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

Decision

Matter of: Community Asphalt Corporation

File: B-249475; B-249475.2

Date: September 14, 1992

William H. Espinosa, Esq., Lance Bultena, Esq., and Michael W. Dolan, Esq., Winthrop, Stimson, Putnam & Roberts, for the protester.
J. Hatcher Graham, Esq., for Colas Road Contractors, an interested party.
Stephen T. Orsino, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
Catherine M. Evans, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of cancellation of solicitation is dismissed as untimely where not filed within 10 working days after protester knew or should have known basis for protest.

2. Protest alleging that agency failed to apply evaluation differential to foreign low bid as required under Federal Acquisition Regulation balance of payments provisions is dismissed where protester is third low bidder, and therefore is not an interested party to challenge evaluation of low bid.

3. Protest alleging that agency improperly included protester's proprietary data in solicitation is dismissed where protester has not established the proprietary nature of the information.

DECISION

Community Asphalt Corporation protests the cancellation of invitation for bids (IFB) No. N62470-92-B-2229, issued by the Naval Facilities Engineering Command for repairs to the runway at the U.S. Naval Air Station (NAS), Guantanamo Bay, Cuba. Community also protests terms of the successor IFB.

We dismiss the protest.

BACKGROUND

The original IFB was issued on August 14, 1991. Based on a government estimate for the work of about $5,500,000, the

Navy reserved $6 million for the project. Community was the low bidder under the original IFB, with a bid price of $7,759,000. On September 25, 1991, the day after bid opening, the contracting officer determined that he would not be able to obtain the additional $1,159,000 necessary to make the award. However, apparently hoping to convince higher authorities of the need for the additional funds, he did not cancel the solicitation, but instead asked the bidders to extend their bids for 60 days. The contracting officer subsequently asked the offerors for 2 more 60-day extensions. When additional funds were never provided, the bids were allowed to expire on March 22, 1992. On April 22, the Commander of NAS Guantanamo Bay reported deteriorating runway conditions, and asked the Navy to approve funding for a new solicitation based on a modified scope of work that would reduce the cost. A new IFB was issued on June 8; a copy was mailed to Community on that date. On July 20, one day before the scheduled bid opening, Community filed this protest.

The protest advances four allegations: (1) the issuance and terms of the second solicitation demonstrates that there was no compelling reason for the cancellation of the first; (2) the second solicitation constituted an impermissible auction; (3) the Navy's conduct in cancelling the first solicitation and reviving it shortly thereafter constituted bad faith and a breach of its duty to fairly, fully and honestly consider bids; and (4) the incorporation of the protester's engineering recommendation in the second solicitation was improper.

After the protest was filed, the Navy proceeded with bid opening. The low bidder was Colas Road Contractors, a Danish firm; Community's bid was third low. Upon receipt of the agency report on the protest, Community filed a second protest alleging that (1) the Navy's cost estimate under the first IFB was unreasonable, (2) the Navy made material misrepresentations to induce Community to keep its bid open for 6 months, and (3) the Navy ignored the Balance of Payments Program requirements of the Federal Acquisition Regulation in proposing to make award to a foreign firm.

UNTIMELY ISSUES

Our Bid Protest Regulations require that protests based upon alleged apparent improprieties in a solicitation be filed by the time set for bid opening or receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1992). Protests of matters other than alleged solicitation improprieties must be filed not later than 10 working days after the basis for protest is known or should have been known. 4 C.F.R. § 21.2(a)(2).

Cancellation-related Issues

Community's first protest ground, challenging the cancellation of the original IFB based on the subsequent issuance of a virtually identical IFB, is untimely. This protest ground concerns a matter other than an alleged solicitation impropriety, and therefore falls under the 10-working-day rule. Community knew or should have known of its basis of protest--that the agency allegedly had misrepresented the reason for canceling the IFB--when it received the new IFB. The record shows that the Navy mailed Community a copy of the IFB on June 8. Since we will presume, absent evidence to the contrary, that documents sent by mail are received within 1 calendar week of mailing, we conclude that Community knew or should have known its basis for protesting the cancellation by June 15. See WesternWorld Servs., Inc., d/b/a The Video Tape Co., B-243808, May 14, 1991, 91-1 CPD ¶ 469. Since Community did not protest the cancellation until July 20, well past the 10-working-day deadline, the protest is untimely.

Community argues that its protest against the cancellation was timely filed under the closing date rule of 4 C.F.R. § 21.2(a)(1), since the basis of protest was only apparent upon review of the terms of the new IFB, and it filed its protest, based upon those terms, before bid opening. In support of its position, Community cites our decision in I.T.S. Corp., B-243223, July 15, 1991, 91-2 CPD ¶ 55, in which we found that a protest against cancellation of an IFB, filed before the time set for receipt of proposals in the new solicitation, was timely. Community contends that I.T.S. Corp. stands for the proposition that where the impropriety of a cancellation becomes apparent upon issuance of a new solicitation, the protester has until the closing date to protest the cancellation.

Community is incorrect. The timeliness standard we cited and relied upon in I.T.S. Corp. was the 10-day rule of 4 C.F.R. § 21.2(a)(2). While the agency argued that I.T.S.'s protest was untimely because it was not filed within 10 days after the firm received the cancellation notice, we held that the basis for I.T.S.'s protest was not apparent until the replacement solicitation was issued. I.T.S. filed its protest within 10 working days after it was presumed to have received the solicitation (see WesternWorld Servs., Inc., d/b/a The Video Tape Co., supra). The protest therefore was timely under 4 C.F.R. § 21.2(a)(2). Community's protest, on the other hand, was filed more than 1 month after Community presumably received the new IFB.

