



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Herman Construction Group, Inc.

File: B-415394

Date: January 4, 2018

William L. Bruckner, Esq., and Jessica L. Mulvaney, Esq., Bruckner Law Firm, APC, for the protester.

Carissa Siebeneck Anderson, Esq., Jon M. DeVore, Esq., and Melinda L. Meade Meyers, Esq., Birch, Horton, Bittner & Cherot, for Eklutna Construction & Maintenance, LLC, the intervenor.

Scott N. Flesch, Esq., and Captain William T. Wicks, Department of the Army, for the agency.

John W. Klein, Esq., and Laura M. Foster, Esq., Small Business Administration.

Kenneth Kilgour, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation failed to include a geographic area restriction is dismissed as untimely when filed after the time set for bid opening.

DECISION

Herman Construction Group, Inc., of Escondido, California, protests the award of a contract to Eklutna Construction & Maintenance, LLC, of Eagle River, Alaska, under invitation for bids (IFB) No. W911SA-17-B-2008, issued by the Department of the Army, as a competitive Small Business Administration (SBA) 8(a) set-aside, for facilities repairs at Fort Hunter Liggett, California. The protester asserts that the awardee is ineligible because it does not have a bona fide place of business within the geographic area serviced by the SBA district office that accepted the requirement into the 8(a) program and that the IFB failed to include a required geographic area restriction.

We dismiss the protest.

BACKGROUND

On August 9, 2017, the Army submitted a letter to the SBA's district office in Fresno, California, offering the requirement for facilities repairs for competition under the SBA's

8(a) program. See Agency Report (AR), Tab 5, SBA Acceptance Letter, at 1. On that same day, the SBA accepted the requirement and stated that the solicitation must limit competition to 8(a) firms located in the geographic area serviced by the Fresno, Sacramento, and San Francisco district offices, and other 8(a) firms with a bona fide place of business within that geographic area. Id.

On August 10, the agency issued the IFB as an 8(a) set-aside and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction. AR, Tab 6, IFB, at 1. The IFB failed to include the geographic restriction. See id. The agency issued several amendments to the solicitation, which included contractor questions and answers. Id., Tabs 7-9, Amend. 1-3. The agency did not receive any questions as to whether a geographic restriction applied.

The contracting officer opened the sealed bids on September 14 and determined that Eklutna had submitted the apparent low bid. AR, Tab 5, Abstract of Offers, at 1. Herman submitted the next lowest bid. Id. On September 15, Herman filed an agency-level protest alleging that Eklutna was not eligible for award of the 8(a) contract because it did not have a bona fide place of business in the geographic area where the work is to be performed. AR, Tab 11, Agency-Level Protest, at 3.

On September 21, in response to the protester's agency-level protest, the Army notified the SBA that Eklutna was the apparent low bidder and asked the Alaska District Office of the SBA to provide an eligibility determination. See AR, Tab 12, Letter from Contracting Officer (CO) to SBA, Sept. 21, 2017. That same day, the Alaska District Office responded that, in the SBA's view, "[i]n accordance with the clauses and provisions included in the subject solicitation" Eklutna "met the eligibility and size criteria for award of the contract." AR, Tab 13, Letter from SBA to CO, Sept. 21, 2017, at 1. The SBA's eligibility determination made no mention of Eklutna having a place of business in the vicinity of the construction requirement. See id.

Based on the SBA's eligibility determination, the contracting officer denied the protester's agency-level protest on September 22. AR, Tab 14, Letter from CO to Protester, Sept. 22, 2017. This protest followed.

DISCUSSION

Herman Construction asserts that Eklutna is ineligible for award because it does not have a place of business within the geographic area serviced by the SBA district office that accepted the requirement into the 8(a) program and that the IFB failed to include a required geographic area restriction. Protest at 3-5. The agency argues that the challenge to the terms of the IFB is untimely. Memorandum of Law (MOL) at 5-9.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present

their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to bid opening be filed before that time. 4 C.F.R. § 21.2(a)(1); see C. Lawrence Constr. Co., Inc., B-290709, Nov. 20, 2002, 2002 CPD ¶ 165 at 1 n.1.

The applicable SBA regulations state that for construction competitions, SBA will determine whether a competitive 8(a) set aside should be competed among only those business concerns having a bona fide place of business within the geographic boundaries of one or more SBA district offices, within a state, or within the state and nearby areas. 13 C.F.R. § 124.507(c)(2). Only those participants with bona fide places of business within the appropriate geographic boundaries are eligible to submit offers. Id.

Here, the IFB did not specify a geographic area in which an offeror must have a place of business. See AR, Tab 6, IFB. Nothing in the IFB limited competition to 8(a) small businesses having a bona fide place of business within any geographic boundaries, let alone within the boundaries of one or more SBA district offices, within a state, or within the state and nearby areas. Amendment 3 to the IFB set September 14, 2017, as the time for bid opening. AR, Tab 9, IFB amend. 3. The protester filed an agency-level protest on September 15, arguing that “it is a clear requirement for 8(a) eligibility that the contractor have a bona fide place of business in the applicable geographic area if the procurement is for construction.” AR, Tab 11, Agency-Level Protest at 3 (emphasis in original). The protester had knowledge of all of the facts necessary to assert its protest of the terms of the solicitation at the time the IFB was issued on August 10, 2017, namely, that the IFB did not contain a geographic restriction.

Because the SBA’s eligibility determination made no mention of the geographic restriction, we asked the SBA for its views on the protest. Although the Army failed to include the geographic restriction set forth in SBA’s 8(a) acceptance letter, the SBA states that “[i]f any potential offeror believed that the solicitation should have been geographically restricted, such a firm should have protested prior to the closing date for the receipt of offers.” SBA MOL at 2. The SBA concludes, moreover, that “[b]ecause the published solicitation [] did not set forth a geographic restriction, [the SBA] reasonably concluded that there was no applicable geographic restriction and therefore Eklutna is eligible for award.” Id. at 3.

Herman challenges the assertion that its protest is untimely, arguing that the protest was filed within 10 days of when Herman knew that the agency failed to follow the Small Business Administration’s direction to the agency that the solicitation contain a geographic restriction. Response to Agency Request for Dismissal at 5-6. The protester’s argument is undermined by the plain language of the agency-level protest, noted above, where Herman stated, unequivocally, “it is a clear requirement for 8(a) eligibility that the contractor have a bona fide place of business in the applicable geographic area if the procurement is for construction.” AR, Tab 11, Agency-Level

Protest at 3 (emphasis omitted). On this record, we find that the agency-level protest, filed after the time for bid opening, is untimely. 4 C.F.R. § 21.2(a)(1). Because the agency-level protest itself was untimely, the subsequent protest to GAO is likewise untimely. See 4 C.F.R. § 21.2(a)(3).

The protester also asserts that the awardee, Eklutna Construction & Maintenance, LLC, is ineligible for award because it lacks a place of business in the geographic vicinity of the construction site. AR, Tab 11, Agency-Level Protest at 3. As noted above, the SBA asserts that it reasonably concluded that Eklutna is eligible for award, where the IFB lacks a geographic restriction. Moreover, because we find untimely the allegation that the solicitation should have contained a geographic area restriction, the protest that the awardee is ineligible for failing to meet that requirement fails to state a valid basis of protest. 4 C.F.R. § 21.5(f).

The protest is dismissed.

Thomas H. Armstrong
General Counsel