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Decision

Matter of: Veterans Electric, LLC

File: B-415064.2

Date: February 1, 2018

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Donald C. Mobly, Esq., and Brian R. Reed, Esq., Department of Veterans Affairs, for the agency.
Stephanie B. Magnell, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency has a compelling reason to cancel invitation for bids after bid opening where after bid opening the design specifications were no longer accurate and the agency's needs changed.

DECISION

Veterans Electric, LLC, of Colgate, Wisconsin, a service-disabled veteran-owned small business (SDVOSB), protests the cancellation of invitation for bids (IFB) No. VA-69D-17-B-0319, which was issued by the Department of Veterans Affairs (VA) for the removal and replacement of obsolete fire alarm devices at the Jesse Brown VA Medical Center in Chicago, Illinois. The VA cancelled the IFB as part of its corrective action in an earlier protest by Veterans Electric that alleged that the IFB was ambiguous, contained obvious errors, and was structured to prevent competition by requiring replacement fire alarm devices to be obtained from the manufacturer. The protester now contends that the VA lacked a compelling reason for the cancellation of the IFB.

We deny the protest.

BACKGROUND

On February 3, 2017, the agency issued the IFB under the provisions of Federal Acquisition Regulation (FAR) part 14. The solicitation was set aside for SDVOSBs and

was amended six times. B-415064, Agency Report (AR), Tab 2, Initial IFB, at 1.¹ The IFB anticipated the award of a single contract to the lowest-priced responsive and responsible bidder. IFB at 28.²

The solicitation required bids to comply with the subcontracting limitations in 13 C.F.R. § 125.6 and stated that no more than 85 percent of the work could be subcontracted to firms that were not also SDVOSBs. Id. at 26. Bidders were required to submit their pricing with a cost breakdown “of material and personnel costs, by specification division listed for the project,” and exclusive of materials. Id. at 1, 26. In addition, bidders were to submit the “[t]otal personnel costs [of] both prime-contractor and all sub-contractors,” as well as “all sub-contractor personnel cost[s] that are not SDVOSB,” and calculate the percentage of self-performed work. Id. The solicitation also provided that a substantial amount of the parts to be used in completing the work, including those used in work related to the Siemens fire alarm system components, was required to be sole-sourced from the manufacturer. Id. at 21. Bidders were required to submit three alternate bids, where various buildings were excluded from the scope of work. Id. at 27-28. Bids were due by September 11, 2017.

On August 10, the protester filed a protest with our Office alleging that the IFB’s limitation on subcontracting requirements were ambiguous; that Siemens, as a supplier apparently offering different prices to different small businesses, was improperly restricting competition; and that a competitor was nonresponsive and had an organizational conflict of interest.³ B-415064, Protest.

By September 6, the Siemens fire alarm system at the Jesse Brown VA Medical Center was experiencing significant malfunctions, and the VA was working with Siemens to obtain repairs under the existing service contract. Fire Alarm Emails, Sept. 6-7, 2017, at 2-4.⁴

¹ Citations to documents provided during an earlier protest are identified by their GAO docket number, B-415064.

² Citations to the IFB are to the conformed IFB at tab 5 of the agency report.

³ On July 7, Veterans Electric filed a protest with the VA challenging the terms of the solicitation as ambiguous with respect to the limitation on subcontracting requirements and raising various other protest grounds. Contracting Officer’s Statement (COS), Aug. 27, 2017, ¶ 6. The agency did not respond to the agency-level protest, but issued amendment 0006 on August 10 as the “corrective action in response to Veterans Electric’s agency level protest.” B-415064, Memorandum of Law (MOL), Sept. 7, 2017, at 2.

⁴ On November 21, 2017, the agency provided our Office an 11-page document consisting of multiple emails over various dates that had been quoted by the contracting officer in the contracting officer’s statement. The document was not assigned an agency report tab number, but the electronic file was titled “Fire Alarm Emails and

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On September 7, Veterans Electric's counsel provided correspondence between Veterans Electric and Siemens to the VA, in which Siemens stated that it would not provide bidders with separate quotes for materials and labor. Comments, Exh. D, Siemens Email to Veterans Electric, Aug. 9, 2017, at 2. According to Veterans Electric, Siemens's decision meant that Veterans Electric was "unable to [comply] with the limitations on subcontracting contained in the FAR and [in] SBA [Small Business Administration] regulations." Id., Veterans Electric Email to Siemens, Aug. 9, 2017, at 2.

