



Decision

Matter of: Competitive Innovations LLC

File: B-422500

Date: June 27, 2024

Timothy B. Mills, Esq., Mills Law Group, LLP, for the protester.
John Cornell, Esq., Department of Homeland Security, for the agency.
Michelle Litteken, Esq., Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging the terms of a solicitation are inconsistent with a regulation is denied where the regulation does not support the protester's interpretation.
 2. Protest challenging terms of the solicitation is dismissed where the protester's assertions fail to state a valid basis for protest.
-

DECISION

Competitive Innovations LLC (CI), a historically underutilized business zone (HUBZone) small business of Arlington, Virginia, protests the terms of request for proposals (RFP) No. 70SBUR24R00000001, issued by the Department of Homeland Security, Citizenship and Immigration Services (USCIS) for program management, administrative, clerical, and technical services (PACTS). The protester contends that the RFP violates a regulation issued by the Small Business Administration (SBA) and the protester's constitutional right to equal protection.

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

BACKGROUND

USCIS issued the RFP, referred to as the PACTS III solicitation, on February 5, 2024.¹ Req. for Dismissal at 1. The agency issued three PACTS III solicitations, with each solicitation pertaining to a different functional category. *Id.* at 1-2; RFP at 9. The PACTS III solicitation for functional category one, administrative management and general management consulting services, is relevant here.²

The solicitation contemplates the award of multiple indefinite-delivery, indefinite-quantity contracts with offerors competing in four separate socioeconomic program set-aside categories: service-disabled veteran-owned small business, woman-owned small business, HUBZone small business, and 8(a) business.³ RFP at 9, 59. An offeror that qualifies for more than one socioeconomic category is permitted to submit proposals in more than one category. *Id.* at 62. For example, a firm that qualifies as an 8(a) small business and a HUBZone small business may submit a proposal for each category.

The solicitation states that USCIS anticipates awarding eight contracts within each set-aside category, for a total of 32 functional category one contracts. RFP at 59. Within each small business set-aside category, the agency intends to allocate the contracts equally among the following types of offerors: prime contractor, small business joint venture, small business prime contractor with one or more small business subcontractors, and mentor-protégé joint venture. *Id.* at 59. The solicitation provides that the total period of performance for the contracts, inclusive of the base period and all option periods, is 15 years. *Id.* at 4, 60-61. The RFP anticipates the issuance of fixed-price, labor-hour, and time-and-materials task orders. *Id.* at 9.

The solicitation establishes that award will be made to the offerors with the highest technically rated proposals with realistic and reasonable prices. RFP at 124. Proposals will be evaluated under two factors, technical and price, and the technical factor consists of the following three subfactors: experience and past performance, accounting system, and facility clearance. *Id.* at 125.

¹ The agency issued five amendments to the RFP, with the final amendment issued on May 23, 2024. All citations of the RFP in this decision refer to the conformed version of the solicitation issued with amendment 5.

² Functional category two pertains to office administrative services, and functional category three concerns engineering services. Req. for Dismissal at 2.

³ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) 19.800. This program is commonly referred to as the 8(a) Business Development program (or simply “8(a) program”).

As relevant here, for the experience and past performance subfactor, the RFP instructs offerors to complete a self-scoring sheet/workbook. RFP at 73. Within the self-scoring sheet/workbook, offerors are to list and provide information about their recent and relevant projects, and the proposal will receive points based on the dollar value of the projects.⁴ *Id.* at 74. For example, a project with an obligated value between \$250,000 and \$400,000 would receive 146 points. *Id.* There is no limitation on the number of qualifying projects an offeror may submit under the experience and past performance subfactor.⁵ *Id.* at 73.

The RFP states that the agency will use a four-phase source selection process. In the first phase, proposals will be grouped by functional category, socioeconomic category, and type of offeror. RFP at 127. In the second phase, USCIS will select the proposals in each group with the highest claimed scores, and in the third phase, the agency will conduct an acceptability review. *Id.* In the fourth and final phase, USCIS will evaluate pricing for fairness and reasonableness and review the supporting documentation for the technical subfactors. *Id.* If the agency finds a claimed evaluation element is unsubstantiated, the agency will reduce the proposal's total claimed score accordingly. *Id.* at 132. The proposals with the highest scores in each grouping will be selected for award. For example, within functional category one, and within the HUBZone category, the two highest-scored proposals submitted by HUBZone prime contractor offerors would be selected for award.

