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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

## **Decision**

**Matter of:** AeroSage LLC

**File:** B-409627

**Date:** July 2, 2014

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David M. Snyder, for the protester.

William D. Robinson, Esq., and Sarah Bloom, Esq., Department of Justice, Bureau of Prisons, for the agency.

Frank Maguire, Esq., Paul E. Jordan, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Protest is sustained where an agency requested quotations for fuel, with next-day delivery required, via the FedBid reverse auction website, and the protester, the lowest-priced technically acceptable vendor, responded timely and affirmatively to a FedBid “Bid Validation” request, but did not timely respond to the contracting officer’s concurrent shorter-deadline, telephonic request for confirmation, leading the contracting officer to make the award to second lowest-priced vendor.

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### **DECISION**

AeroSage LLC, of Tampa, Florida, protests the Department of Justice, Bureau of Prison’s (BOP) placement of an order with W.G. Pitts Company, Inc., of Jacksonville, Florida, under request for quotations (RFQ) No. DJBP0302NP210047, FedBid Buy No. 594154\_02, for next-day delivery of 6,000 gallons of unleaded fuel for the FCC Coleman Federal Prison, Coleman, Florida. The protester asserts that, although it was the lowest-priced, technically acceptable vendor, it was improperly denied award.

We sustain the protest.

### **BACKGROUND**

The RFQ, a small business set-aside, was posted on the FedBid website as a reverse auction on March 11, 2014, with a closing time of 12:00 Noon on March 12, and a delivery time of 9:00 a.m., on March 13. The contracting officer (CO) states:

It was posted on FedBid because the contract with [the incumbent] had expired and I did not have any sources. The reason the RFQ was open for 1 day is because the Facilities Department informed me that their unleaded fuel status was dangerously low and that they need[ed] to have fuel delivered not later than 3/13/2014. Any later could have jeopardized the [prison's] daily operation. During my market research of past acquisitions for fuel, I discovered that the delivery of bulk fuel would require at least 24 hours' notice because of previously scheduled deliveries.

Agency Report (AR), Tab 2, CO's Statement (COS).

AeroSage submitted quotations on March 11 and early on March 12, both of which were determined by FedBid to be "lag" quotations, i.e., not the lowest-submitted quotation or not in the acceptable price range. Protest at 1; see FedBid Terms of Use at 2. A short time prior to the 12:00 Noon closing time on March 12, AeroSage submitted a third, lower "auto rebid." Protest at 1. Shortly after closing, AeroSage received the FedBid system's email "Bid Validation" request, with a response deadline of 5:00 p.m.<sup>1</sup> Protest Exh., FedBid Email, Mar. 12, 2014, 12:03 p.m. Pertinent here, the Bid Validation request directed AeroSage to confirm, by 5:00 p.m. that day, that it could deliver the fuel by March 13, at 9:00 a.m. Id. At 4:36 p.m., AeroSage replied affirmatively to the Validation request via email. Protest Exh., AeroSage Email, March 12, 2014, 4:36 p.m.

During the time after the FedBid Validation request was sent, but before the response was due, the CO advises that "due to the short turn-around time," he "determined that it was appropriate to contact AeroSage, make an offer, and request acceptance prior to delivery." COS at 1-2. The record indicates that, after the Noon closing time on March 12, the CO made two telephone calls to AeroSage's office, at 12:44 p.m. and at approximately 1:45 p.m. Comments at 5. In the second call, the CO directed AeroSage to call back by 2:30 p.m., i.e., within 45 minutes, to confirm delivery and accept the offer. COS at 1-2; Comments at 5. The CO further states that, when AeroSage did not return his call, he "considered that to be a rejection of the Government's offer" and was "concerned that the Government's needs would not be met." COS at 2. He therefore decided to award to the next lowest-priced, technically acceptable vendor, W.G. Pitts, at approximately 3:00 p.m. Id.

