



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: 4H Construction Corporation

File: B-413558.4

Date: February 8, 2017

S. Leo Arnold, Esq., Ashley, Ashley & Arnold, for the protester.
James W. Cullum, Esq., Department of the Army, Corps of Engineers, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging propriety of government estimate is dismissed for failure to diligently pursue the information necessary to raise the allegation where record shows that protester was afforded an opportunity to exchange its bid estimate information with the agency's government estimate information but the protester declined to make the exchange.

DECISION

4H Construction Corporation, of Cleveland, Mississippi, protests the actions of the Department of the Army, Corps of Engineers, in connection with solicitation No. W9127S-16-B-0001, issued to acquire dredging services. 4H argues that the agency unreasonably has determined to convert the acquisition from a sealed bid procurement to a negotiated procurement based on a finding that the prices received in response to the invitation for bids (IFB) were unreasonably high.

We dismiss the protest.

The agency issued an IFB to obtain dredging services for a base year and two 1-year options. In response to the IFB, the agency received three timely bids by the July 28, 2016, bid opening date, including the bid of the protester, which was the low bid received. Agency Report (AR) exh. 11, Bid Abstract. After reviewing the bids, the agency determined that all three were unreasonably high priced, and that it could not make award on the basis of the bids submitted. In this connection, the record shows that the agency made its determination regarding the unreasonableness of the prices by comparing them to a government estimate

prepared by the agency. The record shows that the government estimate for the work was \$13,927,205. AR, exh. 22, Independent Government Estimate at 3. In comparison, 4H's bid was \$18,332,000, and the other two bids were for \$19,279,250 and \$21,564,150 respectively. AR, exh. 11, Bid Abstract. Because all three bids exceeded the government estimate by more than 25 percent, the agency concluded that they were unreasonably high and that award could not be made to any of the bidders.¹

On August 8, 4H submitted a letter to the agency protesting the agency's conclusion that all three bids submitted were unreasonably high. AR, exh. 9. 4H's letter generally challenged the realism of the government estimate, but did not identify any particular basis for its assertion that the estimate was unrealistically low.² Rather, its assertion in its entirety provided only as follows: "On behalf of 4H, I hereby protest the government estimate as unreasonably low. 4H's bid price would be well within 125 percent of the government estimate if the estimate contained reasonable costs for performance." AR, exh. 9, 4H Agency Level Protest, at 1.

In response to the protester's August 8 letter, the agency wrote to 4H on August 15. AR, exh. 15. By that letter, the agency requested that 4H provide the agency with the complete details of its bid estimate in accordance with the requirements of the U.S. Army Corps of Engineers Acquisition Instructions (UAI). The specific provision of the UAI pertinent to the protest is § 33.103-101, which provides as follows:

If, after bid opening, an apparent low bidder protests the reasonableness of the Government estimate, the contracting officer shall provide the details of the Government estimate to the protester upon receipt of complete details of the protester's estimate. The details of the Government and protester's estimates are not to be disclosed to third parties.

¹ By statute, the agency is precluded from awarding a contract for works of river or harbor improvement where the contract price for performing such work exceeds the government estimate for such work by more than 25 percent. 33 U.S.C. § 624.

² Throughout its correspondence in connection with this protest, 4H asserts that the agency's government estimate was "unreasonably low." AR, exh. 9 at 1. Questions of price reasonableness relate to whether or not a price (or in this instance the government estimate) is too high; questions relating to whether or not a price (or government estimate) is too low relate to realism. See Metis Solutions, LLC, et al., B-411173.2, et al., July 20, 2015, 2015 CPD ¶ 221 at 15-16. Thus, although 4H asserts that the agency's government estimate was "unreasonably low," we interpret its allegation to be that the government estimate is unrealistically low.

In response to the agency's request, 4H specifically declined to provide its bid estimate documents. 4H's counsel stated as follows:

My understanding of UAI [§]33.103-101 is that the protestor must provide the details of its bid estimate in order to obtain a copy of the details of the independent government estimate ("IGE"). 4H has not requested a copy of the details of the IGE at this time, so I do not believe it is necessary or required that 4H provide you with the details of its bid estimate.

AR, exh. 16, 4H Letter, Aug. 17, 2016, at 1 (emphasis supplied).

4H's August 17 letter went on to argue that it based its conclusion concerning the realism of the government estimate on a general comparison of that estimate to a previous estimate prepared for a dredging contract in 2013. In other words, without specificity, 4H argued that, because the 2013 estimate was higher than the 2016 estimate, the 2016 estimate was necessarily unrealistic. As with 4H's August 8 letter to the agency, 4H's August 17 letter did not identify any particular elements of the government estimate as unrealistic, and only generally argued that the government estimate should have been higher.

Because 4H declined to provide the agency with a copy of its bid documents, it was not provided with a copy of the government estimate at the time its agency-level protest was pending. Subsequently, on September 8, the agency issued a decision denying 4H's challenge to the realism of the government estimate. AR, exh. 7, Agency Protest Decision. In that decision the agency identified a reduction in the cost of diesel fuel as the principal basis for the reduction of the 2016 government estimate in comparison to the 2013 estimate. Id. at 6. That decision also noted that, because 4H had declined to provide the agency with the details of its bid estimate, it was not possible for the agency to conduct an in-depth comparison between the protestor's bid and the government estimate and, moreover, the protestor had not provided any specific details or information to support its assertion that the government estimate was unrealistic. Id.

On September 16, 4H filed a protest in our Office. That protest alleged for the first time that the agency's reliance on a reduction in the cost of diesel fuel as the principal basis for a reduction in the 2016 government estimate was unreasonable. 4H Protest, Sept. 16, 2016, at 4-5. The agency initially filed a report in response to that protest on October 17. Thereafter, on October 26, before the protestor filed comments responding to the agency report, the agency submitted a letter stating that it was taking corrective action in response to 4H's protest. Specifically, the agency advised that, because it had concluded that all of the bids submitted in response to the IFB were unreasonably high, it intended to convert the acquisition from a sealed bid acquisition to a negotiated procurement.

Based on the agency's corrective action letter, we dismissed 4H's protest as academic by decision dated October 31. 4H Construction Corp., B-413558.3, Oct. 31, 2016 (unpublished decision). Subsequent to our dismissal of its earlier protest, 4H filed the instant protest challenging the agency's corrective action.

4H argues that the agency's decision to convert the acquisition from sealed bidding to negotiated procedures is unreasonable because the agency's conclusion that the prices submitted are unreasonably high is based on a government estimate that is unrealistically low. The only basis for the protester's current challenge to the realism of the government estimate is its contention that it was based on a price for diesel fuel that is too low and does not reflect market realities. The protester maintains that, if the agency calculated the government estimate using a reasonable price for diesel fuel, its bid would be within 125 percent of the government estimate. 4H therefore maintains that the agency is required to award a contract to it at its originally-bid price.

We dismiss 4H's contention relating to the realism of the government estimate as untimely because the record shows that 4H failed to diligently pursue the information underlying this basis of protest. A protester has an affirmative duty to pursue information providing a basis for protest, and a protester's failure to utilize the most expeditious information gathering approach under the circumstances constitutes a failure to meet its obligation. MILVETS Systems Technology, Inc., B-411721.2, B-411721.3, Jan. 14, 2016, 2016 CPD ¶ 42 at 8.

The sole basis for 4H's challenge to the government estimate as unrealistically low is its contention that the agency did not use a realistic price for diesel fuel in calculating the estimate. The record shows that 4H first learned of the diesel fuel price used by the agency in its calculations when it received the agency's September 8 letter denying its agency-level protest. However, as discussed in detail above, 4H declined to avail itself of the opportunity presented by the agency to exchange the basis of its bid estimate for the government estimate, as expressly contemplated under UAI § 33.103-101.³

Had the protester not declined participation in the timely exchange of bid estimate information with the agency, it would have had a copy of the government estimate during August, at the time its agency-level protest was pending. Additionally, had the protester exchanged its bid estimate and the government estimate with the agency at that time, both parties would have had the necessary information to engage in a frank and detailed discussion regarding the propriety of their respective estimates.

³ Even during the course of 4H's protests to our Office the firm has not provided the basis for its bid estimate as part of the record.

In the final analysis, the protester failed to provide--and receive--the information that could have allowed the parties to resolve their disagreement before the agency expended resources defending its position. Moreover, a timely exchange of information also could have prevented the expenditure of our Office's time and resources to resolve a matter that may well have been easily and expeditiously resolved by the parties without our involvement. Under the circumstances, we conclude that 4H failed to diligently pursue the information necessary to file its protest on this basis, and accordingly dismiss this allegation as untimely.

4H's only remaining allegation is that the agency improperly has converted the acquisition from sealed bidding to negotiated contracting procedures. Such a conversion is unobjectionable, however, where, as here, the agency concludes that all of the bid prices submitted are unreasonably high. Federal Acquisition Regulation § 14.404-1. Since the protester has not timely challenged the basis of the agency's government estimate, it follows that there is no basis for our Office to object to the conversion; we therefore conclude that this remaining allegation fails to state a valid basis for protest, and dismiss it on that basis. 4 C.F.R. § 21.5(f).

As a final matter, we do not understand--and the protester has not explained--how it has been prejudiced by the agency's conversion to negotiated procedures. The protester will be afforded an opportunity to engage in the continued competition, and will have an opportunity to negotiate its proposed price with the agency. Under these circumstances, even if the agency's actions had been shown to be improper, we would have no basis to sustain 4H's protest in light of the lack of prejudice to the protester. Sauer, Inc., B-411137, May 22, 2015, 2015 CPD ¶ 171 at 4.

The protest is dismissed.

Susan A. Poling
General Counsel