U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

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Via Email
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RE: B-410081 Protest of Latvian Connection, LLC

Dear Mr. Allen:

On July 14, 2014, Latvian Connection, LLC (Latvian), filed a protest with the U.S. Government Accountability Office (GAO) stating that the U.S. Department of State (State) failed to set aside Solicitation No. 3458493 BAS Parts for small businesses, excluded improperly Latvian from submitting a bid as a result of its "suspension" from FedBid,[1] failed to justify property its use of brand name only items, and discriminated against veteran-owned small businesses.

Your office has requested that the U.S. Small Business Administration (SBA) respond to the issue presented in the protest as they relate to the Small Business Act. For the following reasons, we believe the protest must be sustained.

FACTS

State issued a synopsis for Solicitation No. 3458493 BAS Parts on FedBizOpps on June 28, 2014 for spare and replacement parts for the United States Consulate General in Duibai, United Arab emirates. Agency Report (AR), Tab 6. On that same day, State posted the acquisition on FedBid's reverse auction platform and set a closing date of July 28, 2014. AR, Tab 8. State posted its justification for the use of Honeywell parts as an attachment to the solicitation posted on FedBid. AR, Tab 9. The requirement was full and openly competed. AR, Tab 6. The solicitation states that it is FOB Destination Linden, NJ. Id. In fact, the solicitation states that it is "FOB Destination CONUS (CONtinental U.S.). Id. at 4. State received 5 quotations, all providing responsive bids. Contracting Officer's Statement of Facts at ¶ 5. The quotes ranged from $47,359.50 to $54,895.70. Id.

[1] FedBid's® website explains that it is "the fully managed online marketplace optimizing the way governments, businesses and educational institutions buy the goods and services they need.". See www.FedBid.com/about/.

In the meantime, on July 8, 2014, FedBid notified Latvian that its account was "suspended" in accordance with FedBid's right to terminate services. Protest, Email dated July 8, 2014. According to the email, FedBid "suspended" Latvian's account for the following reasons:

- System and Business Integrity: Latvian Connection has taken actions to repeatedly and purposely interfere with FedBid's business relationships.
- Right to Terminate: Latvian Connection's use of the FedBid marketplace demonstrates that Latvian Connection has not used (and does not intend to use) the FedBid marketplace as required in the FedBid Terms of Use.

Id.

ANALYSIS

1. Set Aside for Small Businesses

   a. Nonmanufacturer Rule

In its protest, Latvian argues that the requirement should have been set-aside for small businesses. Specifically, Latvian argues that State was to have considered the statutory requirement that acquisitions with an estimated value below the simplified acquisition threshold "shall" be set-aside for small businesses. State, however, argues that it could not set-aside the requirement because bidders were required to provide the product of Honeywell, a large business. State believes that under all set-asides, a small business that does not manufacture the product being acquired must provide the product of a small business manufacturer (known as the nonmanufacturer rule), unless SBA has waived this requirement for the specific product (known as a class waiver). In this case, there was no such class waiver.

The agency, however, could have requested an individual waiver. SBA grants individual waivers for a product when a contracting officer determines "that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications of a solicitation, including the period of performance." 13 C.F.R. § 121.1203. If the SBA grants an individual waiver, the small business can provide the product of a large business. See id. § 121.406(b)(1)(iv). In the preamble to a proposed rule concerning the nonmanufacturer rule, SBA provided an example of when an individual waiver would be appropriate:

> 2. Example of an individual waiver. There are occasional instances when the government requires a brand-name product. For example, a government office may need to purchase computers which are compatible with computers already used in that office. If there is no compatible unit manufactured by a small business concern in the Federal market, the SBA may grant an individual waiver at the request of the contracting officer so that a small business offeror may provide a product manufactured by a large business for that particular procurement even though set aside for small businesses.

60 Fed. Reg. 27924 (May 26, 1995). To say, as State does in its legal memorandum, that this requirement cannot be set-aside due to the nonmanufacturer rule, is incorrect.

b. "Overseas" Requirements

State has also argued that this requirement cannot be set-aside for small businesses because the FAR and GAO rulings preclude the set-aside of overseas requirements. SBA does not agree with this assertion for the following reasons.

First, this requirement is not an "overseas" requirement. It clearly states in the solicitation that it is FOB Destination Linden, New Jersey. FOB Destination means that the bidder must deliver the supplies to the specific delivery point free of expense to the Government. FAR 47.303-6, "F.o.b. Destination". In this case, the destination is a city and state in the United States. This is clearly not an "overseas" requirement.

