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Decision

Matter of: Veterans Electric, LLC

File: B-415064.3

Date: June 21, 2018

Joseph A. Whitcomb, Esq., Whitcomb, Selinsky, McAuliffe, PC, for the protester. Donald C. Mobly, Esq., and Brian R. Reed, Esq., Department of Veterans Affairs, for the agency.

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DIGEST

1. Protester's request for a recommendation that it be reimbursed its costs of filing and pursuing its protest is granted, where the record shows that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest.
 2. Protester's request for a recommendation that it be reimbursed its costs of bid preparation is denied, where the agency had a compelling reason to cancel the procurement after bids were opened.
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DECISION

Veterans Electric, LLC, of Colgate, Wisconsin, a service-disabled veteran-owned small business (SDVOSB), requests that we recommend that it be reimbursed its bid preparation costs and the reasonable costs of filing and pursuing its protest of the terms 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. In its protest, Veterans Electric contended that the IFB contained a sole-source parts requirement that, in effect, prevented bidders from complying with the IFB's limitation on subcontracting provision. We dismissed the protest after the VA advised our Office that it would take corrective action by cancelling the solicitation, amending its terms, and re-issuing the procurement. Veterans Electric argues that its protest was clearly meritorious and that the agency unduly delayed taking corrective action, such that it should be reimbursed for its protest costs, including reasonable attorneys' fees, and bid preparation costs.

We grant the request for reimbursement of protest costs, including reasonable attorneys' fees, and we deny the request for reimbursement of bid preparation costs.

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 anticipated the award of a single contract to the lowest-priced responsible bidder. B-415064, Agency Report, Tab 2, IFB, at 1; IFB, Amend. 0006, at 13.¹

The solicitation required bids to comply with the subcontracting limitations in 13 C.F.R. § 125.6, which capped the work to be performed by firms that were not SDVOSBs at 85 percent of the total labor value.² IFB at 26. The IFB required bidders to calculate the percentage of self-performed work. Id. at 26. In addition to requiring disclosures evidencing compliance with 13 C.F.R. § 125.6, the solicitation mandated that components used in the Siemens fire alarm system repair work be sole-sourced from the manufacturer. Id. at 21. Bids were initially due by August 10, 2017. IFB, Amend. 0006, at 1.

On July 7, Veterans Electric filed an agency-level protest with the VA asserting that the IFB contained conflicting provisions.³ B-415064, Contracting Officer's Statement (COS), Aug. 27, 2017, ¶ 6. The protester alleged that Siemens "refused to provide pricing [to potential SDVOSB bidders] with either labor costs excluded or even broken out. [Instead, Siemens] will only provide quotes with labor and installation costs included, because they intend to use one of their 'preferred' contractors, which [on] information and belief, are not . . . SDVOSBs." B-415064, Protest at 3. Veterans Electric argued that the IFB's requirement to purchase repair components from Siemens, which included installation labor, conflicted with the limitation on subcontracting because no SDVOSB would be able to comply with both provisions. Id. at 3-4.

¹ Citations to documents provided during the underlying protest are identified by their GAO docket number, B-415064. Citations to the IFB are to the conformed IFB at tab 5 of the agency report in B-415064.

² Specifically, 13 C.F.R. § 125.6(a)(3) provides that, "[i]n the case of a contract for general construction, [the contractor] will not pay more than 85 [percent] of the amount paid by the government to it to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 85 [percent] subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted." As a practical matter, the regulation caps the amount of work that can be performed here by firms that are not SDVOSBs at 85 percent of the total labor cost.

³ Although the agency-level protest is not part of the record, according to the agency, "the relevant allegations [from the agency-level protest] were reiterated in the GAO protest verbatim." B-415064, Memorandum of Law (MOL), Sept. 7, 2017, at 1 n.1.

In the interim, Siemens confirmed that it would “only be submitting [parts] pricing including electrical installation.” B-415064, Comments, Exh. D, Veterans Electric-Siemens Emails, Aug. 9, 2017, at 1.

