

Case of the Month Club

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Roadmap

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TLS Joint Venture—Protest Case

- Full Cite
 - *TLS Joint Venture, LLC, B-422275, Apr. 1, 2024*
- Brief Summary
 - The procurement was for custodial services.
 - The eventual awardee, SFR, timely submitted its proposal before September 15, 2023, and the agency awarded contract on December 26, 2023.
 - Prior to award, while its proposal was pending, SFR renewed its SAM registration, but the renewal process was not complete before its prior SAM registration expired.
 - Following the award, the protester argued that the award decision was unreasonable because the awardee’s SAM registration had lapsed.
 - GAO sustained the protest and found: (1) the FAR unambiguously requires contractors to “be registered in SAM when submitting an offer or quotation, and shall continue to be registered until time of award,” and (2) the FAR states that a contractor is not “registered” in SAM until the government marks the SAM record “active.”

TLS Joint Venture–Factual Background

- On August 7, 2023, the Navy issued the RFP to procure custodial services at the Naval Surface Warfare Center, Carderock Division in West Bethesda, Maryland.
- The RFP contemplated the award of a fixed-price contract to be performed over a 1-year base period and four 1-year option periods.
- Award would be made on a lowest-priced, technically acceptable basis, considering technical, corporate experience, past performance, and price factors.
- The RFP also incorporated Federal Acquisition Regulation (FAR) provision 52.204-7, System for Award Management. RFP at 100. As part of the evaluation criteria, the RFP advised that offerors must comply with all material aspects of the solicitation, including regulatory requirements, to be considered eligible for award.
- Prior to the September 15 close of the solicitation period, six offerors, including TLS and SFR, submitted proposals.

TLS Joint Venture–Factual Background

cont.

- On November 27, after conducting its preliminary evaluation of proposals, the Navy reviewed and noted that SFR’s SAM registration was “Active” through December 11, 2023.
- On December 19, the Navy finalized its evaluation and determined that SFR’s proposal was technically acceptable and proposed the lowest price.
- The Navy again reviewed SFR’s SAM registration and noted that the firm’s status was “Active” as of December 12, 2023.
- On December 26, the Navy awarded the contract to SFR at a price of \$4,991,620, and notified TLS, the second-low offeror, that its proposal was unsuccessful.
- On December 29, TLS filed its protest at GAO.

TLS Joint Venture–Prior Decisions

- This protest follows GAO’s 2021 decision in *Continuity Global Solutions-Secure Me WLL Security, JV*, B-419875 that upheld an agency’s decision to disqualify an offeror whose SAM registration lapsed pending award.
 - The agency provided the offeror the opportunity to cure by demonstrating its active status and the offeror could not.
- CGS was based on a prior GAO decision involving holding that an offeror’s failure to be registered in SAM after submitting its proposal was a minor informality or irregularity related to responsibility determinations and did not affect the responsiveness or eligibility of its proposal.
- Although it distinguished its prior cases in the sealed bidding context that allowed this minor informality to be waived, it nonetheless held that because SAM registration was a responsibility issue, the agency could allow the offeror to fix the issue any time prior to award. (“In a negotiated procurement, information to be used in determining responsibility could be submitted up until the time of award and an agency properly may provide an offeror with an opportunity to submit the information prior to award.”)

TLS Joint Venture—Decision

- TLS argued that the agency unreasonably selected SFR for award because SFR’s SAM registration had lapsed.
 - TLS first argued that FAR provision 52.204-7 requires an offeror to be continuously registered from the submission of its proposal, through contract award, and until final payment on any contract.
 - TLS contended that SFR did not maintain continuous registration in SAM between proposal submission and contract award because it did not successfully complete the renewal process prior to the expiration of its registration.
- The Navy argued that FAR 52.204-7 did not impose a requirement that an offeror maintain its SAM registration between the close of the solicitation period and award of the contract and that, regardless, SFR’s registration never lapsed because SFR submitted its renewal information before the expiration of its registration.
- First, GAO addressed the meaning of FAR 52.204-7 and the sequence of efforts necessary for a contractor to update their SAM registration.
- GAO found that FAR 52.204-7 was unambiguous and was amended to clarify that an offeror is required to be registered in SAM at the time of proposal submission and that the offeror “shall continue to be registered until time of award;” the older version only required offerors to “be registered in the SAM database *prior to award*, during performance, and through final payment of any contract.”
- GAO rejected the agency’s argument that the regulatory history of the change indicated that the FAR Council did not intend to “create new requirements for offerors” but to clarify the required timing for SAM registration.

