



Comptroller General
of the United States
Washington, D.C. 20541

Decision

Matter of: South Gulf, Inc.
File: B-260521.2; B-260521.3
Date: May 1, 1995

Charles F. Merz, Esq., for the protester.

DIGEST

Where first page of solicitation includes a typewritten statement that the procurement is a 100-percent set-aside for small disadvantaged business (SDB) concerns, the agency's failure to elsewhere in the solicitation check a box to indicate that the procurement is or is not an SDB set-aside does not permit potential bidders to assume that the procurement is not set aside; solicitation, when read as a whole, established the set-aside, and any question about apparent inconsistent provisions should have been raised prior to bid opening.

DECISION

South Gulf, Inc. requests reconsideration of our March 20, 1995, decision summarily dismissing its protest of an award of a contract to the second low bidder under invitation for bids (IFB) No. N62766-95-B-2502 issued by the Department of the Navy. It also now protests the Navy's decision to cancel the IFB instead of awarding it a contract. We affirm the original dismissal and dismiss the new protest.

We dismissed the protest because we viewed the IFB as a 100-percent small disadvantaged business (SDB) set-aside under which South Gulf, as a non-SDB,¹ was not eligible for award even though it was the low bidder. We also stated that South Gulf, to the extent it relied on inconsistent IFB provisions to conclude that the IFB was not set aside for SDB concerns, was not free to adopt its own interpretation of the inconsistency, but rather should have questioned the inconsistency prior to bid opening.

¹Our prior decision inadvertently characterized South Gulf as a "large" business. We recognize that South Gulf is a small business but that it is not an SDB concern.

On reconsideration, South Gulf asserts that our dismissal is legally erroneous because the IFB by its terms is not an SDB set-aside. South Gulf further maintains that if an ambiguity existed, "it is a latent ambiguity showing itself only when the Navy announced the contract would not be awarded to the lowest responsible bidder."

DD Form 1707, the very first page of the solicitation, stated that the "procurement is a 100 [percent] set-aside for . . . SMALL DISADVANTAGED BUSINESS CONCERNS." The solicitation also incorporated Defense Federal Acquisition Regulation Supplement (DFARS) § 252.219-7002, Notice of Small Disadvantaged Business Set-Aside, which was accompanied by a note stating "only applicable if SDB is indicated on DD [Form] 1707 and Page 1 of the instruction to bidders." The instructions to bidders contained the following provision: "OFFERS COVERING THIS PROJECT RESTRICTED TO SMALL DISADVANTAGED BUSINESS CONCERNS. ___ YES

NO." Neither alternative was checked. South Gulf's position is that because the note accompanying DFARS § 252.219-7002 provided that the clause was applicable only if both DD Form 1707 and page 1 of the instructions to bidders so indicated, the absence of that indication in the instruction to bidders precluded the conclusion that the IFB was set aside for SDBs.

We do not agree. Even though the Notice of Small Disadvantaged Business Set-Aside clause, by the terms of its accompanying note, literally was not applicable because the instructions to bidders did not so indicate, such a reading ignores the notice on DD Form 1707 explicitly announcing that the procurement was 100-percent set-aside for SDBs. That notice, moreover, was not a preprinted part of the solicitation form--it was a typewritten entry added for this procurement. In such circumstances, we think the only reasonable reading of the IFB, when that document is read as a whole, is that it was set aside for SDBs and that the Navy simply had inadvertently failed to check the appropriate box on the instruction to bidders page to reflect that restriction. See generally Able Serv. Contractors, Inc., B-250182, Jan. 5, 1993, 93-1 CPD ¶ 8 (where the agency's inadvertent check mark next to "this procurement is unrestricted" did not mean that the solicitation was unrestricted because other provisions in the solicitation established that it was a set-aside).

Furthermore, to the extent the protester relied on the absence of an appropriate check mark on the instruction to bidders page, it did so at its own peril. Under the protester's interpretation--that the Notice of Small Disadvantaged Business Set-Aside could not be operative in the absence of an affirmative indication of an SDB set-aside in the instructions

to bidders--the IFB was facially inconsistent because it also contained the SDB set-aside notice on DD Form 1707. The protester should have, but did not, bring this IFB ambiguity--which clearly was patent and not, as the protester asserts, latent--to the agency's attention. It simply elected to submit a bid on the basis of its own interpretation. It did so at its own risk.

We therefore affirm the dismissal.²

As for the IFB's cancellation, South Gulf, as a non-SDB company, would not be eligible for award and therefore is not an interested party entitled to maintain this protest. See 4 C.F.R. §§ 21.0(a), 21.1(a); ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7.

The prior decision is affirmed and the protest is dismissed.

\s\ Robert H. Hunter
for Robert P. Murphy
General Counsel

²South Gulf contends that it was "improperly denied . . . due process" by our summary dismissal. Our Regulations, however, provide that a protest that "does not state a valid basis" will be "summarily dismiss[ed] . . . without requiring the submission of an agency report." 4 C.F.R. § 21.3(m). South Gulf's protest did not set forth a valid basis for protest.