Second, The Small Business Act states the following with respect to proposed acquisitions valued below the simplified acquisition threshold:

> (j) Small business reservation
> (1) Each contract for the purchase of goods and services that has an anticipated value greater than $2,500 but not greater than $100,000[2] **shall** be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.

15 U.S.C. § 644 (emphasis added). Both the FAR and SBA have codified this statutory mandate in regulations. For example, SBA's regulations state:

> (f) *Contracting Among Small Business Programs.* (1) *Acquisitions Valued At or Below the Simplified Acquisition Threshold.* The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Micro-purchase Threshold but not exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns

[2] The Small Business Act states that small business set asides are mandatory for the acquisition of supplies and services valued from $2,500 to $100,000. 15 U.S.C. § 644(j)(1). However, the FAR Council has implemented an inflationary adjustment pursuant to 41 U.S.C. § 431a and the FAR now states that "Before setting aside an acquisition under this paragraph, refer to 19.203(b). Each acquisition of supplies or services that has an anticipated dollar value exceeding $3,000 ($15,000 for acquisitions as described in 13.201(g)(1)), but not over $150,000, ($300,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition at 2.101), is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. " 48 C.F.R. § 19.502-2(a).

> that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from making an award to a small business under the 8(a) BD, HUBZone, SDVO SBC or WOSB Programs.

13 C.F.R. § 125.2 (emphasis added). The FAR states that "Small business set-asides have priority over acquisitions using full and open competition. See requirements for establishing a small business set-aside at subpart 19.5." FAR § 19.203(e).

State argues that the GAO decision of Latvian Connection General Trading and Construction LLC, B-408633, Sept. 18, 2013, 2013 CPD ¶ 224, applies here. In that case, GAO ruled that FAR 19.000(b) limits the application of FAR part 19 (dealing with SBA's small business programs) to acquisitions conducted in the United States (and its outlying areas). We believe the basis for GAO's ruling was that SBA's regulations were silent on this issue and therefore, the more specific FAR regulation controlled.

Heeding this advice, SBA recently promulgated regulations to address this issue. Specifically, SBA made wholesale changes to 13 CFR § 125.2 on October 2, 2013. As a result, SBA issued a final rule stating that: "Small business concerns must receive any award (including orders, and orders placed against Multiple Award Contracts) or contract, part of any such award or contract, and any contract for the sale of Government property, regardless of the place of performance, which SBA and the procuring or disposal agency determine to be in the interest of:.." 13 C.F.R. § 125.2(a)(emphasis added). Likewise, the rule also states that: "The Small Business Act requires each Federal agency to foster the participation of small business concerns as prime contractors and subcontractors in the contracting opportunities of the Government regardless of the place of performance of the contract." Id. 125.2(c)(emphasis added).

Therefore, SBA's policy and legal interpretation of the Small Business has been incorporated into regulations. In sum, according to statute and regulations, small business set asides, regardless of place of performance, are mandatory for acquisitions valued from $3,000 to $150,000.[3]

Third, State issued regulations specifically addressing this issue. In a proposed rule, State explained:

> DOSAR 619.000 is added to formalize the Department's policy regarding the application of the Small Business Act to contracts awarded by domestic contracting activities (i.e., those located in the United States) where contract performance takes place overseas. Currently, FAR 19.000(b) states that part 19, with the exception of subpart 19.6, applies 'only in the United States or its outlying areas.' This language is ambiguous and subject to interpretation. While the application is clear with respect to contracts both awarded and performed in the United States (it applies) and to contracts both awarded and performed outside

[3] SBA notes that it has submitted other memos to GAO concerning the issue of application of the Small Business Act to overseas procurements. Rather than repeat those legal arguments, we adopt those memos here.

> the United States (it does not apply), the gray area is its applicability to contracts awarded by contracting offices located in the United States but where contract performance takes place overseas. The Department has subsequently followed an informal policy of applying part 19 to such contracts. This DOSAR change, therefore, states this policy in explicit terms.

69 Fed. Reg. 76660 (Dec. 22, 2004). State received at least one comment disagreeing with its proposed rule, as follows:

> 1. Comment: One commentator disagreed that the language of FAR 19.000(b) is ambiguous, and questioned the Department's policy of applying the Small Business Act to contracts awarded domestically and performed overseas. The commentator pointed out that no other agency has made such an interpretation. Response: Nonconcur. The Department does consider the language of FAR 19.000(b), which states that FAR Part 19, with the exception of Subpart 19.6, applies 'only in the United States or its outlying areas', to be ambiguous. The application of the Small Business Act to contracts awarded domestically for performance overseas has been a longstanding practice at the Department of State; this rule merely formalizes that practice.

