



Decision

Matter of: BCW Group, LLC

File: B-417209; B-417209.2; B-417209.3; B-417209.4

Date: March 27, 2019

Shane Cessnun, for the protester.
James L. Weiner, Esq., Department of the Interior, for the agency.
Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest is sustained where procurement was conducted using FedBid reverse auction procedures and agency failed to consider that protester, which submitted the lowest price, timely indicated its price included maintenance in response to a FedBid validation request.

DECISION

BCW Group, LLC (BCW), a small Indian economic enterprise, of Durant, Oklahoma, protests the issuance of a purchase order to ODIN Solutions International, Inc., a small Indian economic enterprise of San Diego, California, under solicitation No. 140A1619Q0026, issued by the Department of the Interior, Bureau of Indian Affairs, for a brand name or equal commercial item known as Promethean ActivPanels. BCW asserts that it submitted the lowest price, and therefore should have been issued the purchase order.

We sustain the protest.

BACKGROUND

The procurement was conducted on behalf of the agency by FedBid, using its reverse auction process.¹ Request for Dismissal, attach. A, Solicitation. The solicitation, issued

¹ FedBid, Inc. is a commercial online procurement services provider that operates a website, which, among other things, hosts reverse auctions. FedBid refers to procurements conducted through its system as “buys,” refers to the agency as the

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on November 27, 2018, sought Promethean ActivPanels² on a brand name or equal basis. Id. at 1. Attached to the solicitation was a specification sheet for the panels, which listed the required salient characteristics applicable to a product offered as equal to the brand name product. Id., attach. 1, Specification Sheet. The specification sheet informed sellers that they would be required to remove the current panels, install the new panels, and complete maintenance once a year, for updating software, cleaning boards, and inspecting cables. Id.

The solicitation stated that award would be made to the seller whose offer would be most advantageous to the agency considering price, technical capability, delivery, and past performance. Request for Dismissal, attach. A, Solicitation, at 2. There was a technical and delivery requirement, but no past performance requirement. Id. Auction bidding began on Tuesday, November 27, at 9:23 a.m. Eastern Time, and ended on Friday, November 30, at 2:00 p.m. Eastern Time. Id. at 1.

As relevant to this protest, at the close of bidding, BCW's bid of \$149,156.26 for the brand name item was the lowest bid submitted. Request for Dismissal at 2. In its bid, BCW checked the box on the FedBid website that stated: "The vendor complies with all terms listed by the Buyer." Request for Dismissal, attach. B, BCW Bid, at 2. BCW, however, did not specifically restate that its bid included maintenance. Id. at 1-4. Following the close of the auction, a representative of FedBid sent, by email, a validation request³ to BCW as follows:

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"buyer" and the participant as the "seller." See FedBid Frequently Asked Questions, www.fedbid.com/getting-started/ (last visited March 8, 2019). In addition, according to FedBid, a seller in the reverse auction is said to submit a "bid." Id. For purposes of this decision, we use the term bid, although we note that the record reflects that the agency uses the term quotations and bids to explain the responses received from vendors. See e.g. Contracting Officer Statement (COS), Chronological Events, at 2.

FedBid is now known as Unison Marketplace. See www.unisonglobal.com/product-suites/acquisition/sourcing/marketplace/ (last visited March 8, 2019).

² Promethean ActivPanels are android-based interactive screens with touch technology. See Request for Dismissal, attach. A, Specification Sheet.

³ We note that pursuant to the FedBid Terms of Use, a request for "Bid Validation" occurs after a solicitation closes, and represents an attempt to "verify and/or confirm Seller's compliance with the Buyer's Solicitation. Any objective compliance issues are communicated to the Buyer." Marketplace Terms of Use at 2-3, <https://www.unisonglobal.com/marketplace-terms-of-use/> (last visited March 8, 2019).

