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Decision

Matter of: Carl R. Jones Excavating & Hauling, LLC

File: B-419717.4

Date: July 29, 2021

Boris A. Kaupp, Esq., McCarthy, Leonard & Kaemmerer, L.C., for the protester.
Thomas J. Warren, Esq., and Edward J. McNaughton, Esq., Department of the Army, for the agency.
Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's cancellation of invitation for bids (IFB) after bid opening is denied where the agency has a compelling reason to cancel the IFB because the solicitation did not accurately state the agency's actual needs and would have restricted competition.

DECISION

Carl R. Jones Excavating & Hauling, LLC (CRJ), of Fredericktown, Missouri, protests the cancellation of invitation for bids (IFB) No. W912EQ21B0001, issued by the Department of the Army, Corps of Engineers (Corps), for construction services. The protester alleges the Corps improperly canceled the IFB after sealed-bid opening.

We deny the protest.

BACKGROUND

The IFB, issued on November 3, 2020 under Federal Acquisition Regulation (FAR) part 14 and set aside for small businesses, contemplated the award of a single, fixed-price contract with a performance period of 665 days after the notice to proceed, for a project referred to as the Below Kennett Seepage Remediation Project.¹ Protest at 2, Agency

¹ The work to be performed under the contract included the cleanout and excavation of approximately 6.3 miles of lateral ditch work; construction of approximately 5.3 miles of landslide berm; precision leveling of approximately 285 acres of agricultural land; and

Report (AR), Tab 4, IFB at 1.² The Corps received and opened 11 sealed bids on January 8, 2021. COS at 1.

CRJ submitted the second lowest-price bid. *Id.* Upon review of the three lowest bids, the contracting officer had concerns that the discrepancy in prices between the independent government estimate (IGE) and these bids could have indicated a lack of understanding of the requirements, representing an unreasonable risk to the government.³ *Id.* at 2. The contracting officer analyzed the bid prices and concluded that the low bid prices of the lowest priced-bidder (Young's General Contracting, Inc. (YGCI)) and CRJ were not "fair and reasonable."⁴ *Id.* The contracting officer found these bidders were ineligible for award and disqualified them, without referring them to the Small Business Administration (SBA). *Id.* The agency found the third lowest-bidder's price--which was 20.37% below the IGE--to be "fair and reasonable." *Id.* As a result, the Corps made award to Medvolt Construction Services on March 23. *Id.*

YGCI and CRJ, separately, filed protests with our Office challenging the award to Medvolt; the protests were docketed as B-419717 and B-419717.2, respectively. Among the allegations asserted by the protesters were: (1) the Corps performed an impermissible price realism analysis; and (2) that finding a bidder's price was too low relates to the issue of responsibility, and the contracting officer was, therefore, required to refer the disqualified small businesses to the SBA for a final determination. On April 9, the agency advised that it would take corrective action by terminating the award, canceling the IFB, and resoliciting. See *generally* AR, Tab 12, Agency Notice of Corrective Action.

The agency's notice of corrective action detailed its rationale for canceling the solicitation. The Corps explained that, in reviewing the protest allegations, it discovered a patent ambiguity in the solicitation that resulted in an IFB that did not reflect the agency's actual needs. *Id.* at 1. Specifically, while the solicitation stated that it was set aside for small businesses, the IFB also: (1) advised bidders to review FAR clause 52.219-27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside

installation of multiple culverts on county and state roads. IFB at 1; Contracting Officer's Statement (COS) at 1.

² All citations to the record are to the consecutive numbering of the pages in the Adobe PDF format of the documents provided by the agency.

³ The differences between the IGE and the three lowest bids were 40.74%, 30.32%, and 20.37%. COS at 1.

⁴ The Corps acknowledges that the solicitation did not include a provision expressly providing for a price realism evaluation and price realism was not listed as an evaluation criterion. COS at 2. For the record, we recognize that a price realism evaluation requirement would not normally be included in an invitation for bids. See *generally* FAR part 14.