On August 10, the protester filed a pre-award protest with our Office challenging the terms of the IFB. Veterans Electric alleged that: the IFB’s limitation on subcontracting requirements remained ambiguous; Siemens, as a supplier apparently offering different prices to different small businesses, was improperly restricting competition; no bidder could comply with the subcontracting limitations as Siemens would only supply the brand-name parts if it also performed the labor; and a competitor was nonresponsive and had an organizational conflict of interest. B-415064, Protest.

The VA never directly replied to the July 7 agency-level protest, but on August 10 it issued amendment 0006, which it characterized as “corrective action in response to Veterans Electric’s agency[-level] protest.” B-415064, MOL, Sept. 7, 2017, at 2. Amendment 0006 replaced the IFB’s worksheet of “Calculation of Self-Performed Work” with the more detailed “Calculation Worksheet for Self-performed and Subcontracted Worksheet.” Compare IFB at 26 with IFB, Amend. 0006, at 2, 14. The revised worksheet required bidders to demonstrate and certify by signature that the percentage of work performed by SDVOSBs, including subcontractor SDVOSBs, would not fall below 15 percent. Id. at 14. Bidders were to complete the worksheet by providing a detailed cost breakdown “of material and personnel costs, by specification division listed for the project,” exclusive of materials. Id. at 26. Bidders were also required to indicate the “[t]otal personnel costs [of] both prime-contractor and all sub-contractors,” “all sub-contractor personnel cost[s] that are not SDVOSB[s]” and calculate the percentage of self-performed work. Id. Amendment 0006 also updated the reference to Veterans Affairs Acquisition Regulation clause 852.219-10 from the December 2009 version to the July 2016 version. Id. at 2. The updated clause provided, in relevant part, that the contractor would “comply with subcontracting limitations in 13 CFR [§] 125.6, as applicable.” Id. at 2-3. Finally, amendment 0006 extended the bid submission deadline to September 11, 2017. Id. at 1.

By September 6, the Siemens fire alarm system at the Jesse Brown VA Medical Center was malfunctioning and Siemens was repairing the alarms under the existing service contract. Fire Alarm Emails, Sept. 6-7, 2017, at 2-4.⁴

On September 7, the VA filed its agency report, in which it defended the terms of the IFB. B-415064, MOL, at 3. On September 11, the agency opened bids. On

⁴ On November 21, 2017, in connection with the protest docketed as B-415064.2, the agency provided our Office with an 11-page document consisting of multiple emails sent over various dates. The contracting officer quoted these emails in the COS. The electronic file was titled “Fire Alarm Emails and Attachments,” but the document was not assigned an agency report tab number. The page numbers cited in this decision are those of the document itself.

September 18, the protester filed its comments in the protest and raised several additional issues. The agency filed a supplemental agency report on September 28, and the protester filed supplemental comments on October 3. On October 12, the GAO attorney assigned to the protest requested that the agency “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. The agency’s response was due by October 18. Id.

On October 18, instead of submitting the supplemental briefing, the VA requested that our Office dismiss the protest on the basis that the VA had identified “errors in its solicitation and its specifications that require correction.” B-415064, Notice of Corrective Action, Oct. 18, 2017. The VA “determined that the specifications need[ed] to be amended, and the acquisition strategy . . . revisited.” Id. In this regard, the agency’s notice of corrective action provided 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.

Id. at 1.

Veterans Electric objected to dismissal of the protest, arguing that the VA’s decision to cancel the solicitation was merely a strategy to avoid a GAO decision sustaining the protest. B-415064, Protester Opposition to Agency Corrective Action, Oct. 23, 2017, at 1-3. The protester also requested that it be reimbursed for attorney’s fees related to the protest and for the cost of proposal preparation. Id. Our Office dismissed the protest on the grounds that the agency’s cancellation of the IFB rendered the protest academic. Veterans Elec., LLC, B-415064, Oct. 25, 2017 (unpublished decision).

On October 25, Veterans Electric filed this protest reiterating its request for “attorney’s fees and reasonable [bid] preparation costs.”⁵ B-415064.2, B-415064.3, Protest at 1.