We are contacting you in order to confirm your ability to comply with the terms below. Your response by reply email is requested by 12:00 Noon [Eastern Time] Monday. Your feedback may be shared with the Buyer. Please note that the Buyer may use this information at his or her discretion during evaluation, and that FedBid does not qualify Bids for evaluation for award. In the absence of a reply email, the Buyer may deem your bid non-responsive. The Buyer may then choose to exclude your Bid from consideration or may remove your Bid. In submitting a bid, you agreed to the following terms. Please confirm the following:

Question: Is your bid price correct, complete (meaning all items requested are included in your bid) and inclusive of all costs the Buyer would incur if your bid is selected?

BCW Response to Dismissal Request, attach. A, Emails from FedBid, at 2 (emphasis omitted). The email further stated that while an affirmative reply does not qualify the bid's technical acceptability, it "provides additional information to the Buyer and confirmation that you understand the terms of this Buy and that your Bid complies with these terms." Id.

BCW timely responded to the FedBid validation request in an email. Specifically, BCW stated: "The unit price . . . is correct. The price includes removing the existing panels and installing 86" [panels]. . . . This includes a once a year maintenance for 3 years on the panels I install." Id. at 1.

On the morning of December 3, an agency program office employee opened and reviewed the five bids that were submitted. COS, Chronological Events, at 2. On December 19, the purchase order was awarded to ODIN, at a price of \$179,668.94. Id. The agency awarded the purchase order to ODIN, despite BCW's lower price, because BCW's low bid only stated that it would comply with "all terms," but did not specifically restate that BCW would provide maintenance. Request for Dismissal at 2; attach. D, Evaluation. In this regard, FedBid never notified the agency that it issued a validation request to BCW, and that BCW confirmed that its bid included maintenance. Id. at 1.

On December 21, BCW submitted its protest to our Office. ODIN has since delivered and installed the panels at the designated location. Request for Dismissal at 3.

DISCUSSION

BCW asserts that since it submitted the lowest bid, it was entitled to the purchase order award. In response, the agency asserts that the bid which it opened did not specifically state that BCW was offering to provide the required maintenance. According to the agency, it was not aware that FedBid sent a validation request to BCW after the solicitation's closing time, and that in response to the validation request, BCW confirmed that its bid included maintenance.

FedBid is a private company. However, as we have stated before, when FedBid hosts a reverse auction on its website for the government, it acts as an agent for the agency conducting the procurement. Latvian Connection, LLC, B-410981, Apr. 6, 2015, 2015 CPD ¶ 125 at 3, AeroSage LLC, B-409627, July 2, 2014, 2014 CPD ¶ 192 at 4. That is, FedBid is conducting the procurement on behalf of the agency.

Since the government, through FedBid, chose to request information from BCW regarding whether BCW was offering maintenance, the agency was required to consider that information in evaluating the bids it received. See Latvian Connection, LLC, *supra* at 4 (holding that agency was required to refer a responsibility determination to the Small Business Administration where FedBid, acting as an agent to the agency, precluded a small business from competing based on the firm's integrity). In this regard, BCW was informed by FedBid that "[i]n submitting a bid, you agreed to the following terms" and then was requested to confirm that BCW's bid was complete and all items requested were included. BCW Response to Dismissal Request, attach. A, Emails from FedBid, at 2 (emphasis omitted). The email further stated that an affirmative reply "provides additional information to the Buyer and confirmation that you understand the terms of this Buy and that your Bid complies with these terms." *Id.* BCW timely responded to the FedBid validation request and confirmed the price was correct, and included removal and installation of panels and maintenance for three years. *Id.* at 1.

While the contracting officer states that he did not know that FedBid sent out a validation request after the bidding closed, FedBid in fact sent out a validation request to confirm BCW's compliance with the agency's requirements. Here, there can be no dispute that the agency authorized FedBid to act on the agency's behalf. As a result, since BCW complied with FedBid's request and verified that its bid included maintenance, and since BCW was the lowest bidder, we find that the agency was required to consider that information before making an award.

RECOMMENDATION

Given that the purchase order here has been fully performed, Request for Dismissal at 3, and other substantive relief is not possible, we recommend that the agency reimburse the protester its bid preparation costs. 4 C.F.R. § 21.8(d)(2). We also recommend that the agency reimburse the protester the costs of filing and pursuing its protest. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel