Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Southeast Technical Services--Entitlement to Costs

File: B-272374.2

Date: March 11, 1997

Robert Gibson for the protester.
Stacy North-Willis, Esq., Department of Veterans Affairs, for the agency.
C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office will not recommend payment of the costs of filing and pursuing a protest where the agency did not unduly delay taking corrective action once the issue of whether it had properly considered the use of simplified acquisition procedures had been put squarely in dispute.

DECISION

Southeast Technical Services requests that our Office recommend that the Department of Veterans Affairs (VA) pay it the reasonable costs of filing and pursuing its protest.

We deny the request.

On May 8, 1995, the agency issued a solicitation for a firm, fixed-price contract to provide labor, equipment, and material necessary to remove and dispose of existing soil and install new ethylene propylene diene monomer waterproofing material, a concrete paver and pedestal system, a new wall, and an athletic turf system in courtyard 2G of building 110 at the VA medical center in Augusta, Georgia. Since the government estimate was less than $25,000, the agency issued the solicitation as a set-aside for emerging small businesses. See Federal Acquisition Regulation (FAR) Subpart 19.10.

The agency received two offers, both of which exceeded $25,000. The agency dissolved the set-aside and revised its estimate. On August 3, the agency issued a new solicitation, adding a bonding requirement, in accordance with the then-current FAR implementation of the Miller Act, 40 U.S.C. § 270a (1994), which essentially required a contractor to provide bid, performance, and payment bonds for any construction requirement in excess of $25,000. See FAR § 28.102-1 (FAC 90-32). The agency received no responses.

On February 28, 1996, the agency issued a new solicitation, again including the bond requirement, with a higher government estimate--$35,000--and received four bids. The protester submitted a bid which did not include the required bid bond and was therefore nonresponsive. The other bids substantially exceeded the government estimate. The agency canceled the solicitation because it did not consider the bid prices reasonable.

On May 24, the agency reissued the solicitation, with the bond requirement, setting a date of June 24 for bid opening. Six hours before the scheduled bid opening time, Southeast Technical Services filed a protest with this Office, essentially objecting to the bonding requirement.

During the time of this procurement, the FAR was being revised to conform to the provisions of the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243, 3342 (1994). On July 3, 1995, prior to the issuance of the second solicitation here, Federal Acquisition Circular (FAC) 90-29, an interim rule revising Part 13 of the FAR, was issued to implement the simplified acquisition procedures called for by FASA. The revised, interim rules mandated the use of simplified acquisition procedures "to the maximum extent practicable" where, as here, the government estimate was under $50,000. Further, the revised Part 13 noted that the Miller Act payment and performance bonds were no longer required for purchases below the simplified acquisition threshold. However, FAR Part 28 continued to require such bonds until June 20, 1996, 4 days prior to the fourth and final bid opening here, and the filing of the protest. See FAC 90-39. Final rules for Part 13 were published on July 26, 1996, during the pendency of the protest; the interim rules for Part 28 are still in effect.)

In its protest, Southeast raised a number of contentions, most of which were without merit or not for consideration by our Office. Southeast complained of discrimination, arguing generally that the bonding requirement discriminated against minority and nonminority contractors, and that it was discriminatory to require a bond of bidders not allowed to compete under a prior version of the solicitation that did not require a bond. Southeast argued that the initial emerging small business set-aside had discriminated against nonlocal firms (presumably only Georgia firms submitted proposals for the initial solicitation.).[1] The protester

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[1]In its comments, Southeast referred to the Supreme Court decision in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), which found unconstitutional an unjustified preference for small and disadvantaged business enterprises and referred to discriminating "against contractors from different origins." It appears now that, by "origins," the protester was referring to other places outside Georgia, rather than other races or nationalities, and that the reference to the Supreme Court decision was merely for emphasis.

asserted that the agency had failed to issue a written amendment to the solicitation advising offerors that the government estimate exceeded $25,000 and failed to provide notice of the rejection of Southeast's bid in February.[2] In pertinent part, however, Southeast made a passing remark that the agency was not using simplified acquisition procedures.[3]

