



Decision

Matter of: Major Contracting Services, Inc.

File: B-400616

Date: November 20, 2008

Barry Jenkins for the protester.

Lt. Col. Vince Vanek, Department of the Army, and Kevin R. Harber, Esq., Small Business Administration, for the agencies.

Nora K. Adkins, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where an awardee was found to be ineligible for service-disabled veteran-owned small business concern (SDVOSBC) status by the Small Business Administration (SBA) and the SBA's Office of Hearings and Appeals based on a timely status protest filed after award under an SDVOSBC set-aside, the agency was not required to terminate the contract under the SBA's applicable regulations.

DECISION

Major Contracting Services, Inc. (MCS) of Colorado Springs, Colorado, protests the decision of the Army to continue performance of a contract awarded to DAV Prime/Vantex Service Joint Venture (DAV Prime JV) of Larue, Texas, under solicitation No. W911S2-08-T-3009 for portable chemical toilet services at Fort Drum, New York, which was issued as a service-disabled, veteran-owned, small business concern (SDVOSBC) set-aside. MCS contends that the Army must terminate DAV Prime JV's contract because the Small Business Administration (SBA) and the SBA Office of Hearings and Appeals (OHA) determined that DAV Prime JV was not an eligible SDVOSBC.

We deny the protest.

The request for quotations (RFQ) for portable chemical toilet services for a base period and four 1-year options was posted to the government point of entry, www.fedbizopps.org, on March 14, 2008. The RFQ was issued as a 100-percent set-aside for SDVOSBCs. The procurement was conducted using simplified

acquisition procedures under Federal Acquisition Regulation (FAR) Part 13.5.¹ The evaluation factors to be considered were price and past performance.

Three quotes were received in response to the RFQ, including quotes from MCS and DAV Prime JV, both of which represented that they were SDVOSBCs. On May 28, the agency made award to DAV Prime JV; performance began June 1. MCS was notified of the contract award in writing on June 2.²

On June 5, MCS submitted a protest to the contracting officer alleging that DAV Prime JV was not a SDVOSBC and was thus ineligible for award. The agency forwarded MCS's status protest to the SBA. MCS's protest was accepted by the SBA on June 19. The SBA notified MCS and the agency on June 26 that it had received the timely filed protest. Upon receiving the SBA's notice, the agency chose to allow DAV Prime JV to continue performance under the protested contract.

The SBA Director of Government Contracting sustained MCS's protest on July 15, finding that DAV Prime did not meet the eligibility requirements of a SDVOSBC, and therefore, the joint venture of DAV Prime and Vantex Service failed to qualify as a SDVOSBC. The SBA decision stated that both DAV Prime and DAV Prime JV were ineligible to receive an award under the current RFQ and both were prohibited from submitting offers on future SDVOSBC procurements. After receiving notice of the decision, MCS contacted the contracting officer to determine the status of the award given the SBA's findings. The contract officer informed MCS on July 21 that he would not make any decision until DAV Prime JV "forego(s) appeal or an appeal decision is made." AR, Tab 13, Email Correspondence.

On July 25, DAV Prime JV appealed the decision of the SBA to the SBA's OHA. The OHA denied DAV Prime JV's appeal on August 15. MCS again contacted the contracting officer on September 8 to determine the status of award and was informed on September 15 that the award was not and would not be vacated. MCS filed the current protest with our Office on September 19 seeking termination of DAV Prime JV's contract because the SBA found, and the OHA affirmed, that DAV Prime JV was not an eligible SDVOSBC.

In 2003, Congress created, by amending the Small Business Act, a procurement program for small business concerns owned and controlled by service-disabled veterans. Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651, 2662

¹ FAR subpart 13.5 authorizes the use of simplified procedures for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold but not exceeding \$5.5 million.

² While MCS asserts that the Army failed to provide timely post-award notice as provided by FAR § 15.503(b)(1), this procurement was conducted under FAR subpart 13.5, which does not specifically require a post-award notice of award.

(2003), 15 U.S.C. § 657f (2006). Under this authority, the SBA, and not our Office or the procuring agency, is the designated authority for determining whether a firm is an eligible SDVOSBC, and it has established procedures for interested parties to challenge a firm's status as a qualified SDVOSBC. Singleton Enters.–GMT Mech., A Joint Venture, B-310552, Jan. 10, 2008, 2008 CPD ¶ 16 at 3; see 15 U.S.C. §§ 632(q), 657b; 13 C.F.R. §§ 125.25, 125.27 (2008); FAR §§ 19.307, 19.1403.

Many of MCS's arguments concern the issue of whether DAV Prime JV qualified as an SDVOSBC, which issue has been resolved by the SBA. Based on these arguments, MCS argues that the contracting officer should have investigated and questioned the joint venture's representation that it was an SDVOSBC. However, we find nothing that would have required the contracting officer to investigate or question DAV Prime JV's representation before making award.

MCS has also asserted that the Army should have terminated the contract upon receiving the SBA's and the OHA's decisions finding DAV Prime JV ineligible as an SDVOSBC joint venture. The Army, on the other hand, argues that in accordance with the SBA's regulations it was not required to terminate the contract. The SBA, whose views we solicited, agrees with the Army.

The SBA's regulations regarding SDVOSBC protests describes the effect of an SBA determination on SDVOSBC status as follows:

Effect of determination. SBA's determination is effective immediately and is final unless overturned by OHA on appeal. If SBA sustains the protest, and the contract has not yet been awarded, then the protested concern is ineligible for an SDVO SBC contract award. If a contract has already been awarded, and SBA sustains the protest, then the contracting officer cannot count the award as an award to an SDVO SBC and the concern cannot submit another offer as an SDVO SBC on a future SDVO SBC procurement unless it overcomes the reasons for the protest.

13 C.F.R. § 125.27(g). The regulation thus explicitly differentiates between a determination's effect when issued before versus after award and, as we have previously found, we think a fair reading of this regulation is that there is no requirement that a contract be terminated if an awardee is found to be other than an SDVOSBC after award was made. Veteran Enter. Tech. Servs., LLC, B-298201.2, July 13, 2006, 2006 CPD ¶ 108 at 3. Indeed, the SBA states that its regulations "do not, under any circumstances, require a procuring activity to terminate or even suspend an award made to an entity that is subsequently determined to not be SDVO

SBC eligible,” although the Army “may certainly be subject to moral suasion” to do so.³ SBA Report at 3.

The protest is denied.

Gary L. Kepplinger
General Counsel

³ Given that DAV Prime JV is not an SDVOSBC and thus should not have been awarded the contract under this solicitation that was limited to SDVOSBCs, we think the agency should consider whether it is appropriate to exercise the options under that firm’s contract.