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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Imaging Services

File: B-242544

Date: April 29, 1991

Gene L. Chilton for the protester.
Charles J. McManus, Esq., Jonathan H. Kosarin, Esq., and Karen Gearreald, Esq., Department of the Navy, for the agency.
Steven W. DeGeorge, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest by unsuccessful offeror alleging clerical error in its proposal is denied where record does not demonstrate that agency either was on actual or constructive notice of the error before award.

DECISION

American Imaging Services protests the award of a contract to Phoenix Medical Electronic Services, Inc. under request for proposals (RFP) No. N00189-91-R-0005, issued by the Norfolk Naval Supply Center, Department of the Navy, for the repair and maintenance of CT scanner and X-ray equipment. The protester contends that it was improperly denied the award on the basis of a clerical error in its proposal relative to its status as a small disadvantaged business (SDB) concern which should have been apparent to the agency.

We deny the protest.

The RFP was issued on October 29, 1990, for the award of a contract to repair and maintain CT scanner and X-ray equipment located at the United States Naval Hospital, Camp LeJeune, North Carolina. Award was to be made to the lowest priced technically acceptable offeror. Five proposals were received by the November 28 closing date. Following an evaluation of the proposals, the agency determined that Phoenix had submitted the lowest priced acceptable proposal and on December 31 awarded a contract to that firm on the basis of its initial proposal.

The solicitation incorporated by reference the Department of Defense (DOD) Federal Acquisition Regulation Supplement (DFARS) clause "Notice of Evaluation Preference for Small Disadvantaged Business (SDB) Concerns" as is found in DFARS § 252.219-7007. This clause provides for a 10 percent evaluation preference in favor of proposals submitted by SDB concerns. For purposes of determining eligibility for the evaluation preference, the RFP also contained the standard "Small Disadvantaged Business Concern Representation" clause found in DFARS § 252.219-7005. Offerors were required to complete this clause in two respects. First, under paragraph (b) of the clause, offerors were required to identify whether they had "qualifying ownership" by any of a number of listed groups. Second, under paragraph (c) of the clause, offerors were required to certify whether they were, or were not, an SDB concern.

In performing its review and evaluation of proposals, the agency concluded that no offeror had certified as an SDB concern. In fact, the protester had in its offer marked the box in the SDB Representation clause, which specified that the firm was "not" an SDB. Thus, the SDB evaluation preference was not applied to any proposal in this procurement. The protester was advised of this in response to its inquiry after being notified on January 3, 1991, of the award to Phoenix. At that time, the protester alleged that it had mistakenly certified as a non-SDB.

The protester contends that it is in fact an SDB concern, entitled to the 10 percent evaluation preference, thus, making it the lowest priced offeror. Although the protester concedes that the certification contained in its proposal is marked so as to indicate that it is not an SDB, it alleges that this was merely a clerical error which it now should be permitted to correct.

Where, as here, a mistake in an offer other than the awardee's is first alleged after award, the general rule is that the unsuccessful offeror must bear the consequences of its mistake unless the contracting officer was on actual or constructive notice of the error before award. Energy Container Corp., B-235595.2, Nov. 2, 1989, 69 Comp. Gen. ___, 89-2 CPD ¶ 414. Based upon our review of the record here, we find that the protester should bear the consequences of its alleged mistake in this instance.

The protester argues that the fact that it had committed a clerical error in its SDB certification should have been apparent to the contracting officer since it affirmatively executed paragraph (b) of the SDB representation clause by identifying its "qualifying ownership" as Hispanic-American. According to the protester, where an offeror represents that

it has a "qualifying ownership" by one of the groups identified under paragraph (b) of the clause, it must necessarily be an SDB concern. Thus, the protester maintains that there was an obvious inconsistency within its proposal which should have placed the contracting officer on actual or constructive notice of a mistake.

The agency initially responds by disputing that there was an inconsistency between the protester's responses to paragraphs (b) and (c) of the clause. According to the agency, an offeror could have "qualifying ownership," but, nonetheless, not be an SDB concern. The agency proffers, for example, that even if Hispanically-owned, a firm might not be operated and controlled on a daily basis by such individuals, as is also required to qualify as an SDB. We believe that the agency is correct. It is clear from the language of the clause itself that having "qualifying ownership" alone does not assure a firm of SDB status. Rather, as the agency's example indicates, there are other requisites involved. Also, we believe that the protester's position effectively makes paragraph (c) of the clause superfluous. See National Projects, Inc., 69 Comp. Gen. 229 (1990), 90-1 CPD ¶ 150 (a solicitation must be read as a whole and in a manner which gives effect to all of its provisions).

Furthermore, the agency maintains that there was evidence to indicate that the protester had acted very deliberately, as opposed to erroneously, in certifying as a non-SBD firm. The agency reports in this respect that its review of the protester's proposal revealed that paragraph (c) of the SBD clause had been initially marked by the protester to indicate that it was an SBD concern. However, this marking had noticeably been "whited-out," and the clause then marked to indicate that the protester was not an SBD. We agree with the agency that this circumstance supported a conclusion by the contracting officer that the protester had intentionally certified as a non-SBD with no apparent error.

In view of the above, we do not believe that the agency reasonably had either constructive or actual notice of the mistake alleged by the protester here. We therefore find unpersuasive the protester's argument that the agency should have requested verification of its proposal.

The protest is denied.

for James F. Hinchman
General Counsel