AeroSage advises that, during the work day on March 12, its office was unattended due to other commitments, but, as indicated above, AeroSage nonetheless

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<sup>1</sup> A Bid Validation request is "the effort of FedBid to verify and/or confirm Seller's compliance with Specifications." FedBid Terms of Use at 1-2.

retrieved and responded to the FedBid email message. Protest at 1. AeroSage asserts that when its personnel “returned to the office on the evening of March 12, 2014, there were two unclear phone messages saying to call [the CO] for award of the contract. The second message said to call by 2:30 PM ET.” Id. AeroSage called back at approximately 6:30 p.m. on March 12, id. at 2, and left a voice message, again confirming that it would supply the fuel, consistent with all RFQ requirements. COS at 2; Protest at 1-2. The CO notes that AeroSage’s voicemail was left “well after duty hours,” but acknowledges ultimately receiving it at approximately 7:45 a.m. on March 13. COS at 2. W.G. Pitts delivered the fuel by 9:00 a.m. on March 13. Id. at 2. This protest followed.

## DISCUSSION

AeroSage argues that the agency acted improperly in awarding to another vendor after AeroSage submitted the lowest-priced quotation, and committed to meeting all the RFQ requirements, including delivery time. In addition, AeroSage notes that it confirmed its quotation, including its commitment to the delivery terms, within the timeframe established by FedBid in its Bid Validation request. AeroSage argues that the agency acted improperly when it imposed a shorter requirement on AeroSage’s response time after the solicitation closed, and contends that the need for a “short notice” response to a voicemail message was the result of “lack of planning” by the agency. Comments at 2.

The agency does not dispute that AeroSage submitted the lowest-priced quotation, or that the company timely responded to the FedBid Bid Validation request by the 5:00 p.m. deadline established in FedBid’s email to AeroSage. Instead, the agency argues that it “attempted to award” to AeroSage, but that AeroSage did not accept the agency’s offer. AR at 3.

Specifically, the agency notes that the FAR provides that “[w]hen appropriate, the Contracting Officer may ask the supplier to indicate acceptance of an order by notification to the Government, preferably in writing, as defined in 2.101.” AR at 3, citing FAR § 13.004(b). The agency explains:

Here, due to the extremely small time window during which the BOP required delivery, the CO determined it was in the BOP’s best interest to contact the prospective awardee, confirm their intent to deliver the next morning, and ask that they indicate acceptance by notification of the Government. [citation omitted]. [The CO] determined that, due to the urgency of the requirement, this was a better option than sending

a purchase order and hoping the contractor would receive it and mobilize in time to render the fuel. [citation omitted].

AR at 4. The agency further maintains that when the CO was unable to contact a representative of the company by telephone, it reasonably interpreted AeroSage's non-response as a rejection of the BOP's offer, and issued the order to the next-lowest-priced vendor. Id. at 5.

As a preliminary matter, AeroSage and the agency disagree about both the type of procurement that is being conducted here, and how to characterize the two exchanges that took place on March 12--one between AeroSage and FedBid via an email, and the second between AeroSage and the agency via voicemail messages. The agency contends that, although it made use of the FedBid website, its procurement was a request for quotations, and that AeroSage provided a quote, not a bid. The agency, citing Federal Acquisition Regulation (FAR) § 13.004(a), notes in this regard that a quotation is not a submission for acceptance by the government and does not constitute an offer. See Computer Assocs. Int'l, Inc., B-292077.3 et al., Jan. 22, 2004, 2004 CPD ¶163 at 3, aff'd., Computer Assocs. Int'l, Inc.--Recon., B-292077.6, May 5, 2004, 2004 CPD ¶ 110 (quotations submitted in response to an RFQ for issuance of order under Federal Supply Schedule are not offers that may be accepted to form a binding contract). Thus, in the agency's view, it was appropriately seeking to expedite the vendor's commitment to deliver, and complete the process of offer and acceptance.

While the record reflects that the agency was soliciting quotes and not bids, RFQ at 3; see Kingdomware Technologies, B-405242, Sept. 30, 2011, 2011 CPD ¶ 199 at 2, n.1, the resolution of this issue is immaterial to our analysis. Instead, we simply conclude that the agency unreasonably imposed an additional requirement on this procurement after the solicitation closed.

In hosting this reverse auction on its website, FedBid was acting as an agent for the BOP, and it conducted the auction as described in its Terms of Use. Under the FedBid Terms of Use, a request for "Bid Validation" occurs after a solicitation closes, and represents an attempt to seek affirmative confirmation from the vendor (or seller, or "bidder") that it will honor its commitment.<sup>2</sup> Terms of Use at 2-3. Of particular importance here, FedBid's Validation request in this matter expressly sought a confirmation from AeroSage that the fuel delivery required by this solicitation would take place by 9:00 a.m. the next day, or March 13. AeroSage provided that commitment, and did so within the timeframe established by the FedBid Validation request.

