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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: PPG-CMS-PSI JV

File: B-298239; B-298239.2

Date: July 19, 2006

Leslie Vallie for the protester.

Joseph G. Councill Jr., Esq., Army Corps of Engineers, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest arguing that agency's evaluation of proposals under solicitation set aside for service-disabled veteran-owned (SDVO) small business concerns was improper because the agency allegedly selected for award firms that were not valid small businesses or qualified SDVO small business concerns is dismissed; protest ultimately involves the question of the status of the awardees as eligible small business and SDVO small business concerns, matters within the exclusive statutory authority of the Small Business Administration.

DECISION

PPG-CMS-PSI JV protests the award of a contract to B&M Construction, Inc. under request for proposals (RFP) No. W29128F-05-R-0021, issued by the U.S. Army Corps of Engineers, Omaha District, for construction and design services in the state of Colorado. PPG challenges the agency's evaluation of proposals and argues that B&M is ineligible for award.¹

¹ PPG also filed a subsequent protest challenging the Corps's issuance of RFP No. W9128F-06-R-0013 (RFP 0013), for design and construction work. In this separately filed protest, PPG argued that RFP 0013 provided for essentially the same scope of work as that covered by RFP No. W9128F-05-R-0021 (RFP 0021), the RFP at issue here, and was therefore an effort by the Corps to circumvent PPG's protest against the award under RFP 0021 and render any decision by our Office meaningless. The agency, however, explained, and the record reflects, that the subsequently challenged solicitation was issued at the behest of the U.S. Air Force Space Command for design and construction of various military projects along the Rocky

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

On December 5, 2005, the Corps of Engineers issued the solicitation as a service-disabled veteran-owned (SDVO) small business set-aside for the award of multiple (not more than three) indefinite-delivery/indefinite-quantity contracts “to accomplish relatively minor projects” for “miscellaneous construction services with minor design capabilities for miscellaneous projects located at various locations in Colorado”, with a base period of 2 years, plus three 1-year options. RFP at 00100 - 10 (as amended).² While there was no yearly dollar limit, or limit to the amount of particular task orders issued under the contracts, each contract had a total maximum value of \$60 million.

Proposals were to be evaluated based on the following factors listed in descending order of importance: (1) design experience; (2) construction experience (design and construction experience were of equal importance); (3) design personnel; (4) construction personnel (design and construction personnel were of equal importance); (5) past performance, design; (6) past performance, construction; (design and construction past performance were of equal importance); (7) project management plan; and (8) price. Price was considered “much less important than” factors 1 through 7. RFP at 00110 - 17.

As it relates to the protest, under both the design and construction experience factors, offerors were required to identify three projects they completed within the past 5 years, each with a construction value of at least \$1 million. In evaluating offerors’ proposals, the agency scored them under each of the seven technical evaluation factors using the following adjectival ratings: exceptional; above average; average; marginal; unacceptable; and neutral. RFP at 00110 -- 6. With regard to price, the RFP required offerors to provide hourly rate information for

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Mountains with work anticipated at Air Force bases in Wyoming and Colorado. While, as the agency notes, there could potentially be some overlap of work between the solicitations, RFP 0013 differs in scope from RFP 0021 since RFP 0013 anticipates the award of contracts with a maximum value of \$75 million to firms with greater construction and design experience, the issuance of task orders with higher dollar values (but capped at \$10 million), and performance of work at locations in Colorado as well as Wyoming. PPG’s protest in this regard therefore is without merit.

² As originally issued, the RFP provided for the performance of work in North Dakota, South Dakota, and Wyoming. However, through an amendment to the RFP, the Corps deleted these states, substituting solely the state of Colorado. See RFP amend. 1.

various construction and design personnel positions, which would be evaluated for reasonableness, realism and completeness. RFP at 00110 – 16.

By the RFP's January 11, 2006 closing date for receipt of proposals, the Corps had received a total of 10 proposals, including the proposals submitted by PPG and B&M. In evaluating PPG's proposal, the Corps assigned PPG the following technical factor ratings: (1) design experience – average; (2) construction experience – marginal; (3) design personnel – above average; (4) construction personnel – marginal; (5) past performance, design – above average; (6) past performance, construction – marginal; and (7) project management plan – average. With these ratings, PPG was ranked seventh of the ten offerors. Agency Report (AR) Tab 5, Source Selection Authority Report, Apr. 6, 2006, at 7. On April 17, the Corps made awards to the three most highly rated offerors: (1) NDG Constructors JV; (2) enVision-Kurtz JV; and (3) B&M Construction, which had teamed with two other firms, Merrick & Company and Torix General Contractors.