⁵ Veterans Electric simultaneously protested the agency’s decision to take corrective action by cancelling the IFB. The corrective action challenge was docketed as B-415064.2, while the request for recommendation for the reimbursement of costs was docketed as B-415064.3. Due to the manner of briefing, the parties’ arguments in B-415064.3 were largely argued in the B-415064.2 protest. In defending the corrective action, the contracting officer attested that repairs “performed over the past three years by other contractors” had rendered inaccurate the IFB’s specifications and as-built drawings. Supp. COS, Nov. 17, 2017, ¶¶ 4, 8. He also identified a possible ambiguity in the solicitation relating to the alternate bids. Id. ¶¶ 2-4. Our Office denied this challenge to the corrective action, concluding that the identification of inaccurate technical specifications provided a compelling reason to cancel the IFB after bid opening. Veterans Elec., LLC, B-415064.2, Feb. 1, 2018, 2018 CPD ¶ 42 at 6.

DISCUSSION

Veterans Electric requests reimbursement of attorneys' fees related to its initial pre-award protest challenging the terms of the IFB and for its proposal costs. As discussed below, we grant the request for protest costs, including reasonable attorneys' fees, because we find that the protest was clearly meritorious and the agency unduly delayed taking corrective action. We deny the request for reimbursement of bid preparation costs, as these are costs that a bidder would bear in the ordinary course of business.

Request for Recommendation of Reimbursement of Protest Costs

Clearly Meritorious Protest

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, where, based on the record, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. PADCO, Inc.--Costs, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. Based on our review of the record, we find Veterans Electric's challenge to the IFB terms to be clearly meritorious.

The protest alleged that the IFB contained conflicting requirements, in that it required bidders to demonstrate compliance with the subcontracting limitations, but also mandated that bidders use Siemens replacement parts, which Siemens would only sell here with installation labor that would violate the IFB's subcontracting limitation.⁶ See generally B-415064, Protest. After initially defending the IFB, the VA took corrective action. B-415064, Notice of Corrective Action, Oct. 18, 2017, at 1. According to the agency, it recognized that "the [IFB] specifications did not adequately describe VA's requirements, rendering it difficult for potential offerors to price their proposals adequately." Id. Overall, the VA took corrective action in response to the same issue raised by Veterans Electric in its both its agency-level and GAO protests. Id.

We agree with the protester that the conflict in the IFB's provisions is self-evident. In this regard, bids that proposed to use Siemens parts, as required by the IFB, would also

⁶ No party argues that Siemens is an SDVOSB or a "similarly situated" company for the purposes of 13 C.F.R. § 125.6.

be using labor supplied by Siemens, as Siemens' parts and labor were inseparable here. B-415064, Protest at 3. However, a bidder's use of Siemens' labor for installation, instead of the SDVOSB's own labor, would run afoul of the 13 C.F.R. § 125.6 subcontracting limitation. We thus find that a reasonable agency inquiry into the protester's arguments and a close review of the IFB would have revealed to the agency the nature of the conflicting provisions and the absence of a defensible legal position. On this basis, we find that the protest is not only meritorious, but clearly meritorious. Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41 at 5 (recommending reimbursement of costs where corrective action indicated that agency agreed with protester's specific arguments); see also Triple Canopy, Inc.--Costs supra.⁷

Delay

As set forth above, our Office may only recommend reimbursement of protest costs if we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. AAR Aircraft Servs.--Costs, supra. With respect to the promptness of the agency's corrective action under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate

⁷ The VA inconsistently defends the reasoning behind its corrective action while simultaneously arguing that the protest was not clearly meritorious because one of the conflicting terms was waivable. B-415064.2, MOL, Nov. 17, 2017, at 3. In this regard, the agency's position is that, even if a bid's failure to comply with the IFB's subcontracting limitation renders it "technically non-responsive," the VA could waive this failure as "a minor informality." Id. We do not agree with the agency that compliance with the 13 C.F.R. § 125.6. subcontracting limitation is waivable as "a minor informality."