Alternatively, Community maintains that it did in fact file its protest within 10 working days after it knew or should have known its basis of protest. In this regard, Community

asserts that it could not have known that the scope of work under the new IFB was almost identical to that under the canceled IFB until its employees made a site visit to the airfield; Community filed its protest 4 working days after the site visit. We reject Community's argument. While the site visit may have been necessary to confirm the nature and scope of the work so that prospective bidders could prepare accurate bids, we think the fact that the new IFB contemplated virtually the same work as the canceled IFB was apparent on the face of the solicitation. Since we presume Community received the IFB by June 15, (1 calendar week after the June 8 issue date), Community had 10 working days, or until June 29, to protest the cancellation of the original IFB on the basis that the new IFB contemplated the same work. As Community did not meet this standard, its protest of the cancellation is untimely.

We also find several of Community's other protest issues untimely because they are related to, or rely upon, the untimely protest of the cancellation. First, Community alleges that the second solicitation constituted an impermissible auction. However, where cancellation of the prior solicitation was proper, resolicitation does not constitute an impermissible auction. Bill McCann, B-234199.2; B-234856, June 13, 1989, 89-1 CPD ¶ 554. Since Community did not timely challenge the cancellation, we have no basis to question its propriety; we therefore have no basis to find that the new solicitation amounted to a prohibited auction. Next, Community asserts that the Navy's conduct in canceling the first solicitation and reviving it shortly thereafter constituted bad faith and a breach of its duty to fairly, fully and honestly consider bids. This argument is no more than a restatement of its assertion that the cancellation was improper, and is therefore untimely. Also untimely is Community's allegation that the Navy made material misrepresentations to induce Community to keep its bid open for 6 months; Community also should have known of this protest basis when it received the new IFB. Finally, Community challenges the reasonableness of the government estimate under the IFB. Although Community raised this issue within 10 days after it learned the amount of the estimate, the issue relates to the propriety of the cancellation, since the allegedly unreasonable estimate was the basis for the agency's allocation of funds for the procurement. Since we have found the protest of the cancellation untimely, we will not revisit the issue simply because the protester has raised a new, timely argument on that issue. See Adrian Supply Co.--Recon. and Protests, B-242819.6 et al., Apr. 9, 1992, 92-1 CPD ¶ 356.

Balance of Payments Program

In its second protest, Community objected to the Navy's failure to apply an evaluation differential to Colas Road Contractors' low bid under the balance of payments provisions at Federal Acquisition Regulation (FAR) § 25.303. Under the regulations, a 50 percent evaluation differential must be applied to foreign offers for work to be performed outside the United States. While the applicable provisions were not included in the IFB, Community argues, they should have been read into the IFB and applied to this evaluation under the holding of G.L. Christian & Assocs. v. United States, 160 Ct. Cl. 58, 320 F.2d 345 (1963), cert. denied, 375 U.S. 954 (1963).

Community is not an interested party to protest this aspect of the evaluation. Under our Regulations, an interested party for the purpose of filing a protest is an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). Generally, a party is not deemed to have the necessary economic interest where there are other intervening offerors that would be in line for award if the awardee were eliminated from competition. James McGraw, Inc., B-236974.2, Jan. 24, 1990, 90-1 CPD ¶ 99. Since another bidder (i.e., the second low bidder), not Community, would be in line for award if the 50 percent evalaution differential were applied to Colas' bid, Community is not an interested party to protest the evaluation. See id.; 4 C.F.R. § 21.1(a). We therefore dismiss this protest ground.[1]

OTHER ISSUES

Community also protests the terms of the new IFB, alleging that the incorporation of the protester's verbal engineering recommendations in the second solicitation was improper. Community argues that suggestions it made to the Navy after bid opening under the first IFB amounted to value engineering change proposals (VECP) under FAR § 52.248-3, and as such were not to be disclosed outside the government. We disagree. VECPs are proposals made to change existing contracts, not proposals made before a contract is awarded. Compudyne Corp., 44 Comp. Gen. 784 (1965). Since Community

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[1]In any case, we note that the so-called "Christian Doctrine" is limited to incorporation of mandatory contract clauses into an otherwise validly awarded government contract; it does not stand for the proposition that mandatory provisions should be incorporated into an IFB. Mosler Sys. Div., Am. Standard Co., B-204316, Mar. 23, 1982, 82-1 CPD ¶ 273.

was never awarded a contract under the first IFB, its suggestions to the Navy are not entitled to be treated as VECPs.

To the extent Community is arguing that its verbal suggestions to the Navy constituted proprietary information that otherwise should not have been disclosed, Community has not established that this was the case. In this regard, we note that the suggestions were never put into writing to the Navy; thus, there is no documentary evidence that the Navy was aware of the alleged proprietary nature of the suggestions. See EDN Corp., B-225746.2, July 10, 1987, 87-2 CPD ¶ 31. Further, while Community asserts that the Navy acknowledged the proprietary nature of the suggestions, it has submitted no evidence concerning the content of the suggestions that would tend to show that they were not based on publicly available information. See id. In fact, the little information Community has provided indicates that at least one suggestion--deletion of a polymer additive from the paving materials--was obvious rather than innovative or unique. See id. We conclude that Community has not established the likelihood of its claim of improper agency action, and therefore is not entitled to further consideration of the matter. See Cajar Defense Support Co.--Recon., B-240477.2, Sept. 14, 1990, 90-2 CPD ¶ 215.

The protest is dismissed.

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Assistant General Counsel