Upon learning of the award decisions, PPG filed a protest with the Corps dated April 21 challenging B&M's eligibility as an SDVO small business concern and challenging its small business size status. On April 26, the Corps forwarded PPG's protest to the Small Business Administration (SBA) for resolution. The SBA bifurcated PPG's protest and separately considered two issues: the status of B&M as an SDVO small business and whether B&M's arrangement with its two principal subcontractors should result in B&M being considered other than a small business concern.³ The SBA dismissed the first issue, but as to the second, found that B&M's principal subcontractors were "affiliates" and, as a consequence, B&M was other than a small business concern and not eligible for award.⁴ AR, Tab 10, Letter from SBA to B&M Construction, Inc., May 11, 2006. Prior to resolution of the size status protest, PPG filed the subject protest with our Office on April 25.

While PPG articulates numerous bases for protest, the gravamen of PPG's complaint is that the Corps's entire evaluation was merely a "ruse" designed to select large businesses as opposed to SDVO small business concerns. Protester's Comments at 6. According to PPG, by comparing the capabilities of offerors who were in fact large businesses with those of small businesses, the Corps selected offerors capable

³ SBA regulations expressly provide that the protest procedures governing size protests are separate from those governing a firm's SDVO status. 13 C.F.R. § 125.25 (2006).

⁴ The Corps has indicated that it intends to take "appropriate action" in response to the SBA's decision holding that B&M is not eligible for award. Agency Report at 2. At the time of this decision, the Corps indicated to our Office that it is awaiting the final resolution of B&M's appeal of its size status determination to SBA's Office of Hearings and Appeals (OHA).

of performing very large projects in contravention of the actual requirements of the RFP, which entailed relatively small projects. Not only was this contrary to the RFP, but, in PPG's view, it also created an unfair playing field since the capacity of large businesses is naturally greater than that of small businesses such as PPG.

As support for its contention, PPG alleges that "many of the firms ranked higher [than PPG] were just 'Fronts' for large businesses or others" and contends that the Corps failed to consider this fact in its evaluation since the Corps failed to evaluate the "management and control" of the offerors to determine whether they were eligible SDVO small business firms. Protester's Comments at 8. By way of example, PPG highlights the fact that the Corps had selected B&M for award, yet the SBA later found B&M to be other than small and therefore ineligible for award under the solicitation.⁵

While PPG believes that the Corps improperly applied the evaluation criteria by selecting firms with capabilities that greatly exceeded the requirements of the RFP, it has failed to present any specific support for its contention that the agency's evaluation deviated in any way from the RFP's evaluation scheme. Rather, PPG's challenge is based solely on the supposition that the evaluation must have been improper because the awardees and other offerors more highly rated than PPG were, according to PPG, not in fact small businesses or did not qualify as valid SDVO small businesses concerns.⁶ This argument, however, hinges on the small business and

⁵ In its comments on the agency report, PPG objected to the limited documents produced by the agency and requested the proposals of all the offerors more highly rated than PPG, as well as the agency's evaluation of these firms. The agency did not furnish PPG with this information because it had properly designated the information proprietary and source selection sensitive; as such, these documents would only be available to a protester's legal counsel, through our protective order process. See 4 C.F.R. § 21.4 (2006). PPG decided to proceed without counsel and thus the agency properly did not provide PPG with the requested documents.

⁶ PPG argued for the first time in its comments on the agency report that the evaluation of the awardee enVision-Kurtz JV was tainted by a conflict of interest because, according to PPG, the owner of enVision and other employees are former employees of the Corps and PPG suspects that they are "close friends with those on the evaluation committee" and that the members of the evaluation panel "may be hoping to migrate to the private business and join enVision." Protester's Comments at 5. Under our Bid Protest Regulations, however, a protester is required to raise issues other than alleged solicitation improprieties within 10 days of the time it knows, or should have known, of the basis for its protest. 4 C.F.R. § 21.2(a)(2). Because PPG first raised this issue in its comments on the agency report, more than 10 days after PPG learned of the award to enVision, this protest ground is untimely and therefore dismissed.

SDVO small business status of the awardees and other offerors, issues which are not for consideration by our Office. Specifically, the Small Business Act, 15 U.S.C. § 637(b)(6) (2000), gives the SBA, not our Office, conclusive authority to determine matters of small business size status for federal procurements. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1); Randolph Eng'g Sunglasses, B-280270, Aug. 10, 1998, 98-2 CPD ¶ 39 at 3. Similarly, the SBA is the designated authority for determining whether a firm is an eligible SDVO small business concern, and it has established procedures for interested parties to challenge a firm's status as a qualified SDVO small business concern. 15 U.S.C. §§ 632(q), 657(b); 13 C.F.R. §§ 125.25, 125.27 (2006); Federal Acquisition Regulation (FAR) §§ 19.307, 19.1403. As a consequence, our Office will neither make nor review SDVO small business status determinations. Accordingly, we deny PPG's challenge to the Corps's evaluation of proposals since it is unsupported by any specific evidence demonstrating that the evaluation was unreasonable or deviated from the terms of the RFP, and to the extent PPG challenges the size status of the awardees or other offerors, or whether they were eligible SDVO small business concerns, these aspects of its protest are dismissed.

The protest is denied in part and dismissed in part.

Gary L. Kepplinger
General Counsel