On September 11, during the pendency of the protest, the VA opened the bids.

On October 12, the GAO attorney assigned to the protest requested additional briefing from the parties. By October 18, the agency was to "submit supplemental briefing about the ability of bidders to submit responsive bids that address the cost breakdown requirements in the solicitation." GAO Email, Oct. 12, 2017.

On October 18, the VA requested that we dismiss the protest on the basis that it had identified "errors in its solicitation and its specifications that require correction." B-415064, Req. for Dismissal – Corrective Action, Oct. 18, 2017. The VA "determined that the specifications need[ed] to be amended, and the acquisition strategy . . . revisited." Id. Veterans Electric objected to the request for dismissal, arguing that the agency's decision to cancel and review the solicitation after opening bids is "unfair and unreasonable" and merely designed to avoid having our Office issue a decision sustaining the protest. B-415064, Protester Obj. to Agency Corrective Action, Oct. 23, 2017, at 1-3. Veterans Electric also argued that there existed an organizational conflict of interest because another bidder allegedly obtained "procurement development services" from Siemens. Id. at 5. Our Office dismissed the protest on the grounds that the agency's intended cancellation of the IFB rendered the protest academic. Veterans Electric, B-415064, Oct. 25, 2017 (unpublished decision).

On October 25, Veterans Electric filed the instant protest with our Office, challenging the VA's decision to cancel the solicitation as merely a pretext put forth in order to avoid a decision in which our Office might sustain the protest. Protest at 2, 3. In this regard, the protester asserts that the agency improperly intends to cancel the IFB. Id. The agency stayed cancellation of the IFB pending resolution of the protest. VA Email to GAO, Jan. 26, 2018.

On November 3, the supervisory engineer at the Jesse Brown VA Medical Center informed the contracting officer that repairs and changes related to the malfunctioning Siemens fire alarms would require subsequent modification of the IFB's as-built drawings. Fire Alarm Emails, Engineer to Contracting Officer, Nov. 3, 2017, at 1 (the

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Attachments." The page numbers cited in this decision relate to the consecutive pages of the document.

“contract documents must be updated to reflect the as-built condition.”). The engineer added that, at this time, the fire alarm “system is not fully operational, and cannot be turned over to the Construction Contractor for improvements until all the defects are clear.” Id. at 1-2.

DISCUSSION

As described above, Veterans Electric argues that the VA lacked a compelling reason to take corrective action by cancelling the solicitation.⁵

Because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed, when an agency issues an IFB and opens bids, award must be made to the bidder who submitted the lowest responsive bid unless there is a compelling reason to reject all bids and cancel the invitation. FAR § 14.404-1(a)(1). The standard for canceling an IFB after bids have been opened differs from the standard for canceling a request for proposals (RFP) after award, where an agency need only demonstrate a reasonable basis for the cancellation. See Noelke GmbH, B-278324.2, Feb. 9, 1998, 98-1 CPD ¶ 46 at 3. The standard requiring a compelling reason for cancellation applies to IFB procurements because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed at a public bid opening. United Contracting LLC, B-407417, Jan. 2, 2013, 2013 CPD ¶ 1 at 2.

The agency has the discretion to determine whether a compelling reason exists to cancel a solicitation, and we will review the decision to ensure that it was reasonable. Dynamic Corp., B-296366, June 29, 2005, 2005 CPD ¶ 125 at 4. A compelling reason to cancel a solicitation after bid opening exists where material solicitation terms are ambiguous or in conflict. P.J. Dick, Inc., B-259166, B-260333, Mar. 6, 1995, 95-1 CPD ¶ 131 at 4. As a general rule, the need to change inadequate or ambiguous specifications and to revise them, after the opening of bids, to properly express the agency’s minimum needs also constitutes a compelling reason. See FAR § 14.404-1 (c)(1), (2); G.H. Harlow Co., Inc., B-245050 et al., Nov. 20, 1991, 91-2 CPD ¶ 484 at 3; United Contracting LLC, supra, at 2.

