



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: PF Construction Corporation
File: B-232141
Date: October 14, 1988

DIGEST

For a party to prevail based on its interpretation of a solicitation provision, the party must at least show that its interpretation of the provision is reasonable and susceptible of the understanding reached. Where an invitation for bids (IFB) was issued as a total small business set-aside, and the agency by amendment inadvertently referenced a clause indicating that the IFB was a small disadvantaged business (SDB) set-aside, without deleting prior inconsistent provisions indicating that the IFB remained a small business set-aside, bidder could not reasonably conclude that an SDB set-aside was intended, especially where regulations prohibited an SDB set-aside for the type of construction project solicited.

DECISION

PF Construction Corporation (PFC), a small disadvantaged business (SDB) concern, protests the award of a contract under invitation for bids (IFB) No. N62474-87-B-7758, issued as a total small business set-aside by the Naval Facilities Engineering Command for construction work at the Naval Space Surveillance Field Station in Maricopa, Arizona. PFC contends that amendment No. 3 converted the IFB from a small business set-aside to an SDB set-aside, and that therefore the Navy should only award the contract to an SDB concern.

We deny the protest.

The IFB was issued on May 1, 1988 as a total small business set-aside. Amendment No. 2 of the IFB, dated May 4,

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provided for a 10 percent evaluation preference for SDBs.^{1/} On May 20, the Navy issued amendment No. 3 which defined an SDB concern for the purposes of this procurement. In addition, however, the amendment indicated that "DFARS § 52.219-7006 - Notice of Total Small Disadvantaged Business Set-Aside" was to be added to the contract clauses which were incorporated by reference into the solicitation.^{2/} The amendment contained no other reference which suggested that the solicitation was being converted to an SDB set-aside, nor did it delete the conflicting provisions which indicated that the IFB was a small business set-aside with an evaluation preference for SDBs.

Bids were opened on June 1. Of 11 small business bids received, 2 were from SDB concerns. PFC submitted the eighth low bid (third low after applying the SDB evaluation preference), but submitted the low SDB bid. On June 2, PFC protested to the agency contracting officer, objecting to any award to a firm that was not an SDB. The Navy denied the protest, stating that there was never any intent on the part of the Navy to convert the IFB to an SDB set-aside and that the reference in the solicitation to "DFARS Clause 52.219-7006" was inadvertent. This protest followed.

As stated above, PFC interprets the solicitation as requiring award to an SDB concern because amendment No. 3 allegedly converted the IFB from a small business set-aside to an SDB set-aside. Based on this interpretation of the solicitation, PFC would be in line for award as the low SDB concern. However, for a party to prevail based on its

^{1/} This SDB preference was incorporated into the solicitation pursuant to an interim rule, effective March 21, 1988, issued by the Department of Defense (DOD) to implement section 1207 of the National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, 100 Stat. 3973, and section 806 of Pub. L. No. 100-180 (the DOD Authorization Act for fiscal years 1988 and 1989). See 53 Fed. Reg. 5114, 5126 (1988) (to be codified at 48 C.F.R. § 219.7000). Effective June 6, 1988, the SDB evaluation preference may not be used in a solicitation issued as a small business set-aside. See 53 Fed. Reg. 20626, 20630 (1988) (to be codified, as amended, at 48 C.F.R. § 219.7000(a)).

^{2/} This clause was also promulgated pursuant to the interim rule. See 53 Fed. Reg. 5114, 5129 (1988) (to be codified at 48 C.F.R. § 219.7006). Generally, the SDB set-aside is invoked if there is a reasonable expectation that offers will be obtained from at least two responsible SDB concerns.

interpretation of a solicitation provision, the party must at least show that its interpretation of the provision in issue is reasonable and susceptible of the understanding reached. See T&A Painting, Inc., B-229655.2, May 4, 1988, 88-1 CPD ¶ 435.

As stated above, the solicitation was issued as a total small business set-aside, and amendment No. 2 added an evaluation preference for SDBs while retaining the small business set-aside. While amendment No. 3 incorporated by reference DFARS § 52.219-7006, it also defined an SDB concern for purposes of this procurement, which is consistent with the use of the evaluation preference under the small business set-aside as well as with the use of an SDB set-aside, and failed to delete the IFB provisions establishing the solicitation as a small business set-aside. Under the circumstances, we think that it was questionable, at best, as to whether a prudent bidder could reasonably conclude from amendment No. 3 that an SDB set-aside was intended.

Moreover, PFC otherwise knew or should have known that this type of procurement was not eligible to be set aside for SDB concerns. DOD interim rule § 219.502-72(b)(2), 53 Fed. Reg. 5114, 5123 (1988) (to be codified at 48 C.F.R. § 219.502-72(b)(2)), which also became effective March 21, 1988, prohibited an SDB set-aside for construction and related contracts in excess of \$5,000 and under \$2 million. This provision was published in the Federal Register and therefore we must regard PFC as being on constructive notice of its contents. See Commercial Diving Center, B-190939, Jan. 18, 1978, 78-1 CPD ¶ 48. Since the government estimate (\$84,000) and PFC's bid (\$89,800) were within this range, setting aside this procurement for SDBs would have violated DOD regulations. We therefore cannot agree that PFC's interpretation of the solicitation was reasonable.

The protest is denied.


James F. Hinchman
General Counsel