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<sup>2</sup> In addition, the FedBid terms of use provide that a "Buyer is NEVER obligated to complete the transaction, regardless of the status of the Buy." Terms of Use at 8.

While the process established by the BOP's agent (FedBid) was underway, the CO here imposed a second requirement--in our view, an overlay to the actions underway by FedBid--in which the CO, via voicemail, sought to complete the steps of offer and acceptance (and confirmation of the delivery requirement) during the course of 45 minutes. Thus, the agency's actions here are analogous to a decision to accelerate the closing time for final revised proposals on the date those proposals are due. This additional requirement for telephonic confirmation was not only unstated in the RFQ, but was inconsistent with the instructions set forth in FedBid's previously-issued Bid Validation request. AeroSage responded to the Validation request as asked and confirmed its commitment to deliver the fuel the next day; the company had no reason to expect that, separate and apart from this inquiry, there was a later-sent voicemail message waiting that imposed a different requirement (a return telephone call) with a shorter response time.

These actions violate a fundamental premise of government procurements: that offerors must be advised of the bases upon which their proposals will be evaluated. H.J. Group Ventures, Inc., B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203 at 4. Specifically, it was unreasonable for the CO to provide AeroSage approximately 45 minutes to respond to a voicemail message, when nothing in the RFQ alerted AeroSage that such a request would be forthcoming and, in fact, AeroSage received (and affirmatively replied to) FedBid's emailed Bid Validation request with a later deadline. Further, there is nothing in the record suggesting that AeroSage would fail to deliver the fuel as promised: AeroSage submitted a quotation in which it certified that it would comply with all requirements of the RFQ, and the agency points to nothing to cast doubt on AeroSage's ability or intention to perform.<sup>3</sup>

In short, the agency here chose the method of, and its agent for, meeting this requirement, and FedBid sought confirmation of the very issue (ability to make timely delivery) that the CO sought to confirm via voicemail messages. Given that

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<sup>3</sup> To the extent that the CO's decision not to award to AeroSage was based on a concern that AeroSage would be unable to timely deliver the fuel, see COS at 2, this would appear to be a negative responsibility determination. See FAR § 9.104-1(b). In such case, the CO's action would have deprived AeroSage, a small business, of its statutory right to have a negative responsibility determination reviewed by the Small Business Administration (SBA) under the Certificate of Competency process. See FAR § 9.104-3(d)(1); see, e.g., Fabritech, Inc., B-298247, B-298247.2, July 27, 2006, 2006 CPD ¶ 112 at 3-6; F & F Pizano Trucking Co., Inc., B-212769, Nov. 30, 1983, 83-2 CPD ¶ 629 at 1-2 (notwithstanding finding of urgency, contacting officer acted improperly in rejecting a small business as nonresponsible without referring the matter to SBA).

AeroSage responded as requested by FedBid, we think the CO's actions improperly imposed an additional unstated requirement in this procurement.<sup>4</sup>

## RECOMMENDATION

Given that the purchase order here has been fully performed, COS at 2, and other substantive relief is not possible, we recommend that the agency reimburse the protester its quotation preparation costs. 4 C.F.R. § 21.8(d)(2) (2014). We also recommend that the agency reimburse the protester the costs of filing and pursuing its protest. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling  
General Counsel

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<sup>4</sup> The protester also challenges the agency's use of FedBid generally; asserts that the RFQ failed to state an appropriate NAICS category size standard; and argues that the awardee would not be eligible under the appropriate size standard. Protest at 1-2. These first two arguments are, essentially, challenges to the terms of the solicitation, filed after closing, and thus are untimely. 4 C.F.R. § 21.2(a)(1). The third argument, AeroSage's contention that the awardee is ineligible for award as a small business, is a matter within the jurisdiction of the Small Business Administration. 4 C.F.R. § 21.5(b). Finally, the protester asserts that its protest should be sustained since the agency report was submitted one day later than the 30-day due date set for the report by our Office. Comments at 1. There is no provision in our Regulations, however, for sustaining a protest based on a late agency report. Thus, this protest ground does not set forth a basis on which we may grant relief. 4 C.F.R. § 21.1(c)(4).