Before the deadline for the submission of proposals, CI filed this protest with our Office.⁶

DISCUSSION

The protester advances two challenges to the RFP. First, the protester contends that the solicitation improperly creates an evaluation preference for HUBZone offerors that

⁴ The RFP states that a project is relevant if (1) another offeror did not include the project in its proposal, (2) the predominant services performed are similar to the services outlined in the statement of work and the functional category, (3) funds were obligated, (4) the project was executed under a contract as defined in FAR section 2.101, (5) the offeror has provided at least 6 consecutive months of performance, (6) the offeror provided the service as a prime contractor or a first tier subcontractor, (7) the project was performed by the offeror or a partner/member of the offeror's teaming arrangement, and (8) performance was rated as satisfactory or better. RFP at 75-78. The solicitation provides that a project is recent when at least one day of performance occurred within 2 years of the date the RFP was issued. *Id.* at 78.

⁵ Within the experience and past performance subfactor, proposals will also receive points if the offeror has an adequate accounting system and if the offeror has a facility clearance, *i.e.*, a determination that the offeror is eligible for access to classified information. See RFP at 74.

⁶ The agency issued three amendments to the RFP after CI filed its protest. The protester does not challenge the changes resulting from any of the amendments.

are certified in one more other socioeconomic programs, but it does not provide the same preference to HUBZone firms that do not hold any additional certifications. According to the protester, this preference violates 13 C.F.R. § 126.609 of SBA's regulations. Second, CI asserts that the solicitation violates its constitutional right to equal protection by permitting certain firms that are participants in the SBA's 8(a) program to receive credit for contracts that were awarded as 8(a) set-asides.⁷ For the reasons discussed below, we find no basis to sustain the protest.

Alleged Violation of an SBA Regulation

As noted above, CI alleges that the solicitation improperly provides an evaluation preference for the award of a HUBZone set-aside contract to HUBZone firms that are certified in one more other socioeconomic programs (referred to here as "HUBZone-plus offerors"), but it does not provide the same preference to HUBZone firms that do not hold any additional certifications (referred to here as "HUBZone-Only Offerors"). Protest at 2. According to CI, the preference for HUBZone-plus offerors stems from the fact that under the experience and past performance subfactor, a HUBZone-plus offeror can submit and receive points for its relevant HUBZone set-aside contracts and any relevant contracts it performed under other socioeconomic programs, while a HUBZone-only offeror would be limited to submitting and receiving points for relevant contracts for only its HUBZone contracts. Essentially, CI contends that a HUBZone-plus offeror has a larger pool of prior contracts to use in its proposal, and because the RFP permits an offeror to submit an unlimited number of contracts under the experience and past performance subfactor, the HUBZone-plus offerors are improperly advantaged with an evaluation preference. *Id.* at 13.

The protester alleges that this advantage violates 13 C.F.R. § 126.609 of SBA's regulations, which provides, in relevant part, as follows:

A procuring activity cannot restrict a HUBZone competition (for either a contract or order) to require SBA socioeconomic certifications other than

⁷ CI's constitutional argument is premised on a federal district court decision where the court enjoined the SBA from using a rebuttable presumption of social disadvantage in administering the 8(a) program. *Ultima Servs. Corp. v. Dep't of Ag.*, No. 20-cv-0041 (E.D. Tenn. July 19, 2023). The rebuttable presumption assumes, unless there is evidence to the contrary, that members of certain racial and ethnic groups qualify as socially disadvantaged within the meaning of the 8(a) program requirements. See 13 C.F.R. § 124.103(b). The district court held that the SBA's use of the rebuttable presumption violated the plaintiff's Fifth Amendment right to equal protection of the law. Here, CI contends that offerors that were admitted to the 8(a) program using the rebuttable presumption of social disadvantage should not be permitted to use 8(a) set-aside contracts under the experience and past performance subfactor. Protest at 20. The protester does not object to an 8(a) firm using 8(a) set-aside contracts where the firm was admitted to the 8(a) program on a basis other than the rebuttable presumption of social disadvantage. Resp. to Req. for Dismissal at 14.

HUBZone certification (*i.e.*, a competition cannot be limited only to business concerns that are both HUBZone and 8(a), HUBZone and WOSB, or HUBZone and SDVO) or give evaluation preferences to firms having one or more other certifications.

Id. at 2 (*quoting* 13 C.F.R. § 126.609).

In responding to the protest, the agency argues that the RFP does not violate the regulation because the RFP does not require HUBZone offerors to hold any additional socioeconomic certifications, and it does not award points for holding one or more socioeconomic certifications. Req. for Dismissal at 4. Rather, USCIS maintains that holding a HUBZone certification is a requirement to compete in the HUBZone category--not a scored element. *Id.* USCIS requests dismissal of this allegation, arguing that the protest ground is factually and legally insufficient. *Id.* at 5.

