



Decision

Matter of: Megatech Corporation

File: B-417582

Date: June 25, 2019

Haley Wood, for the protester.

Kevin T. Lyster, Esq., Department of the Navy, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is dismissed as untimely where protester's challenge to award based on patently ambiguous terms of reverse auction was filed after closing time for submission of bids.

DECISION

Megatech Corporation, of Tewksbury, Massachusetts, a small business, protests the award of a contract to EMD Marine and Supply Inc., of San Diego, California, under request for quotations (RFQ) No. N0612A19RCHW024 (also identified as Unison reverse auction Buy No. 968764_02), issued by the Department of the Navy, Naval Supply Systems Command, for 10 commercial Chevy 350 engine trainers and mobile start carts for the Interservice Mechanic A-School at the Naval Construction Training Center at Naval Base Ventura, at Port Hueneme, California. The protester contends that the Navy improperly awarded the contract to the lowest-priced technically acceptable bidder, contrary to the terms of the reverse auction solicitation.

We dismiss the protest as untimely because it challenges an alleged impropriety in the solicitation that should have been protested before bid opening.

BACKGROUND

The RFQ, issued on March 15, 2019, requested bids from small businesses through the online reverse auction site at unisonmarketplace.com (the successor to fedbid.com), and specified an auction closing date of March 25. The initial auction was held, but was canceled when the Navy determined that all bids were unacceptable. Request for Dismissal at 1. The Navy reposted the auction on April 3, with a closing date of April 9.

After reviewing the second set of bids, the Navy again canceled the auction upon discovering that the RFQ had omitted a requirement. Id.

On April 22, the Navy amended and reposted a third auction with a closing date of April 26. The RFQ incorporated by reference the provision at Federal Acquisition Regulation § 52.212-2, but did not provide fill-in information for the blanks. Amended RFQ at 2. The RFQ specified that “Buyers and Sellers agree to conduct this transaction through Unison Marketplace in compliance with the Unison Marketplace Terms of Use.” Id. The reverse auction listing on Unisonmarketplace.com included a heading for “bidding requirements,” under which appeared the following statement:

Evaluation Criteria/Basis of Award: Sellers understand that the Marketplace ranks all Bids by price; however, pursuant to applicable acquisition regulations and/or departmental guidelines, Buyers may use criteria other than price to evaluate offers. Accordingly, please note that, unless otherwise specified in the Buy Terms, below, to the extent required by applicable regulations and/or guidelines, award will be made to the responsible Seller whose offer confirming to the solicitation will be the most advantageous to the Buyer on the basis of price, technical capability, delivery, and past performance.

Unison Reverse Auction No. 968764_02, at 3.

The RFQ directed bidders to submit an electronic spreadsheet containing a parts list and the prices for each part, along with labor and delivery costs. The RFQ also required submission of a word processing document with a narrative explaining the serviceability of the bidder’s engine trainer kits, confirmation that the design of the supplied items ensured they would be free of hazards and compliant with safety requirements, and listing any contractor or manufacturer warranties. Statement of Work at 3-4.

After reviewing the bids in the third round, the Navy concluded that EMD had submitted the lowest-priced technically acceptable bid of \$111,549, and awarded the contract on that basis on May 8. Request for Dismissal at 1; Award Notice Posting on fbo.gov (May 7, 2019) at 1. This protest followed.

PROTEST

The protester argues that the Navy improperly failed to consider Megatech’s technical approach and past performance based on an extensive history supplying training aids to the government. Megatech argues that its bid was superior to EMD’s, but that the Navy improperly failed to give any consideration to the value provided by Megatech. Protest at 1.

The Navy initially requested dismissal, arguing that the selection of EMD for award was based on it submitting the lowest-priced technically acceptable bid, and that the selection was consistent with the RFQ. Request for Dismissal at 1. As such, the Navy argued that Megatech's protest failed to set forth a valid basis to challenge the award to EMD. Id. at 2. After our Office questioned whether the terms of the bid from unisonmarketplace.com specified that award would be made to the lowest-priced technically acceptable bidder, the Navy submitted a second dismissal request.

The Navy now argues that the protest should be dismissed as untimely because the basis of award stated in the unisonmarketplace.com terms was patently ambiguous. That ambiguity was not challenged before the closing time for submission of bids, so the Navy argues that any challenge to its decision to treat the ambiguous term as permitting award to the lowest-priced technically acceptable bidder is untimely. Renewed Request for Dismissal at 1.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based on alleged improprieties in a solicitation that are apparent prior to bid opening be filed before that time. 4 C.F.R. § 21.2(a)(1). A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. DCR Servs. & Constr., Inc., B-415565.2, B-415565.3, Feb. 13, 2018, 2018 CPD ¶ 125 at 4 n.6. A patent ambiguity must be protested prior to the next closing time for the submission of responses to the solicitation, in order to be considered timely. Id.; 4 C.F.R. § 21.2(a)(1). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4.

We have considered essentially identical language in the terms of a reverse auction previously. FitNet Purchasing Alliance, B-410263, Nov. 26, 2014, 2014 CPD ¶ 344 at 4. In particular, where an agency did not insert a clear statement of the basis for award, the boilerplate language used by the reverse auction hosting site (at the time known as FedBid.com) "could be reasonably interpreted consistent with an evaluation [on a lowest-priced technically acceptable basis]." Id. at 5. At the same time, we recognized that the same provision "could also be interpreted as providing for a best value tradeoff." Id. at 6. Given that there were two reasonable interpretations of the solicitation language, we determined that the solicitation was ambiguous, and that any protest challenging the terms had to be filed before the deadline for receipt of bids. Id. No protest was filed, so "the agency effectively had discretion to award a contract on either basis." Id.

Given the presence of essentially the same language in the reverse auction terms here, and given that no indication elsewhere in the RFQ clarified the agency's intended basis for award, we reach the same result. Accordingly, we conclude that the RFQ was patently ambiguous regarding the basis for award, so any protest arguing that the Navy should clarify the basis of award had to be filed before the auction closing time to be

timely. The third reverse auction closed on April 26, but this protest was not filed until May 17, making it untimely.

The protest is dismissed.

Thomas H. Armstrong
General Counsel