TLS Joint Venture–Decision cont.

- GAO then turned to the definition of what it means to be “registered” in SAM and held that FAR 52.204-7 is satisfied only when offerors enter all mandatory information, complete all representations and certifications, receive validation from the Government, and the Government has marked the record as “active.” Thus, GAO cautioned that “until that sequence is complete, the contractor is not registered in SAM.”
- GAO asked the General Services Administration (GSA) to weigh in on the process and detailing the numerous steps to update registration.
- Based on GSA’s input, GAO noted that the awardee’s SAM registration expired at 9:34 a.m. on December 11, and that the Government did not activate the renewed registration until 9:48 a.m. on December 12.
- GAO then turned to whether this error rose to the level of competitive prejudice and held that it did: “We conclude that, but for the agency’s failure to identify SFR as ineligible for award under the terms of the RFP, TLS would have had a substantial chance for award as one of the offerors remaining in the competitive field.” TLS was also next in line for award.

TLS Joint Venture– Key Takeaways

- Now that GAO has joined COFC in finding that an awardee was ineligible for failure to maintain an active SAM registration continuing from proposal submission until award, contractors should be on high alert given the vagaries of the SAM registration and update process.
- In *TLS*, GAO does not cite to or even mention its 2021 decision. Rather, in a footnote, it cites to *CGS–ASP Security JV LLC*, B-420497, and states: “A challenge that an offeror did not comply with a mandatory solicitation requirement, such as FAR provision 52.204-7, does not constitute part of the agency’s responsibility determination.” Thus, the opportunity to cure a SAM registration error, recognized in *Continuity Global Solutions-Secure Me WLL Security, JV*, appears seriously in doubt.
- The SAM registration and update process includes numerous governmental steps, some of which are manual, such as sending the record to the Internal Revenue Service for verification of the contractor taxpayer identification number. The Defense Logistics Agency must also verify the contractor’s CAGE code, and once all of these steps are completed, GSA must process the application and mark the registration as “active.” Under the best of circumstances, as shown in *TLS*’s registration timeline, this can take several days. Unfortunately, however, the process can experience delays at any point and take even weeks for a registration to be updated.
- While it may not have changed the outcome, *TLS* did not intervene in the GAO protest. Contractors may also wish to take note of the non-intervention here as a “lesson learned.”

Aero-Tel Wire Harness Corp.—Size Protest

- Full Cite

- *Aero-Tel Wire Harness, Corp., SBA No. VSBC-344-P, Mar. 22, 2024*

- Brief Summary

- This is a SDVOSB set-aside—Service-Disabled Veteran Owned Small Business.
- Following notification that Fortem was the apparent awardee, Aero-Tel filed a size-protest raising multiple grounds as to why Fortem was not a qualified SDVOSB.
- Aero-Tel’s protest was based partly on the SBA’s list of SDVOSBs and “hearsay evidence.”
- Fortem did not reply to OHA’s inquiries regarding its SDVOSB.
- OHA found Fortem was not an eligible SDVOSB for purposes of this procurement—protest sustained.

Aero-Tel Wire Harness Corp.–Small Biz Protest Rules/Regulations

- Typical protest
 - Timely GAO: 10 days after when you know/should have known of protest ground and/or after the close of a timely request, mandatory debriefing.
 - Remember, must request debriefing within 3 days of award notice for it to count for tolling purposes.
 - Also, for the mandatory stay to be triggered, the protest must be filed within 10 days of award or 5 days from close of debriefing.
 - Timely COFC: 6 years.
- Size protests
 - The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) adjudicates SDVOSB status protests pursuant to 15 U.S.C. § 657f and 13 C.F.R. Part 134 Subpart J.
 - A size protest must be submitted to the CO within five business days after receiving notification of the apparent awardee to be timely. 13 C.F.R. § 134.1004(a)(3).