The agency report of July 26 effectively responded to most of the protest issues. In response to the protester's major contention--that the agency was discriminating against certain contractors by insisting on a bid bond--the VA stated that it was simply complying with FAR Part 28, which required bid and Miller Act bonds for projects over $25,000. The agency did not discuss the provisions of FAR Part 13, implementing FASA by mandating the use of simplified acquisition procedures where practicable for purchases under $50,000, or the June 20 revision to FAR Part 28, providing for the inapplicability of the Miller Act to purchases conducted under simplified procedures. Its only response to Southeast's mention of the simplified acquisition procedures was the irrelevant assertion that, in accordance with FAR Part 19, it set aside acquisitions under $25,000 for emerging small businesses.

When Southeast, likewise, did not address the simplified acquisition procedures issue in its comments, our Office raised the issue with the parties. On September 5, we provided a written memorandum to the parties, pointed out the changes to the FAR--the mandatory use of simplified acquisition procedures where practicable as well as the changes to Parts 13 and 28 regarding the applicability of the Miller Act to purchases under such procedures. Since FAR Part 13 requires the use of

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[2]Neither assertion was true. The cover page of the solicitation expressly advised potential bidders of a government estimate in the $25,000-$100,000 range. The agency sent two letters--one dated March 29, notifying Southeast of the rejection of its bid, and a second dated May 14, notifying the protester that the solicitation was being canceled.

[3]The relevant portion of the protest is as follows:

> ". . . we were never notified that our offer was unsuccessful from the previous bidding of this project. This VA center does not use any of the prescribed simplified acquisition procedures. They do not try to reduce any administrative costs or costs of bonds that are not required on contracts under $25,000. It appears that they are trying to do a lot of job justification at the expense of small businesses. We at Southeast Technical Services believe that this VA center in Augusta, Georgia are misus[ing] their option of requiring bi[d] and performance bonds on all contracts is an open form of discriminating . . . . " [sic]

simplified procedures if "practicable," we asked the agency to address whether using those procedures was "practicable" for the instant solicitation. We also asked for a justification for the bonding requirement apart from the provisions of the Miller Act. Six days later, on September 11, the agency admitted that it had simply not considered using simplified acquisition procedures and canceled the solicitation. We dismissed the protest as academic, and Southeast filed this request with our Office for a recommendation that it recover its costs of pursuing the protest.

Under the Competition in Contracting Act of 1984 (CICA), our Office may recommend recovery of costs where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (1994). Additionally, as noted above, our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (1996), provide that we may recommend that a protester recover its costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to a protest. This does not mean, however, that our Office will recommend the award of protest costs in every case in which an agency takes corrective action in response to a protest; rather, we will recommend payment of costs only where, based on the circumstances of the case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Instrumentation Lab. Co.--Request for Declaration of Entitlement to Costs, B-246819.2, June 15, 1992, 92-1 CPD ¶ 517. In deciding whether an agency's corrective action was so delayed as to warrant recovery of costs, the determination of the appropriate date from which the promptness is measured is critical. Holiday Inn-Laurel--Entitlement to Costs, B-265646.4, Nov. 20, 1995, 95-2 CPD ¶ 233.

With regard to the issue upon which the agency took corrective action--the failure to follow the simplified acquisition procedures of FAR Part 13--the protester did no more than use the phrase "simplified acquisition procedures" in its initial protest and thus failed to raise the issue in any meaningful way. In fact, it was not until our Office directed the agency's attention to it, by our message of September 5, that the issue was squarely framed. The promptness of the agency's corrective action, taken on September 11, thus must be measured from the time we identified the issue. Using that measure, the record contains no basis for concluding that the agency unduly delayed taking corrective action, once it realized that its position might be in error. Rather, the VA's decision to cancel the solicitation, 6 days after the simplified procedures issue effectively was raised, constitutes exactly the type of prompt corrective action which we seek in bid protest resolution, and which it is

not our intent to penalize. See Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 (corrective action taken 8 working days after the issue was first squarely put in dispute was not unduly delayed).

The request is denied.

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