

GAO REMINDS AGENCIES THAT ISSUES WITH SIZE STATUS MUST BE RESOLVED BY SBA.

Introduction: A recent Government Accountability Office (“GAO”) decision reiterates that issues or questions regarding a potential awardee’s size status must be referred to the Small Business Administration (“SBA”) for resolution. A procuring agency cannot “self help” by considering the size issue as a matter of bid or proposal responsiveness.

Summary: The protest of *Singleton Enterprises-GMT Mechanical, A Joint Venture*, B-310552, Jan. 10, 2008, 2008 CPD ¶ ___ involved an invitation for bid (“IFB”) that was set-aside for service-disabled veteran-owned small business (“SDVOSB”) concerns. Singleton and GMT submitted a bid as a joint venture and self-certified as to the joint venture’s status as a SDVOSB. Although the Singleton-GMT JV bid, on its face, appeared to comply with all IFB requirements, the procuring agency had a copy of a Singleton-GMT JV agreement from another procurement and concluded, based upon the record in that acquisition, that the JV agreement did not comply with the SBA regulations and the Singleton-GMT joint venture was not an eligible SDVOSB. Accordingly, the agency rejected the Singleton-GMT JV bid as nonresponsive.

The GAO sustained Singleton-GMT JV’s protest, finding that the agency’s determination that the bid was nonresponsive was clearly in error. Responsiveness consists of determining whether a bid, as submitted, represents an offer to perform precisely what is called for in the solicitation, without exception. Responsiveness is to be determined at bid opening, from the bid documents as submitted. In this case, the agency went outside the bid documents and reviewed a joint venture agreement obtained in a different procurement. More importantly, the agency’s rationale for finding the Singleton-GMT JV bid nonresponsive was the agency’s concern that the Singleton-GMT JV was not an eligible SDVOSB. As GAO observed, concerns regarding a bidder’s status are to be referred to the SBA, the agency responsible for determining whether a bidder meets the appropriate standards, and may not ordinarily be determined by the agency conducting the procurement.

Discussion and Practitioner Tips: While GAO found that the agency in *Singleton* erred, there are occasions when an agency can legitimately reject a small business proposal as nonresponsive. In addition to procurement-specific requirements, many small business set-aside solicitations include a “Limitation on Subcontracting” clause or other clauses that impose requirements relating to utilization of small/disadvantaged businesses. The issue of whether a business is actually small is an issue of responsibility which is solely the purview of the SBA. See, e.g., *Hydroid LLC*, B-299072, Jan. 31, 2007, 2007 CPD ¶ 20. The issue of whether a proposal complies with all material requirements of the solicitation, however, such as the Limitation on Subcontracting clause, is an issue of a proposal’s responsiveness which may be determined by the contracting officer and reviewed by GAO.

Small/disadvantaged contractors competing for a set-aside procurement should:

- Review the solicitation carefully and ensure they understand and comply with all requirements;
- Structure their proposals and use of subcontractors in light of the limitation on subcontracting clause, if present; and,

- If unsuccessful, ensure they request a debriefing, as this may be the contractor's only opportunity to discover whether the agency has improperly eliminated the contractor due to size status concerns or other responsibility issues and therefore may have a viable basis to protest the award decision.

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