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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: American Analytical & Technical Services, Inc.

File: B-292100

Date: June 11, 2003

Kesavalu M. Bagawandoss for the protester.

Kenneth R. Pakula, Esq., Environmental Protection Agency, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Consistent with the terms in the invitation for bids, contracting agency properly calculated evaluated prices by adding ten percent to prices bid by all firms other than those of qualifying small disadvantaged business concerns.

DECISION

American Analytical & Technical Services, Inc. (AATS) protests the failure of the Environmental Protection Agency (EPA) to award it a contract under invitation for bids (IFB) No. PR-HQ-02-10708, for multi-media, multi-concentration, organic analytical (sample analysis) services. AATS alleges that the agency's evaluation of bidders' prices was improper.

We deny the protest.

The IFB, issued on August 8, 2002, sought to procure laboratory testing services in support of EPA's investigatory and cleanup activities, primarily with regard to hazardous waste sites nationwide, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. The solicitation contemplated the award of multiple indefinite-quantity contracts for a 1-year base period with two 6-month option periods.

The IFB informed bidders that the agency planned to conduct both a full and open competition, and a small business set-aside competition of up to 25 percent of the contract awards. IFB, § L.10. Relevant to this protest, the solicitation stated that the

Small Business Administration (SBA) 8(a) program was not applicable to this procurement.¹ Id. The IFB also contained the clause at FAR § 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, which stated that the agency would, as part of the evaluation, add 10 percent to the prices of all bidders except those of qualified small disadvantaged business (SDB) concerns (or other bidders covered under the clause).² IFB, § I.9. The solicitation established that contract awards would be made to the responsible bidders submitting the lowest evaluated prices.³

Nineteen bidders, including AATS, a large business, and Mitkem Corporation, an SDB, submitted bids by the September 10 bid opening date. As part of its price evaluation, EPA added 10 percent price to the total extended prices of non-SDB bidders. On February 26, 2003, after completion of both the price evaluation and responsibility determinations, EPA made awards to eight bidders, including Mitkem and another SDB concern. AATS, by contrast, was determined to have the ninth lowest evaluated price and did not receive an award. Agency Report (AR), Tab 6, Source Selection Decision, at 7-8.

On March 11, the agency notified AATS that it did not receive a contract award; the only information provided was that AATS's "bid had a higher evaluated price than those eligible [bidders] who received an award." AR, Tab 7, Contracting Officer's Letter to AATS, March 11, 2003. In response to an oral inquiry by AATS on March 11 regarding the agency's award decision, EPA informed AATS that it would not provide it a debriefing, and directed AATS to submit its specific questions in writing. On March 13, AATS requested, in writing, information regarding EPA's price evaluation, as well as the evaluation of bidders' past performance. On March 20, AATS learned that the agency had misplaced its written inquiry and would be unable to reply without additional time. That same day, AATS filed a timely protest with our Office, challenging the agency's evaluation of bidders' prices and the resulting decision not to award it a contract.

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2000), authorizes the SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. These subcontracts may be awarded on a competitive or noncompetitive basis. See Federal Acquisition Regulation (FAR) § 19.800.

² Likewise, the solicitation instructed bidders to represent whether they were, among other things, SDB concerns. IFB, § K.5, Small Business Program Representations.

³ The solicitation stated that each bidder's price would be evaluated based on the maximum ordering quantities, the consideration of all option periods, and how the agency would weight the various contract line items in the evaluation of price; AATS does not challenge these aspects of the agency's price evaluation.

As a preliminary matter, the EPA argues that AATS's protest fails to set forth a detailed statement of the legal and factual grounds of protest and, therefore, should be dismissed. The agency essentially argues that AATS's protest does little more than rely on the protester's inability to understand the nature of a sealed bidding procurement as well as the failure to be one of the procurement's low bidders as grounds for protest. We disagree.

Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds of a protest, 4 C.F.R. § 21.1(c)(4) (2003), and that the grounds stated be legally sufficient. 4 C.F.R. § 21.1(f). These requirements contemplate that protesters provide, at a minimum, either allegations or evidence that the protester will prevail in its claim of improper agency action. Military Agency Servs. Pty., Ltd., B-290414 et al., Aug. 1, 2002, 2002 CPD ¶ 130 at 4 n.4. Here, as shown below, AATS's protest adequately sets forth the protester's assertion that the agency's price evaluation was inconsistent with the terms of the solicitation, and resulted in the wrongful selection of Mitkem instead of AATS for one of the awarded contracts. In other words, AATS's protest here does sufficiently allege that the agency took particular actions and that these actions were contrary to law or regulation.⁴ See Charleston Marine Containers, Inc., B-283393, Nov. 8, 1999, 99-2 CPD ¶ 84 at 4.

AATS charges that the agency's evaluation of bidders' prices was improper. Specifically, AATS contends that the agency should not have applied the SDB preference to the price evaluation of any bids. AATS argues that had the SDB preference not been applied to bidders' prices, then its evaluated price would have been lower than that of Mitkem, one of the SDB awardees. EPA contends that application of the SDB preference was entirely consistent with the terms of the solicitation. We agree with the agency.

The evaluation of offers must be in accordance with the solicitation's evaluation provisions. Triune Assocs., B-292005, May 13, 2003, 2003 CPD ¶ __ at 2. As set forth above, the solicitation here contained the clause at FAR § 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, which stated that the agency would add an evaluation factor of 10 percent to the price of all bidders except those of qualified SDB concerns. This price evaluation adjustment applied to the portion of the competition not set aside for small businesses. See FAR § 19.1102(b)(3). Accordingly, as part of the unrestricted competition, the agency properly added a 10 percent factor to the price evaluation of all non-SDB bidders, including AATS.

⁴ Moreover, we find it incongruous for the agency not to provide the protester with additional information about how bidders' prices were evaluated, despite several requests, and then to assert that AATS's protest is legally and factually insufficient.

AATS does not dispute that the solicitation contained notice of the SDB price evaluation preference. Instead, AATS argues that the agency's application of the SDB price evaluation adjustment was improper because of the solicitation's provision stating that the SBA 8(a) program was not applicable here. The protester is mistaken. In fact, the SDB preference is not to be used in acquisitions that are awarded pursuant to the 8(a) program. FAR § 19.1102(b)(2).

In its protest AATS also challenged the evaluation of bidders' past performance in the agency's determination of contract awards. EPA addressed this allegation in its report,⁵ and the protester failed to respond in its comments; thus, we consider AATS to have abandoned this argument and will not consider it further. MFVega & Assocs., LLC, B-291605.3, Mar. 25, 2003, 2003 CPD ¶ 65 at 4.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁵ EPA pointed out that this procurement was conducted using sealed bid procedures, with award being made on the basis of price and price-related factors only. Accordingly, consideration of bidders' past performance was in the context of the agency's determination of the bidders' responsibility, not part of the evaluation of bids.