71 Fed. Reg. 34836, 34837 (June 16, 2006). Further, one commenter questioned "the practicality of the proposed rule, citing the requirement for subcontracting plans and goals and questioning how goals will be negotiated." Id. at 34837. Specifically, the commenter questioned how an agency could reconcile these small business subcontracting goals with U.S. treaty obligations and the frequent U.S. foreign policy goal of requiring U.S. contractors to use host country businesses and resources. Id. State responded by noting that this policy was not new and in fact,

> the Department has not experienced difficulties in implementing this policy. FAR 19.702(b) states that subcontracting plans are not required for contracts that will be performed entirely outside of the United States, so contracts that are performed overseas are already exempted from the subcontracting plan requirements. Additionally, the Omnibus Diplomatic Security and Antiterrorism Act (Public Law 99-399) stipulates that ten percent of the monies appropriated for diplomatic security should, to the extent practicable, be awarded to minority owned business concerns, and another 10 percent to small businesses. In making any set-aside recommendations, A/SDBU takes into account all of the issues raised by the commentator, including any limitations that foreign governments may impose. No change to the rule is therefore necessary.

Id. Consequently, in the final rule, State promulgated the following regulation:

> It is the Department's policy to provide maximum opportunities for U.S. small businesses to participate in the acquisition process. DOS contracts that are awarded domestically for performance overseas shall be subject to the Small Business Act as a matter of policy. Contracts that are both awarded and performed overseas should comply on a voluntary basis.

48 C.F.R. § 619.000.

As a result of the foregoing, State should have provided maximum opportunities to small businesses to participate and failed to do so.

2. Exclusion of Latvian

State admits that Latvian was excluded from this competition but holds that full and open competition is not required in simplified acquisitions and that FedBid's determination to exclude Latvian is not a protestable action by the contracting officer for this acquisition and is not related to the acquisition in any way. We disagree.

First, State has utilized a contractor to perform acquisition services on behalf of State. Any actions by the contractor are imputed to State. In this case, FedBid precluded Latvian from submitting a bid, and the contracting officer for State tacitly accepted this decision, which means that State precluded Latvian from submitting a bid. This is not a case where Latvian submitted a bid and it was rejected – Latvian was completely excluded from bidding at all. FedBid and State excluded Latvian from bidding for "integrity" reasons. Specifically, FedBid informed Latvian that it did not meet FedBid's Terms of Use, including: "System and Business Integrity: Latvian Connection has taken action to repeatedly and purposely interfere with FedBid's business relationships." Protest, Email dated July 8, 2014 (emphasis added).

Second, when a small business is denied the opportunity to compete for integrity reasons, the matter must be referred to SBA for a Certificate of Competency. The Small Business Act provides in pertinent part that SBA is "empowered, whenever it determines such action is necessary:"

> to certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, **integrity,** perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer or an officer engaged in the sale and disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration.

15 U.S.C. § 637(b)(7)(A) (emphasis added). Although SBA generally receives such referrals when a small business is the apparent successful offeror, SBA's regulations acknowledge that a contracting officer must refer a small business to SBA for a possible Certificate of Competency (COC) when the contracting officer:

> (ii) Refuses to consider a small business concern for award of a contract or order after evaluating the concern's offer on a non-comparative basis (e.g., a pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility type

> evaluation factors (such as experience of the company or key personnel or past performance); or
> (iii) Refuses to consider a small business concern for award of a contract or order because it failed to meet a definitive responsibility criterion contained in the solicitation.
> (3) A small business offeror referred to SBA as nonresponsible may apply to SBA for a COC. Where the applicant is a non-manufacturing offeror on a supply contract, the COC applies to the responsibility of the non-manufacturer, not to that of the manufacturer.

13 C.F.R. § 125.5(a)(2). These regulations codify GAO rulings on the issue – the issue of when an agency rejects a bid or determines a proposal is unacceptable for reasons relating to responsibility. In those cases, the matter must be referred to SBA for a COC. GAO has explained that:

> A contracting agency cannot—merely by the terms of a solicitation—change a matter of responsibility into one of responsiveness. Raymond Engineering, Inc., B–211046, July 12, 1983, 83–2 CPD ¶ 83. Responsibility refers to the bidder's apparent ability and capacity to perform all of the contract requirements; responsiveness concerns whether a bidder has unequivocally offered to provide supplies or services in conformity with the material terms and conditions of the solicitation. See Skyline Credit Corp., B–209193, May 15, 1983, 83–1 CPD ¶257.

