protester that the contracting officer had reason to question OBXtek's small business status, SES has identified no basis for our Office to sustain its protest. The contracting officer forwarded SES's size challenge to the SBA, which concluded that the task order solicitation did not require recertification of an offeror's small business status and that therefore the protest was untimely. n5 Protest, Attach. E, SBA Size Determination, at 1. In this regard, the SBA has conclusive authority to determine size status matters for federal procurements. *4 C.F.R. § 21.5(b)(1); Mark Dunning Indus., Inc., B-405417.2, Nov. 19, 2013, 2013 Comp. Gen. Proc. Dec. P 267 at 5 [*10]*. Furthermore, an offeror's size status is determined at the time that it submitted its proposal, not at the time that it is issued a task order. See *Research & Dev. Solutions, Inc., B-410581, B-410581.2, Jan. 14, 2015, 2015 Comp. Gen. Proc. Dec. P 38 at 6*. n6 While OBXtek's size status changed after it submitted its initial proposal, the record shows--and SES does not disagree--that OBXtek was listed as small on the date that its proposal was submitted.

n5 We note that SES declined to file an appeal with the Office of Hearings and Appeals. Protest at 6.

n6 See also Size Appeal of Ramcor Services Group, Inc., SBA No. SIZ-5510, Nov. 1, 2013, at 4 (small business size status determined as of date of initial proposal submission, not date of final proposal revision).

Other Issues

With respect to SES's contention that the agency failed to enforce the OCI provisions of the task order RFP, SES states that Jacobs Technology, Inc.--a partner in the joint venture performing the incumbent contract--assisted [*11] other offerors, including OBXtek, in preparing their proposals, thus creating an OCI. In this regard, SES argues that the contracting officer improperly refused SES's requests for the contracting officer to take action or provide clear guidelines in the event that Jacobs Technology was chosen to be the TOS contractor. Protest at 10.

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. Id.

Here, SES's argument is predicated on the award of the TOS contract to Jacobs Technology. However, the TOS contract instead was awarded to National Aerospace Solutions, LLC. Air Force Dismissal Request, Attach. 2, FedBizOpps Notice, June 16, 2015. Given that Jacobs Technology was not awarded the TOS contract, SES's protest does not provide facts that establish that the agency violated a procurement [*12] statute or regulation. This protest ground therefore is dismissed. See *4 C.F.R. § 21.5(f)*.

SES also argues that the pre-award notice failed to notify disappointed offerors of their rights with respect to challenging the small business status of an apparently successful offeror as required by *FAR § 15.503(a)(2)*. In this regard, SES

states that the pre-award notice addressed only challenges to the SDVOSB status of the apparently successful offeror. Protest at 10. SES asserts that this omission delayed the filing of its protest challenging OBXtek's small business status.

We dismiss this protest ground because there is no showing that the protester was misled by the notice. See *McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 Comp. Gen. Proc. Dec. P 54 at 3* (GAO will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award); *Statistica, Inc., v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996)*. Here, SES filed its size challenge three days after receiving the [*13] pre-award notice, clearly demonstrating that the notice did not mislead it regarding its right to file a size-status protest. Protest, Exh. D, SES Size Protest, May 29, 2015.

We also dismiss SES's argument that the agency provided a flawed debriefing. Our Office will not review a protester's contention that the debriefing it received was inadequate because the adequacy of a debriefing is a procedural matter that does not involve the validity of an award. *A1 Procurement, JVG, B-404618, Mar. 14, 2011, 2011 Comp. Gen. Proc. Dec. P 53 at 5 n.5*.

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel

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