As a general matter, an agency's judgment as to whether a small business offeror will be able to comply with a subcontracting limitation presents a question of responsibility not subject to our review. See Spectrum Sec. Servs., Inc., B-297320.2, B-297320.3, Dec. 29, 2005, 2005 CPD ¶ 227 at 6. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal's acceptability. See TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5. Clearly stated technical requirements in a solicitation are considered to be material to the needs of the government, so a vendor's submission that fails to conform to those material terms is technically unacceptable, and it may not form the basis for award. See Webco Dental & Med. Supplies, Inc., B-410587, Jan. 8, 2015, 2015 CPD ¶ 32 at 4; see also Orincon Corp., B-276704, July 18, 1997, 97-2 CPD ¶ 26 at 4 (RFP's subcontracting limitation was mandatory and could not be waived). Here, bidders must demonstrate and certify compliance with the subcontracting limitation. On these facts, the subcontracting limitation is a material requirement that cannot be waived as a minor informality. The claim that a bid's evident failure to comply with the subcontracting limitation is waivable and renders the protest not clearly meritorious has, itself, no merit.

and resolve the impropriety. See Chant Eng'g Co., Inc.--Req. for Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4. While we usually consider corrective action to be prompt if taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. See Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3. With regard to Veterans Electric's clearly meritorious protest, we find that the VA unduly delayed taking corrective action.

Veterans Electric challenged the conflicting requirements in its initial August 10 protest. The VA filed its agency report on September 7. On September 18, Veterans Electric filed its comments and a supplemental protest largely expanding on the grounds raised in its initial protest. The agency filed a supplemental agency report on September 28, and the protester filed supplemental comments on October 3.

On October 12, the GAO requested additional briefing on the central protest issue, *i.e.*, whether bidders would be able to comply with the solicitation requirements regarding the cost breakdown. Responses were due on October 18. Instead of submitting a response, the VA requested that our Office dismiss the protest on the basis that the VA had identified "errors in its solicitation and its specifications that require correction." B-415064, Notice of Corrective Action, Oct. 18, 2017, at 1.

The VA argues that it did not unduly delay taking corrective action. B-415064.2, MOL, at 19-20. This timeline above does not demonstrate that the agency took appropriate and prompt steps to investigate the issue of whether bidders could realistically comply with the apparently competing provisions requiring brand-name parts and the limitation on subcontracting. Instead, the agency defended the terms of the IFB in the agency report and the supplemental agency report, thus requiring the protester to unnecessarily incur additional expenses. On this basis, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. See PB&A, Inc.; Envtl. Synectics, Inc.--Costs, B-410074.3, B-410074.4, Sept. 15, 2015, 2015 CPD ¶ 285 at 5.

Request for Recommendation of Bid Preparation Costs

Veterans Electric also requests that, in light of the cancellation of the IFB, we recommend that it also be reimbursed the costs of bid preparation. However, the expenses Veterans Electric incurred in preparing its bid are typical costs of doing business and competing for government contracts. See KAES Enters., LLC--Protest & Costs, B-402050.4, Feb. 12, 2010, 2010 CPD ¶ 49 at 4; Rice Servs., Inc.; Watson Servs., Inc., B-293861 *et al.*, June 15, 2004, 2004 CPD ¶ 167 at 5 n.3. Under the circumstances here, where we found that the cancellation of the solicitation was unobjectionable, there is no basis for us to recommend reimbursement of those costs. Veterans Elec., B-415064.2, *supra*; KAES Enters.--Protest & Costs, *supra*, at 4-5.

RECOMMENDATION

We recommend that Veterans Electric be reimbursed its reasonable costs incurred with respect to pursuing the protest issues raised in the protest docketed at B-415064, including reasonable attorney's fees. See 31 U.S.C. § 3554(c)(2); 6K Sys., Inc.--Costs, B-408124.6, Dec. 16, 2014, 2015 CPD ¶ 10. Veterans Electric should file its claims for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days of receipt of this recommendation. 4 C.F.R. § 21.8(f).

The request that GAO recommend reimbursement of protest costs related to the protest B-415064 is granted; the request for bid preparation costs is denied.

Thomas H. Armstrong
General Counsel