

Mr. Siu



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Star Brite Construction Co., Inc.
File: B-241741
Date: February 1, 1991

Frank R. Ciesla, Esq., Giordano, Halleran & Ciesla, for the protester.
Bill C. Giallourakis, Esq., for D&K Construction Co., Inc., an interested party.
Paul M. Fisher, Esq., Department of the Navy, for the agency.
Jeanne Isrin, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that procurement was incorrectly set aside for small disadvantaged businesses is dismissed as untimely where solicitation clearly stated the set-aside restriction and protest was filed after bid opening.

DECISION

Star Brite Construction Co., Inc. protests the award of a contract to any other bidder under invitation for bids (IFB) No. 62472-90-B-4010, issued by the Department of the Navy for miscellaneous building repairs at the Naval Weapons Station Earle, Colts Neck, New Jersey. We dismiss the protest.

Notice of the procurement was published in the Commerce Business Daily (CBD) on July 23, 1990. The notice provided that the project was being considered for a small disadvantaged business (SDB) set-aside but that, if adequate interest was not received from SDB concerns, the procurement would be conducted on an unrestricted basis. Thirty-nine companies responded to the synopsis and requested copies of plans and specifications; 10 firms identified themselves as SDB concerns. Relying on the material received from them plus her past experience with the firms, the contracting officer concluded that there was a reasonable expectation that offers would be received from at least two responsible SDB concerns and that award would be made at a price not exceeding the fair market price by more than 10 percent, thus mandating an SDB set-aside pursuant to the requirements of Department of

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Defense Federal Acquisition Regulation Supplement (DFARS) § 219.502-72(a). The IFB was issued on August 23, stating specifically on the front cover: "This procurement is set aside for small disadvantaged business." On September 20, Star Brite requested and was sent a copy of the solicitation.

Two bids were received by bid opening on October 10. Star Brite was the apparent low bidder, but as it is not an SDB concern, it has been found ineligible for award. The other bidder, D&K Construction Co., Inc., is an SDB concern and has therefore been determined in line for award. Star Brite filed this protest with our Office on October 19. Award has been withheld pending resolution of the protest.

Star Brite contends that the procurement was improperly set aside for SDBs because the criteria for such set-asides were not met in this case. Furthermore, it contends that D&K has demonstrated neither the technical nor financial capability to perform the contract.

We dismiss the protest as untimely. Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation that are apparent prior to bid opening must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1990). As the solicitation plainly stated that the procurement was restricted to SDBs, any protest that the set-aside was improper had to be filed prior to the October 10 bid opening. As Star Brite delayed filing its protest until October 19, it is untimely and will not be considered. See Continental Collection & Disposal, Inc.--Protest and Recon., B-238842.2; B-238842.3, June 25, 1990, 90-1 CPD ¶ 591.

Star Brite maintains that even though filed after bid opening, its protest should be deemed timely because it was verbally advised in a September 18 telephone conversation with the contracting officer that the procurement would be unrestricted because sufficient SDB interest had not been received. Star Brite believes that, based on this advice, it reasonably concluded that the procurement now was unrestricted, and thus had no reason to protest prior to bid opening.

This argument does not change our conclusion. First, the Navy has denied ever advising Star Brite that the procurement would be unrestricted, and the protester has furnished no contemporaneous documentation or other evidence of the alleged telephone conversation. Moreover, even if there was evidence of verbal advice as alleged, any change in the IFB terms to eliminate the SDB set-aside would have required an amendment to the solicitation (see Federal Acquisition Regulation § 14.208(a) and (c)). Star Brite never received any amendment deleting the set-aside (none was issued), and thus could not

properly rely on the alleged verbal notice. See Simpson Contracting Corp., B-238279, Feb. 8, 1990, 90-1 CPD ¶ 165.

The protester also challenges D&K's ability to perform the contract. The contracting officer has found D&K to be a responsible firm and our Office does not review affirmative determinations of responsibility absent a showing of fraud or bad faith by procurement officials, or that definitive responsibility criteria in the solicitation were not applied. 4 C.F.R. § 21.3(m)(5); National Council of Fishing Vessel Safety and Ins., B-239303, Aug. 15, 1990, 90-2 CPD ¶ 127. As neither exception applies here, we will not consider this issue.

Finally, in its comments on the agency report, Star Brite objects for the first time to the contracting officer's reading aloud Star Brite's bid at the bid opening despite the fact that Star Brite was not an SDB concern eligible for award. This allegation is untimely. A protest of other than an alleged solicitation defect must be filed within 10 working days after the basis of the protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). Where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the latter raised allegations must independently satisfy the timeliness requirements; our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. EER Sys. Corp., 69 Comp Gen. 207 (1990), 90-1 CPD ¶ 123. As the protester became aware of the issue as of the October 10 bid opening, but did not raise the issue until December 6, in its comments on the agency report, we will not consider the issue.

Star Brite requests reimbursement of its protest and bid preparation costs. These costs are only available where we find a violation of statute or regulation by the agency. 4 C.F.R. § 21.6(d). We have found no violation here. See Electrospace Sys., Inc., B-227964, July 27, 1987, 87-2 CPD ¶ 94.

The protest is dismissed.


John M. Melody
Assistant General Counsel