(SDVOSB); and (2) included FAR clause 52.219-3, Notice of Historically Underutilized Business Zone (HUBZone) Set-Aside or Sole Source Award. *Id.* at 1-2. The agency represented that it was not the Corps's intent to limit competition only to small businesses that qualified as both SDVOSB and HUBZone small business concerns. *Id.* at 2. Rather, the agency wanted to maximize competition amongst small businesses and intended for the IFB to be set aside for all small businesses. *Id.*

CRJ objected to the agency's proposed corrective action.⁵ AR, Tab 13, CRJ's Comments and Objections to Agency's Corrective Action. Based on the agency's intent to terminate the award, cancel the IFB, and re-issue a solicitation that reflected the agency's actual needs, our Office dismissed the protests as academic. *Carl R. Jones Excavating & Hauling, LLC*, B-419717.2, Apr. 20, 2021 (unpublished decision). This protest followed.

DISCUSSION

CRJ challenges the agency's cancellation of the IFB arguing that the solicitation was not ambiguous and that the agency's contention that the IFB failed to meet the agency's actual needs is unsupported.⁶ Protest at 5-6; Comments at 3-6. The agency explains that the contracting officer recognized the need to take corrective action in response to the prior protests because the bids submitted by YGCI and CRJ had been incorrectly excluded from the competition, and the Corps had improperly made award to the third-lowest bidder. Memorandum of Law (MOL) at 2, 5. Upon her review, the contracting

⁵ Specifically, CRJ argued that the solicitation was not ambiguous and rather than resolicit, the agency should award CRJ the contract because it was the lowest-priced bidder that was both a HUBZone small business concern and an SDVOSB concern. AR, Tab 13, CRJ's Comments and Objections to Agency's Corrective Action at 2-3. In the alternative, CRJ asserted that any re-solicitation should be restricted to either HUBZone or SDVOSB concerns--and not as a small business set-aside--in order to be consistent with what the firm believed to be the original solicitation's intent. *Id.* at 3.

⁶ In filing and pursuing this protest, CRJ has made arguments that are in addition to, or variations of, those discussed below. While we do not address every issue raised, we have considered all of the protester's arguments and conclude that none furnishes a basis on which to sustain the protest. For example, CRJ contends that the agency's corrective action does not address the evaluation errors raised in CRJ's initial protest. Protest at 5-6. As discussed above, CRJ's earlier protest was dismissed because the agency's proposed corrective action that included termination of Medvolt's contract and cancellation of the solicitation rendered CRJ's protest challenging the award to Medvolt academic. We have consistently stated that an agency's corrective action need not resolve every protest issue or provide the precise remedy sought by the protester; rather, it must only render the protest academic. See *Raytheon Co.*, B-419393.5, B-419393.6, Dec. 22, 2020, 2020 CPD ¶ 410 at 6; *Quotient, Inc.*, B-416473.4, B-416473.5, Mar. 12, 2019, 2019 CPD ¶ 106 at 3. Consequently, CRJ's argument provides no basis to sustain the protest.

officer identified other defects in the IFB. Therefore, the contracting officer concluded that cancelation of the IFB was the only reasonable and viable course of action under the circumstances. *Id.* at 4, 6.

Generally, when an agency issues an IFB and opens bids, award must be made to the responsible bidder that 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 after award, where an agency need only demonstrate a reasonable basis for the cancellation. *Veterans Elec., LLC*, B-415064.2, Feb. 1, 2018, 2018 CPD ¶ 42 at 4. The standard requiring a compelling reason for cancellation applies to IFB procurements because of the potential adverse impact on the competitive bidding system of cancelation 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 record shows that in response to the initial protests filed by YGCI and CRJ challenging the award to Medvolt, the contracting officer concluded that the award of the contract to Medvolt was improper. AR, Tab 11, Contracting Officer Determination and Findings (D&F) Canceling the IFB at 4. Specifically, the contracting officer found that the Corps performed an improper and flawed price analysis and failed to refer YGCI and CRJ to the SBA for a responsibility determination. *Id.* As a result, the contracting officer found that termination of the award was appropriate, and that another award could not be made under the solicitation, as currently drafted. *Id.* at 5. Specifically, the contracting officer discovered that the solicitation inadvertently included two extraneous set-aside provisions--one for HUBZone small businesses and one for SDVOSB concerns. *Id.* The contracting officer noted that the agency intended to issue the IFB as a total small business set-aside, not as a set-aside for HUBZone small business concerns or SDVOSB concerns, or both. *Id.*; see AR, Tab 1, Market Research Report; AR, Tab 2, Small Business Coordination Record at 1. Further, the contracting officer recognized that the inadvertent inclusion of these two extraneous clauses created an ambiguity in the solicitation.

