



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Building Services Unlimited, Inc.--
Entitlement to Costs

File: B-254323.3

Date: March 10, 1994

Carol L. O'Riordan, Esq., Shapiro, Lifschitz and Schram, for the protester.

Riggs L. Wilks, Jr., Esq., Elizabeth DiVecchio Berrigan, Esq., and Brad Farber, Esq., Department of the Army, for the agency.

Barbara C. Coles, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not entitled to reimbursement of the costs of filing and pursuing protest under Section 21.6(e) of Bid Protest Regulations where the agency took prompt corrective action--23 working days after being notified that the protest was filed.

DECISION

Building Services Unlimited, Inc. (BSUI) requests that our Office declare it entitled to recover the reasonable costs of filing and pursuing its protest challenging the decision by the Departments of the Army and Air Force, National Guard Bureau, not to set aside invitation for bids (IFB) No. DAHA17093-B-0002 for small disadvantaged businesses (SDB) concerns. The solicitation was issued for maintenance, repair and minor construction at National Guard facilities in Bangor, Maine.

We deny the request.

BSUI filed two protests with our Office challenging the terms of the IFB. In its first protest, B-254323, filed July 30, 1993, BSUI challenged the agency's failure to set the procurement aside for SDBs. In its subsequent protest, B-254323.2, filed on August 4, BSUI argued that the solicitation was defective because it failed to contain the standard "Variation in Estimated Quantities" clause (Federal Acquisition Regulation § 52.212-11); BSUI also argued that even if the acquisition were not set aside for SDBs, delivery orders not expected to exceed \$25,000 should be

excluded from the scope of the solicitation and set aside for either small businesses or emerging small businesses.

On September 2, the agency informed our Office that it was canceling the solicitation because the contracting officer failed to conduct a market survey to determine whether the solicitation should be set aside for exclusive SDB participation. We subsequently dismissed BSUI's protests as academic based on the cancellation.

Our Bid Protest Regulations provide that a protester may be entitled to reimbursement of its costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to a protest. 4 C.F.R. § 21.6(e) (1993). This provision is intended to allow the award of costs where we find that the agency unduly delayed taking corrective action in response to a clearly meritorious protest. Anderson Columbia Co., Inc., B-250530, Nov. 24, 1992, 92-2 CPD ¶ 377.

While the Army argues that it did not base its cancellation decision on the arguments set forth in BSUI's protest, we conclude that the cancellation was in response to BSUI's claim that the agency improperly failed to set aside this procurement for SDB participation. The Army's letter canceling the solicitation explains that it failed to follow "proper procedures" in reaching its determination of whether or not to set aside the procurement. Specifically, the Army states it did not comply with the regulations implementing the Department of Defense SDB program, set forth in Defense FAR Supplement (DFARS) part 219, which require procurements to be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns, (2) award will be made at a price not exceeding the fair price by more than 10 percent, and (3) scientific and/or technological talent consistent with the demands of the acquisition will be offered. DFARS § 219.502-2-70-(a).

While the agency did not complete its investigation concerning whether or not to set aside the acquisition,¹ the agency concedes that it failed to consider whether an SDB set aside was appropriate by either discussing the matter with a Small Business Administration representative or conducting an investigation using a market survey or a

¹Prior to determining whether the solicitation should be set aside for SDB concerns, the agency reported--in response to a protest filed by Government Contract Advisory Services, Inc. challenging the cancellation here (B-254323.4)--that funding was no longer available for this procurement.

review of the procurement history.² Therefore, even if the agency had ultimately determined that the acquisition was not suitable to be set aside for exclusive SDB participation, in our view, the cancellation here constituted corrective action in response to BSUI's protest.

Even though we conclude that the Army's action was taken in response to BSUI's protest, we also review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. See Locus Sys., Inc.--Entitlement to Costs, 71 Comp. Gen. 243 (1992), 92-1 CPD ¶ 177; Commercial Energies, Inc.--Recon. and Entitlement to Costs, 71 Comp. Gen. 97 (1991), 91-2 CPD ¶ 499. In this case, the agency notified our Office of its intention to take corrective action on September 2, 23 working days after being notified by our Office that the protest was filed. Such corrective action, taken early in the protest process, is precisely the kind of prompt reaction to a protest that our Regulations are designed to encourage. Special Sys. Servs., Inc.--Entitlement to Costs, B-252210.2, June 8, 1993, 93-1 CPD ¶ 445. Accordingly, we conclude that the award of costs is not appropriate in this case.

The request for a declaration of entitlement to costs is denied.

Robert P. Murphy
 Robert P. Murphy
 Acting General Counsel

²We have sustained protests under similar circumstances where the agency failed to make reasonable efforts to ascertain small business capability to perform the contract. See DCT Inc., B-252479, July 1, 1993, 93-2 CPD ¶ 1.