Aero-Tel Wire Harness Corp.–Factual Background

- On December 26, 2023, DLA issued RFQ No. SPE4A7-24-T-7074 for electrical power cable assemblies.
- The projected quantities requested totaled 866 cable assemblies and accessories under NAICS 334290 for delivery to DLA Distribution San Joaquin in California.
- The Contracting Officer (CO) set aside the procurement for SDVOSBs and assigned North American Industry Classification System (NAICS) code 334419, Other Electronic Component Manufacturing, with a corresponding size standard of 750 employees.
- Fortem Genus Inc. and Aero-Tel Wire Harness Corp. submitted their quotes on January 10, 2024, both representing itself as an SDVOSB.
- On January 24, 2024, the CO announced that Fortem was the *apparent* awardee.
- Aero-Tel filed a protest challenging Fortem’s SDVOSB status with the CO following receipt of the notice of award.

Aero-Tel Wire Harness Corp.–How Small Biz Protests Work

- Post filing at GAO:
 - Potential motions to dismiss, fights over “5-Day Letter” (i.e. contents of the record).
 - Agency produces record.
 - Protester files supplemental protest grounds and comments.
 - Potential multiple rounds of briefing.
 - Possible hearing.
 - GAO issues decision on Day 100 or earlier.
 - Potential, but not with task order protests, of follow-on protest at COFC (whether the protester with a second-bite or intervenor challenging agency decision to take corrective action based on GAO sustain).
- Post filing a size protest with the CO:
 - The CO refers the protest to the relevant office of the SBA.
 - The SBA/OHA then investigates whether the awardee rightly certified itself as a, for example, SDVOSB.
 - SBA/OHA confers with awardee and agency.
 - No further work from protester.
 - SBA/OHA issues a decision.
 - Potential appeal to OHA by protester or awardee.

Aero-Tel Wire Harness Corp.–OHA Decision

- Aero-Tel challenged Fortem’s size status under two bases:
 - First, Fortem not listed in SBA’s database of certified SDVOSBs.
 - Second, based on “hearsay evidence,” another company prepared and submitted Fortem's quote and Fortem likely intends to subcontract all manufacturing to the other company, in contravention of the nonmanufacturer rule.
- The CO forwarded the protest to OHA for review.
- Fortem did not submit any formal response to the protest allegations.
- On February 21, 2024, Fortem forwarded OHA a copy of a letter, dated May 22, 2019, from the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE).
- In the letter, CVE stated that it had verified Fortem as an SDVOSB, effective for a period of “three (3) years from the date of this letter.”
- Because CVE’s verification of Fortem appeared to have expired in May 2022, OHA requested that Fortem clarify whether it possessed any current certification or verification.
- In response, Fortem asserted that it was “in the process of working with SBA to recertify.”

Aero-Tel Wire Harness Corp.–OHA Decision

- OHA did some of its own research.
- The Case File (record created by SBA in this case) indicated that Fortem applied for SDVOSB certification on January 19, 2024.
- SBA subsequently notified Fortem that its application was incomplete in various respects.
- Then, on February 22, 2024, Fortem’s application was administratively withdrawn due to inactivity.
- The decision noted that “[i]n an SDVOSB status protest pertaining to a procurement, OHA determines the eligibility of the protested concern as of the date of its initial offer or response which includes price.”
- “Here, Fortem submitted its quotation on January 10, 2024. Therefore, OHA must examine Fortem’s SDVOSB eligibility as of this date, using the substantive ownership and control regulations in effect on that date.”
- Governing SBA regulations:
 - Generally require that a concern must be a certified SDVOSB in order to compete for, or to be awarded, an SDVOSB set-aside contract. 13 C.F.R. §§ 128.200(c)(1) and 128.401(a).
 - If, however, a concern submitted “a complete SDVOSB certification application to SBA on or before December 31, 2023,” the concern is permitted to self-certify as an SDVOSB until such time as “SBA declines or approves the concern's application.”
- Here, there is no dispute that Fortem was not an SBA-certified SDVOSB as of January 10, 2024, when Fortem submitted its quotation for the instant procurement and Fortem could not properly self-certify as an SDVOSB for this procurement, because Fortem did not apply for SDVOSB certification prior to December 31, 2023.
- Accordingly, OHA sustained the protest.

Aero-Tel Wire Harness Corp.—Key Takeaways

- Don't need outside counsel, or any counsel, to file a size protest.
- Different timelines and triggers for those timelines as compared to a non-size protest.
 - For size protests, notice of apparent awardee, not the actual award, is the key trigger.
- Can rely on speculation in size protests.
- Burden on apparent awardee to prove small business eligibility—unlike in GAO where it is protester's burden to prove a procurement error that prejudiced it.

Presenters



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