In this regard, FAR clause 52.219-27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside, states, in relevant part:

(c)(1) Offers are solicited only from service-disabled veteran-owned small business concerns. Offers received from concerns that are not service-disabled veteran-owned small business concerns shall not be considered.

(c)(2) Any award resulting from this solicitation will be made to a service-disabled veteran-owned small business concern.

FAR 52.219-27. Similarly, FAR clause 52.219-3, Notice of HUBZone Set-Aside or Sole Source Award, states the following:

(c)(1) Offers are solicited only from HUBZone small business concerns. Offers received from concerns that are not HUBZone small business concerns will not be considered.

(c)(2) Any award resulting from this solicitation will be made to a HUBZone small business concern.

FAR 52.219-3.

The contracting officer expressed concerns that the IFB, as drafted, could be interpreted to limit competition to only those contractors certified as both SDVOSB and HUBZone concerns, which could have discouraged competition. AR, Tab 11, Contracting Officer D&F Canceling the IFB at 5. The contracting officer thus concluded that inclusion of these clauses was a fatal flaw in the solicitation that could not be addressed without canceling the IFB and resoliciting the requirement as a small business set-aside. *Id.* Moreover, the contracting officer also explained that, in the interest of ensuring fairness to the bidders whose prices were revealed, the requirement would be resolicited as “a best value tradeoff, using past performance and price as the selection criteria (PPT).” COS at 7. The Corps explained that resoliciting in this manner will allow previous bidders to compete on more than just price, and will “reduce the negative impact of their previous pricing having been revealed.” *Id.*

CRJ first argues that the solicitation was not ambiguous and that it was clearly set aside for small business concerns that qualified as either a HUBZone small business concern or a SDVOSB concern, or both. Protest at 5.

An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. As a general matter, where a dispute exists as to the meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of the provisions; to be reasonable, an interpretation must be consistent with such a reading. See *ArmorWorks Enters. LLC*, B-405450, Oct. 28, 2011, 2011 CPD ¶ 242 at 3. A party’s particular interpretation need not be the most reasonable to support a finding of ambiguity; rather, a party need only show that its reading of the solicitation provisions is reasonable and susceptible of the understanding it reached. *RELI Grp., Inc.*, B-412380, Jan. 28, 2016, 2016 CPD ¶ 51 at 6. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error. *Shertech Pharmacy Piedmont, LLC*, B-413945, Nov. 7, 2016, 2016 CPD ¶ 325 at 4 n.2.

Our review of the record shows that the IFB was patently ambiguous regarding the solicitation’s set-aside status. On the one hand, the IFB indicated (in block 10 of standard form 1442) that the solicitation was set aside for small businesses.⁷ IFB at 1.

⁷ We note that the IFB, however, did not include FAR clause 52.219-6, Notice of Total Small Business Set-Aside, which is required to be included in solicitations involving total small business set-asides. FAR 19.507.

On the other hand, the IFB also indicated that the solicitation was reserved for HUBZone small businesses and/or SDVOSB concerns. *Id.* at 19, 50-52, 175. Given the conflicting information that was apparent on the face of the solicitation, it would be extremely difficult to determine, conclusively, whether the IFB was set aside for small businesses, HUBZone small businesses, or SDVOSB concerns. *See M.R. Pittman Grp., LLC*, B-419569, May 5, 2021, 2021 CPD ¶ 197 at 3-4 (finding discrepancy regarding the set-aside status of the IFB created a patent ambiguity in the solicitation).

