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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Veteran Enterprise Technology Services, LLC

File: B-298201.2

Date: July 13, 2006

Marc Goldschmitt for the protester.

Capt. Peter G. Hartman, Department of the Army, for the agency.

Peter D. Verchinski, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency is not required to terminate contract awarded under service-disabled veteran-owned (SDVO) small business set-aside, despite Small Business Administration's determination in response to SDVO protest that awardee was not an SDVO concern, where agency awarded contract after making a reasonable urgency determination, as allowed by the Federal Acquisition Regulation.

DECISION

Veteran Enterprise Technology Services, LLC (VETS) protests the Department of the Army's decision to permit Wexford Group International, Inc. (WGI) to continue performing a contract awarded under request for proposals (RFP) No. W9124Q-06-R-0002, issued as a service-disabled veteran-owned (SDVO) small business set-aside, for support services for the Rapid Equipping Force (REF). VETS contends that the Army must terminate the contract because the Small Business Administration (SBA) has determined that WGI is not an SDVO small business concern.

We deny the protest.

On February 7, 2006, the Army issued the RFP to acquire various support services, including management, operations, logistical, administrative, and project support, for the REF, which develops strategies and methodologies to swiftly introduce material innovations into the Army. The Army received several proposals, including VETS's and WGI's, and ultimately selected WGI for award. On March 10, the

contracting officer determined that award should be made without delay,¹ and thus executed a written determination, pursuant to Federal Acquisition Regulation (FAR) § 15.503(a)(2)(iii), that urgency necessitated award to WGI without providing the other offerors the required pre-award notice of the intended awardee.² Shortly thereafter, the Army made award to WGI. Upon learning of the award, VETS filed a protest with the Army (which forwarded the allegations to SBA) challenging WGI's SDVO and small business size status. On April 26, SBA held that WGI did not qualify as an SDVO small business.³ On the basis of that determination, VETS requests that our Office recommend that the Army terminate WGI's contract and make award to VETS.⁴ The Army takes the position that, since it properly proceeded with the award following an urgency determination, and VETS's SDVO status protest was not filed until after award, SBA's determination applies to future procurements only. We agree with the Army.

SBA's regulations regarding SDVO small business protests are found at 13 C.F.R. § 125.24-28. Section 125.27(g) of those regulations describes the effect of an SBA determination on SDVO status as follows:

(g) 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 [(small business concern)] contract award. If a contract has already been awarded, and SBA sustains the protest, then the

¹ The agency concluded that WGI would need 3 weeks prior to the April 1 contract start date to assemble its work force and phase in to full performance, and that pre-award notice was not feasible because it could delay the phase-in and, thus, contract performance.

² Under FAR § 15.503(a)(2)(i)(D), in procurements that have been set aside for SDVO small businesses, the contracting agency generally is required to inform each unsuccessful offeror, in writing, of the identity of the apparent successful offeror prior to making award. However, as noted above, FAR § 15.503(a)(2)(iii) provides that preaward notice is not required where the contracting officer makes a written determination that the urgency of the requirement necessitates award without delay. Our Office will review such determinations for reasonableness. See Resource Applications, Inc., B-271079.6, Aug. 12, 1996, 96-2 CPD ¶ 61 at 2.

³ The protester's size status protest is still pending before SBA; the awardee's appeal of SBA's determination that it is not an SDVO small business was denied on June 29.

⁴ The Army contends that SBA did not issue its determination within the required 15-day period, see FAR § 19.307(h), and that the SDVO status determination does not apply to the current procurement for this reason. The record is not clear on this point, and we need not resolve it in light of our conclusion below.

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 (e.g., it changes its ownership to satisfy the definition of an SDVO SBC set forth in § 125.8).

The regulation thus explicitly differentiates between a determination's effect when issued before versus after award. Specifically, while the regulation expressly states that SBA's determination affects the current solicitation if award has not been made at the time of the determination—it precludes award to the protested firm—it does not similarly provide for termination if award has already been made. Rather, the only identified effects of post-award determinations are that the contracting officer cannot count the award as an SDVO small business award (presumably for purposes of meeting set-aside goals), and that the firm determined not to be an SDVO small business cannot compete on future SDVO procurements. By separately addressing pre-award and post-award determinations, and explicitly making only pre-award determinations effective for the current procurement, we think the regulation makes clear that post-award determinations do not require termination, and that termination therefore is not required here.⁵

In response to our request for its views, SBA cites section 125.27(e) of its regulations, which provides that an agency may proceed with contract award, despite a timely SDVO status protest, where the agency determines in writing that award is in the public interest.⁶ SBA maintains that, although this regulation does not by its language apply to the situation here—since VETS's protest was filed after

⁵ We note that SBA's small business size protest regulations specifically provide that a timely filed protest applies to the procurement at issue, even if award has been made. See 13 C.F.R. § 121.1004(c). We have cited this provision in holding that an agency should terminate an awardee's contract, even where no pre-award notice was required (and award therefore was permissible), where a size protest was timely filed, there is no appeal of SBA's determination, and there are no countervailing circumstances that would weigh in favor of allowing the large business concern to continue performance. See, e.g., Tiger Enters., Inc., B-292815.3, B-293439, Jan. 20, 2004, 2004 CPD ¶ 19 at 4. The SDVO regulations do not include any similar provision and, conversely, the small business protest regulations do not include language similar to that in 13 C.F.R. § 125.27(g), which we have found gives post-award SDVO status determinations only prospective effect.

⁶ The FAR provides that a contracting officer may not make award after receiving a an SDVO protest until (1) SBA has made an SDVO status determination, (2) 15 business days have expired since SBA's receipt of the protest, or (3) the contracting officer determines in writing that an award must be made to protect the "public interest." See FAR § 19.307(h).

award--a public interest determination nevertheless should be required of the agency in order for the award to WGI to be viewed as proper. We decline to adopt this view since, as SBA acknowledges, there simply is no requirement that the agency make a public interest determination where award is made prior to an SDVO status protest. Accordingly, we find no requirement for the agency to make a public interest determination here.

VETS also asserts that there was no real urgency here, since the agency could have avoided any delays caused by the pre-award notice by extending the incumbent's contract or by awarding a bridge contract for the services. The protester apparently believes that the absence of a proper urgency determination would warrant treating the situation here as being subject to the pre-award portion of section 125.27(g), which would make the determination applicable to the current procurement and require termination.

The urgency determination was reasonable. Support services currently were being provided under several existing contracts (the contract awarded here consolidated those services under a single contract) that were expiring, and at least three of them had no options remaining and therefore could not be extended. There is no requirement that agencies award new contracts to cover potential delays resulting from the pre-award notice of an intended award. See generally Resource Applications, Inc., supra, at 3 (urgency determination under small business set-aside). Further, there is no basis for us to question the need for the services on a continuing basis. The agency explains that REF's mission is "to develop strategies and methodologies to swiftly introduce material innovations into the U.S. Army by taking emerging technologies to operational environments for initial field evaluation," and that its "immediate mission is to get these innovations and technologies into Iraq." Agency Memorandum for Record, June 6, 2006. The Army advises that these innovations already have reduced fatalities and injuries to the troops in Iraq, which demonstrates the importance of REF's mission and, it follows, of the support services being procured. VETS has provided no basis for us to question the Army's characterization of REF's mission, and has not shown that the support services are not required on a continuing basis in order for REF to satisfy that mission, or that any other aspect of the Army's urgency determination was unreasonable. Accordingly, we conclude that the determination was reasonable--sufficient time was not available to provide pre-award notice and still allow the start-up time necessary to ensure the continued operation of REF after April 1. See Dawkins Gen. Contractors & Supply, Inc., B-243613.11, Sept. 21, 1992, 92-2 CPD ¶ 190 at 4.⁷

⁷ VETS raises two further arguments. First, VETS asserts that, since the RFP did not require a transition period, the awardee's need for such a period should not be permitted to form the basis for an urgency determination. However, even absent a provision in the solicitation for a transition period, we find nothing unreasonable in
(continued...)

We conclude that, since the SBA determination that WGI did not qualify as an SDVO small business was not issued until after award, that determination does not apply to this procurement. Consequently, the Army is not required to terminate WGI's contract.

The protest is denied.

Gary L. Kepplinger
General Counsel

(...continued)

an agency's taking into consideration the need to award a contract sufficiently in advance of the start date to allow the new contractor to prepare for performance. Second, VETS challenges the urgency determination on the basis that the Army was allegedly aware of the need to procure these services 1 year prior to the expiration of the existing contracts. However, VETS has presented no evidence in support of its argument and, moreover, has cited no authority for the proposition that a delay in initiating a procurement invalidates a subsequent urgency determination made under FAR § 15.503(a)(2)(iii).