As this protest concerns interpretation of a regulatory provision, our analysis begins with the text of the provision. See *Curtin Mar. Corp.*, B-417175.2, Mar. 29, 2019, 2019 CPD ¶ 117 at 9 (*quoting Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). In construing a statute or regulation, “[t]he first step ‘is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in this case.’” *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). In this regard, we “begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). If the statutory or regulatory language is clear and unambiguous, the inquiry ends with the plain meaning of the language. *ASRC Fed. Data Net. Techs., LLC*, B-418028, B-418028.2, Dec. 26, 2019, 2019 CPD ¶ 432 at 8 (*citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

Here, we agree with the agency that the RFP does not violate 13 C.F.R. § 126.609. That regulation prohibits procuring agencies from (1) requiring offerors to hold a socioeconomic program certification in addition to a HUBZone certification and (2) providing an evaluation preference to HUBZone firms with additional certifications. The RFP does not implicate either prohibition. HUBZone offerors are not required to hold any additional certifications. Furthermore, no points are assigned for socioeconomic program certifications. Although a HUBZone-plus offeror may have more contracts to submit under the experience and past performance subfactor, the RFP does not expressly provide an evaluation preference to firms with more than one socioeconomic program certification. While a HUBZone-plus offeror may have an inherent advantage under the experience and past performance subfactor, nothing in the SBA’s regulation requires USCIS to compensate for such an advantage.⁸ Accordingly, this allegation is denied.

⁸ The Federal Register notice in which SBA promulgated 13 C.F.R. § 126.609 stated that SBA had received multiple comments “supporting the clarification to more clearly
(continued...)

Alleged Violation of Constitutional Right to Equal Protection

CI argues that the solicitation violates its right to equal protection under the U.S. Constitution by permitting HUBZone offerors that are also participants in the 8(a) program to receive points for contracts that were awarded as 8(a) set-aside contracts. Protest at 24. The protester asserts that USCIS should not allow offerors that were admitted to the 8(a) program using the rebuttable presumption of social disadvantage to use 8(a) contracts under the experience and past performance subfactor. *Id.* USCIS responds that there is no legal or equitable basis for CI's allegation. Req. for Dismissal at 5.

Under the Competition in Contracting Act, 31 U.S.C. § 3552, our Office is authorized to decide protests concerning alleged violations of a procurement statute or regulation. We find CI's contention that the RFP violates its right to equal protection under the U.S. Constitution does not involve a violation of a procurement statute or regulation. In support of its position, the protester cites a court decision concerning the constitutionality of the use of a rebuttable presumption of social disadvantage for admission into the 8(a) program. Protest at 3 (*citing Ultima Services Corp., supra*). The case cited by CI does not relate directly to the rights of a prospective government contractor in a procurement, and it does not pertain to an 8(a) firm's ability to use prior 8(a) contracts to demonstrate its experience or past performance in a procurement. Accordingly, we decline to consider the protester's challenge to the RFP on constitutional grounds; the issue is a matter for the courts, not our Office, to decide. *See Detekion Sec. Sys.*, B-298235, B-298235.2, July 31, 2006, 2006 CPD ¶ 130 at 16-17 n.6; *Elrich Contracting, Inc.*, B-262015, B-265701, Aug. 17, 1995, 95-2 CPD

set forth SBA's position prohibiting a contracting activity from restricting a competition to firms with multiple certifications." 88 Fed. Reg. 26164, 26179, April 27, 2023. The notice continued: "[one] commenter believed that agencies could follow the prohibition (*i.e.*, not limiting competition to firms with multiple certifications) but circumvent SBA's intent by providing significant evaluation preferences to firms with one or more other certifications, and thus exclude firms with one certification from any meaningful opportunity to be awarded a specific contract or order." *Id.* SBA stated that it recognized the concern and was adding § 126.609 (as well as similar provision for other socioeconomic programs) to "specify that a procuring activity also cannot give additional evaluation points or any evaluation preference to firms having one or more additional certifications." *Id.*

¶ 71 at 2. *DePaul Hosp. and the Catholic Health Ass'n of the U.S.*, B-227160, Aug. 18, 1987, 87-2 CPD ¶ 173. As such, this allegation is dismissed.

The protest is denied in part and dismissed in part.

Edda Emmanuelli Perez
General Counsel