CRJ next argues that there is no support for the agency's assertion that the solicitation did not meet its actual needs. Protest at 6; Comments at 4-7. CRJ points out that the agency received 11 bids and many were lower in price than the IGE, including CRJ's own bid, which, in CRJ's opinion, was the most competitive out of the pool of qualified bidders (*i.e.*, HUBZone small businesses). *Id.* CRJ also contends that the agency's alleged desire to obtain more competition is unreasonable because additional competition would likely result in the receipt of bids even lower than CRJ's--which the agency had already found to be too low--and, thus, raise concerns about those firms' capability to actually perform the work at its bid price. Comments at 5. According to CRJ, the agency simply does not have a compelling reason to cancel the IFB because its rationale for cancellation and planned re-solicitation is unreasonable. *Id.*

Here, the record plainly supports the agency's assertion that it intended to solicit this requirement as a small business set-aside, based on the agency's market research and the Corps's coordination with SBA. AR, Tab 1, Market Research Report at 4 ("Based on market research this acquisition is recommended to be advertised as a Small Business Set-Aside."); AR, Tab 2, Small Business Coordination Record; AR, Tab 3, Contract Type Memorandum for the Record at 1 ("This action will be a Small Business set-aside acquisition using FAR Part 19.5 procedures."). Given the ambiguity raised by the inadvertent inclusion of multiple set-aside provisions, the IFB clearly did not accurately reflect the agency's actual intent.

Furthermore, CRJ's assessment about the adequacy of competition received under the defective solicitation provides no basis to sustain the protest. The purpose of our bid protest function is to ensure that agencies obtain full and open competition to the maximum extent practicable, and we will generally favor otherwise proper agency actions that are taken to increase competition. *See Wittenberg Weiner Consulting, LLC*, B-413457 *et al.*, Oct. 31, 2016, 2016 CPD ¶ 320 at 5. We have said that our Office does not generally permit a protester to use a protest to advocate for more restrictive, rather than more open, competitions for government requirements. *See, e.g., Al Baz 2000 Trading & Contracting Co., W.L.C.*, B-416622.2, Dec. 12, 2018, 2018 CPD ¶ 422 at 4.

Finally, contracting officers have 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. *Veterans Elec., LLC, supra*; *P.J. Dick, Inc.*, B-259166, B-260333, Mar. 6, 1995, 95-1 CPD ¶ 131 at 4. As a general rule, the

need to revise inadequate or ambiguous specifications, after the opening of bids, to properly express the agency's minimum needs constitutes a compelling reason. *Veterans Elec., LLC, supra*; 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*. Additionally, section 14.404-1(c)(10) of the FAR specifically permits cancellation, consistent with the compelling reason standard, where cancellation is clearly in the government's interest. In this regard, our Office has found that a contracting officer's desire to obtain enhanced competition by relaxing a material specification constitutes a valid reason under this FAR standard. See, e.g., *Aero Innovations, Ltd.*, B-227677, Oct. 5, 1987, 87-2 CPD ¶ 332 at 3.

The contracting officer's concern that the inclusion of the conflicting set-aside provisions may have restricted competition is clearly documented in the D&F accompanying the Corps's decision to cancel the IFB. In the D&F, the contracting officer concluded that canceling the IFB would allow the agency to resolicit the requirement--without the restrictive SDVOSB and HUBZone set-aside provisions--and allowing all eligible small businesses to compete, thereby increasing competition. AR, Tab 11, Contracting Officer D&F Canceling the IFB at 5. While CRJ may disagree with this conclusion, a protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. *Wittenberg Weiner Consulting, LLC, supra*.

On this record, we find that the contracting officer had a compelling reason to cancel the IFB when she determined that, among other things, the solicitation was patently ambiguous. As such, the contracting officer reasonably exercised the discretion afforded to her, and we find no basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel