

Decision

Matter of: M R Pittman Group, LLC

File: B-419569

Date: May 5, 2021

Jonathan S. Forester, Esq., Riess LeMieux, for the protester.
Matthew R. Keiser, Esq., and Jacob S. Stephens, Esq., Department of the Army, for the agency.
Christopher An, Esq., Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's rejection of bid because the protester was not a small business is dismissed as untimely. Although the protester argues the agency was required to treat the solicitation as an unrestricted procurement because it failed to include information required for a small business set-aside--the solicitation also included other information to indicate that it was a set-aside for small business concerns. This discrepancy regarding the set-aside status of the solicitation created a patent ambiguity the protester should have raised before the closing time for receipt of bids.

DECISION

M.R. Pittman Group, LLC, of New Orleans, Louisiana, protests the award of a contract to J. Star Enterprise, Inc., a small business of New Orleans, Louisiana, under Invitation for Sealed Bids (IFB) No. W912P8-20-B-0063, issued by the Department of the Army, Army Corps of Engineers, New Orleans District, for the inspection, removal, and repair of the pump units for Wilkinson Canal Pump Station in Plaquemines Parish, Louisiana. Pittman, which submitted the lowest-priced bid but did not receive the contract because it is other than small, challenges its non-selection for award on the basis that the IFB was not in fact a set-aside for small business concerns.

We dismiss the protest.

BACKGROUND

On September 14, 2020, the agency published a pre-solicitation notice on the government wide point of entry, beta.SAM.gov, announcing a contract opportunity for repair and maintenance services at the Wilkinson Canal Pump Station. This notice

identified the anticipated procurement as a total small business set-aside under NAICS code 811310. Agency Req. for Dismissal, Attach. 1, Pre-Solicitation Notice at 1. Subsequently, on December 21, 2020, the agency issued the IFB seeking bids for the required repair and maintenance services. The agency represents that it intended to issue the IFB as a total small business set-aside. Contracting Officer's Statements (COS) at 1. Consistent with applicable regulations for small business set-asides, the IFB incorporated by reference Federal Acquisition Regulation (FAR) clause 52.219-6, Notice of Total Small Business Set-Aside, and incorporated the full text of FAR clause 52.219-14, Limitations on Subcontracting. IFB at 36, 50-51; see FAR 19.507(c) and (e) (paragraph (c) provides that FAR clause 52.219-6 must be included in solicitations "involving total small business set-asides," and paragraph (e) provides that FAR clause 52.219-14 must be inserted in solicitations "if any portion of the requirement is to be set-aside for small business.").

Contrary to the FAR's instruction for set-aside procurements, however, the IFB did not identify the applicable North American Industry Classification System (NAICS) code or corresponding size standard for the intended small business set-aside.¹ See FAR 19.501(e) (requiring that "[a]ll solicitations involving set-asides, in total or in part, *shall specify the NAICS code(s) and corresponding size standard(s)*") (emphasis added).

The Army received four bids by the January 20, 2021, bid opening; Pittman's price of \$5,547,400 was the apparent low bid, while J-Star's \$6,255,788 price was the third highest bid.² Protest, Exh. 7, Bid Results. On January 26, the contracting officer notified Pittman that it was ineligible for award because Pittman was other than small under NAICS code 811310. Protest, Exh. 8, Bid Rejection Notice at 1-2. This protest followed.

DISCUSSION

Pittman contends that it was improperly denied the award for not being a small business. By failing to include the required NAICS code and size standard information in the solicitation, Pittman essentially argues the solicitation cannot be treated as a set-aside for small business concerns. Protest at 3. In this vein, the protester argues the agency improperly relied on the NAICS code and size standard information contained in the pre-solicitation notice. Because the pre-solicitation information was extrinsic to the final solicitation, and the solicitation did not incorporate the pre-solicitation information

¹ Additionally, the IFB incorporated FAR clause 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items. Within that clause, however, the Army failed to indicate that FAR clauses 52.219-6 or 52.219-14 were applicable. IFB at 44.

² The record does not discuss or reference why the agency made award to J-Star, the third low bidder, instead of the second low bidder. We note for the record, however, the basis for awarding to the third low bidder, has no relevance to the issues raised here.

by reference, Pittman argues the final solicitation was controlling, noting that “language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material” being incorporated. *Id.* at 3 (quoting *Laboratory Corp. of Am. v. U.S.*, 108 Fed. Cl. 549 (2012)). For the reasons that follow, we find that the IFB was patently ambiguous about whether it was a small business set-aside because it simultaneously incorporated applicable set-aside provisions, but failed to provide an applicable NAICS code and corresponding size standard. Having competed under this patently ambiguous solicitation without questioning the set-aside status of the solicitation, the protester is untimely to now argue, after bid opening and award, that the agency is precluded from treating the IFB as a set-aside.

Our Bid Protest regulations contain strict rules for the timely submission of protests. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for the receipt of bids be filed before that time. 4 C.F.R. § 21.2(a)(1); *Sikorsky Aircraft Corp.*, B-416027, B-416027.2, May 22, 2018, 2018 CPD ¶ 177 at 6. A patent solicitation ambiguity exists where the solicitation contains an obvious, gross, or glaring error. *Sheritech Pharmacy Piedmont, LLC*, B-413945, Nov. 7, 2016, 2016 CPD ¶ 325 at 4 n.2. An offeror has an affirmative obligation to seek clarification of a patent ambiguity prior to the due date for bids. 4 C.F.R. § 21.2(a)(1); *Pitney Bowes, Inc.*, B-294868, B-294868.2, Jan. 4, 2005, 2005 CPD ¶ 10 at 5. When a patent ambiguity exists but is not challenged prior to the bid submission deadline, we will not consider subsequent untimely arguments asserting the protester’s own interpretation of the ambiguous provision. *FFLPro, LLC*, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10.

Relevant to the facts presented in this protest, our Office has found that when an agency has indicated that a solicitation is to be set-aside for small business concerns, the agency’s failure to elsewhere in the solicitation check a box to indicate that the procurement is or is not such a set-aside does not permit potential bidders to assume that the procurement is not a set-aside. *South Gulf, Inc.*, B-260521.2, B-260521.3, May 1, 1995, 95-1 CPD ¶ 225 at 1. Rather, if, when read as a whole, the solicitation establishes a set-aside, any question about apparent inconsistent provisions should be raised prior to bid opening. *Id.*; see also *Sheraton S. Hills*, B-225092, Nov. 10, 1986, 86-2 CPD ¶ 548 (dismissing as untimely a post-award challenge alleging that the solicitation was ambiguous regarding set-aside restrictions).

As set forth above, the IFB here included FAR clauses 52.219-6 and 52.219-14, both of which mark the IFB as a set-aside for small business concerns. IFB at 36, 50-51. For example, FAR clause 52.219-6(c)(1) explicitly states that “[o]ffers are solicited only from small business concerns,” and that “[o]ffers received from concerns that are not small business concerns shall be considered nonresponsive and will be rejected.” While the protester correctly argues that the IFB failed to include the applicable NAICS code and corresponding size standard required by the FAR for a set-aside, this discrepancy

underscores the ambiguity that was evident on the face of the solicitation.³ Thus, on this record, we find that the protester failed to timely challenge a patent ambiguity with the IFB's terms, therefore, we dismiss the protest. 4 C.F.R. § 21.2(a)(1).

The protest is dismissed.

Thomas H. Armstrong
General Counsel

³ The protester's reliance on *Laboratory Corp. of America v. United States, supra*, is misplaced. In that case, the Court of Federal Claims rejected the government's argument of a patent ambiguity based on apparent inconsistencies between the terms of the solicitation and the website vendors were required to use when uploading their quotations. In contrast, here, the apparent inconsistency appears on the face of the solicitation itself (*i.e.*, the IFB incorporated FAR clauses 52.219-6 and 52.219-14, but failed to provide an applicable NAICS code). Thus, under both our decisions and under the applicable decisions of the United States Court of Appeals for the Federal Circuit, this post-award protest, stemming from a patent ambiguity with the terms of the solicitation, is untimely. See, *e.g.*, *Insero Corp. v. United States*, 961 F.3d 1343, 1349 (Fed. Cir. 2020) (“[A] party who has an opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.”) (*quoting Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007)).