⁵ In contrast, in its initial protest, Veterans Electric argued that the solicitation required amendment to correct the flaws in the solicitation relating to the inability of bidders to break out the costs as required by the solicitation. See, e.g., B-415064, Comments at 2; B-415064, Supp. Comments at 2-4.

The protester also raised various other protest grounds, including that another bidder should be disqualified due to an organizational conflict of interest. Protest at 5. Although this and other protest grounds are not addressed in this decision, we have carefully considered each one and find that none provides a basis to sustain the protest.

Our review of the record here shows that the VA has a compelling reason to cancel the solicitation. The agency's notice of corrective action provides as follows:

[T]he [IFB] specifications did not adequately describe VA's requirements, rendering it difficult for potential offerors to price their proposals adequately. VA also found an abnormality in its solicitation that impacted competition as well. As a result, VA has determined that cancelling the solicitation and resoliciting is appropriate under the circumstances. It is VA's intention to reprocur in FY [fiscal year] [20]18.

B-415064, Notice of Corrective Action, Oct. 18, 2017, at 1. The contracting officer was "aware that intervening work had been performed over the past three years by other contractors that overlapped the requirement[s] in the specifications (which were more than three years old)," implying that the IFB's specifications were not an accurate reflection of the work required by the agency.⁶ Supp. COS, Nov. 17, 2017, ¶ 4. He also identified a possible ambiguity in the solicitation relating to the alternate bids. Id. ¶¶ 2-4. The contracting officer found that these potential problems with the IFB provided a basis to "cancel the acquisition and reprocur with corrected specifications." Id. ¶ 4.

After the VA notified our Office of its intent to cancel the solicitation, the engineer advised the contracting officer that, due to the ongoing fire alarm systems repairs, the as-built drawings would need to be updated. The contracting officer thus concluded that "the design drawings [and] specifications issued for [the] bid no longer reflect[ed] the Government's needs" and that he "cannot move forward with a new procurement until a new design package is submitted to me by the facility." Supp. COS ¶ 8; see also Fire Alarm Emails.

Veterans Electric argues that this reasoning is flawed because "emails between the VA and Siemens show that the VA was aware of the defects in the alarm system . . . four days before bid opening, and [the VA] opened the bids anyway." Comments at 3. The protester asserts that the VA's requirement for the removal and replacement of fire alarms has "not materially changed since the VA's pre-solicitation announcement in December 2016" and that these arguments regarding the as-built drawings are merely a "post hoc rationalization for canceling the solicitation after bid opening." Comments at 3-4. These arguments are not persuasive, however, because a procuring agency is not precluded from canceling a solicitation based upon the post-opening discovery of a sufficient reason to cancel. Brickwood Contractors, Inc., B-292171, June 3, 2003, 2003 CPD ¶ 120 at 6; Ace-Federal Reporters, Inc., B-237414, Jan. 31, 1990, 90-1 CPD ¶ 144 at 3.

⁶ The agency does not address its decision to open bids in light of the fact that it knew of repairs related to malfunctioning Siemens fire alarms and other work related to the IFB specifications prior to opening bids.

The record reflects that the ongoing repairs render inaccurate the IFB documents that bidders relied upon to design and price their bids and that the IFB no longer reflects the VA's needs. In similar situations in which factors affecting the agency's needs arose after cancellation, we determined that a basis for cancellation that exists at the time of the agency report can justify such cancellation as long as it would have properly supported the determination to cancel at the time that decision was made. See Noelke GmbH, supra, at 3 (finding a reasonable basis to cancel an RFP); Integrity Nat'l Corp., B-411582, Sept. 1, 2015, 2015 CPD ¶ 278 at 4. Although the standard of review for a cancellation of an RFP differs from that of an IFB after bid opening, here we conclude that the need for revised specifications and as-built drawings reasonably provide a compelling reason for canceling the solicitation. Without correction, the IFB does not reasonably reflect the VA's needs. On this record, there exists a compelling basis to cancel the solicitation. Werres Corp., B-255379, B-255381, Feb 25, 1994, 94-1 CPD ¶ 153 at 4.

The protest is denied.

Thomas H. Armstrong
General Counsel