



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Simpson Contracting Corporation

File: B-238279

Date: February 8, 1990

Mike Simpson, for the protester.
Edward J. Korte, Esq., Department of the Army, for the agency.
Paula A. Williams, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Even though contracting officials erroneously advised the protester that an evaluation preference for small disadvantaged business (SDB) concerns would be applicable to a forthcoming procurement, where the solicitation contained no SDB provision because the procurement was exempted from the requirement by regulation, a protest of the lack of an SDB preference is untimely when filed after the bid opening date.

DECISION

Simpson Contracting Corporation protests any award of a contract under invitation for bids (IFB) No. DAAD01-89-B-0256 issued by the United States Army for maintenance and repair of roofs for various buildings at Yuma Proving Ground, Yuma, Arizona.

We dismiss the protest.

This requirement was originally solicited as a 100 percent small disadvantaged business set-aside. Simpson had submitted the only bid under that solicitation; however, the contracting officer decided to cancel the solicitation based on a finding that Simpson's prices were unreasonable and to resolicit the requirement on an unrestricted basis. By letter dated September 13, 1989, the Army informed Simpson of that decision stating that Simpson would be among those solicited and that a 10 percent evaluation preference

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for small disadvantaged businesses (SDB) would be applied to its bid should the firm elect to participate. Simpson protested the decision to cancel the original solicitation to our Office on September 21 but subsequently withdrew the protest by letter dated December 28.

The Army did issue the instant solicitation on November 9, on an unrestricted basis but the IFB did not contain the clause "Notice of Evaluation Preference for Small Disadvantaged Business Concerns." Bid opening was held as scheduled on December 11. Simpson was the second-low bidder on this solicitation without the 10 percent SDB evaluation preference.

On January 10, Simpson filed this protest alleging that it was prejudiced by the agency's failure to evaluate its bid in accordance with the contracting officer's September 13 letter. The protester argues that it is the only bidder eligible for award under the solicitation since it would be the low bidder if the SDB evaluation preference had been applied.

Bidders are to be notified that an SDB preference will be applied to the evaluation of bids through a solicitation clause. To the extent that Simpson now contends that the solicitation should have contained the SDB evaluation preference clause, the protest is untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989), provide that a protest such as this which is based on alleged improprieties in a solicitation that are apparent prior to bid opening must be filed either with the agency or this Office prior to that date. Here, the protester states that "when [it] received the bid page" for the subject solicitation on November 10, the firm contacted the contract specialist who allegedly "stated that Simpson would be afforded the 10 percent evaluation . . ." Thus, the absence of the SDB evaluation preference clause in the solicitation was apparent to Simpson. Simpson should therefore have filed its protest prior to the December 11 bid opening. The fact that Simpson relied on written and oral advice from contracting officials that the SDB evaluation preference would be applied to its bid does not relieve the protester from its obligation to file the protest prior to bid opening. See Air Inc., B-236334, Nov. 13, 1989, 89-2 CPD ¶ 455.

We note that Simpson takes the position that its bid protest is timely because it makes "no mention of alleged improprieties in the [s]olicitation." However, this is nothing more than form over substance--the crux of Simpson's protest is the absence of the SDB evaluation preference

clause in the solicitation. In any case, under Defense Federal Acquisition Regulation Supplement § 219.1071-1(c) (DAC 88-10), the SDB evaluation preference clause is inapplicable to an unrestricted procurement for construction services such as the one at issue here. Consequently, even if Simpson's protest had been timely filed, it provides no basis for our Office to conclude that there was any impropriety in the evaluation of bids.

Accordingly, the protest is dismissed.


for Robert M. Strong
Associate General Counsel