DAVSAM International, Inc., B-218201, B-218201.3, April 22, 1985, 85-1 CPD ¶ 462. In this case, the terms of the solicitation are that "Buyers and Sellers agree to conduct this transaction through FedBid in compliance with the FedBid Terms of Use. Failure to comply with the below terms and conditions may result in offer being determined non-responsive." AR, Tab 8. FedBid notified Latvian that its account was "suspended" in accordance with their right to terminate services, terminated them based on "business integrity" and that Latvian has not used the marketplace as required in the FedBid Terms of Use. As a result, State, through its contractor/agent FedBid, by terms of the solicitation, changed a matter of responsibility into one of responsiveness. This violates the Small Business Act since the matter should have been referred to SBA for a COC.[4]

In addition, we believe this is also similar to where an agency rejects a bid based on a pre-award survey. In Sierra Engineering, the GAO sustained a protest where the agency rejected a bid based on a negative pre-award survey of Sierra's facility and the agency admitted in the report that this was actually a matter of responsibility that should have been referred to SBA for a COC. Sierra Engineering, B-237820, Jan. 16, 1990, 90-1 Comp. Gen. Proc. Dec. ¶ 58. Likewise, in Propper Manufacturing Co., Inc., B-208035, March 22, 1983, 83-1 Comp. Gen. Proc. Dec. ¶ 279, the GAO ruled that the contracting officer's rejection of protester's bid was a nonresponsibility determination. Although the contracting officer's rejection was derived from

[4] We note that when a matter is referred to SBA for a COC, the offeror seeking a COC must demonstrate that it is "eligible for a COC, [and] must qualify as a small business under the applicable size standard in accordance with part 121 of this chapter." 13 C.F.R. § 125.5(b). Therefore, even if State believed Latvian were not a small business, it cannot make that determination – SBA makes that determination.

the Food and Drug Administration's (FDA's) statement that it could not recommend the protester for award, the FDA recommendation was not binding on the contracting officer. GAO stated that: "While the DLA contracting officer contends that he could not have found Propper responsible without supplanting the FDA's statutory authority, we do not believe this to be the case. FDA did not find or recommend that the protester's product be considered unacceptable under the FDC Act. This determination was made by the DLA contracting officer, and reflects his interpretation of the meaning of FDA's statement that insufficient data was available to permit a favorable recommendation." The same is true here. State's rejection of Latvian was a determination made by the State contracting officer, based on the recommendations of its agent/contractor FedBid, which he/she did not have to accept, but did. State's decision was a determination of nonresponsibility that should have been referred to SBA.

Finally, we believe that this exclusion from bidding is a de factor suspension or debarment from contracting.[5] A de facto suspension or debarment occurs when there are "repeated determinations of nonresponsibility or a long-term attempt by an agency to preclude a company from competing for government contracts .... See Old Dominion Dairy Prods., Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980). Such actions require that the party being debarred must be afforded procedural due process, including notice and an opportunity to be heard on the basis for debarment. See FAR § 9.406-3; Frank Cain & Sons, Inc. -- Request for Recon., B-236893.2, June 1, 1990, 90-1 CPD ¶ 516; Deloitte Haskins & Sells, B-222747, July 24, 1986, 86-2 CPD ¶ 107." Keeson, Inc.; Ingram Demolition, Inc., Nos. B-245625; B-245655, Jan. 24, 1992, 92-1 Comp. Gen. Proc. Dec. ¶ 108. In Keeson, GAO ruled that the exclusion of any offeror charged with violating asbestos regulations constituted a significant restriction on the field of competition since this exclusion applied without any consideration of the validity of the allegations and could not be waived. Id. As a result, the exclusion applied to an offeror "even after a binding determination that the allegations were without merit." Id. This restriction on competition is tantamount to a de factor suspension or debarment. Id.

Here, Latvian is precluded from bidding on any acquisition where an agency uses FedBid. This is a repeated determination of nonresponsibility or a long-term attempt by all agencies to preclude Latvian from competing. Further, Latvian is being excluded by State without any consideration as to the validity of the allegations by FedBid. This is a restriction of competition tantamount to a de facto suspension or debarment.

[5] Formal suspension and debarment procedures are set forth in FAR subpart 9.4 and provide contractors with certain due process rights.

CONCLUSION

Based on the foregoing, we believe that the protest must be sustained.

Respectfully submitted,

/S/

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