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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Retro Environmental, Inc.

File: B-411457.3

Date: August 19, 2015

Joseph C. Kovars, Esq., and James E. Edwards Jr., Esq., Ober, Kaler, Grimes & Shriver, for the protester.

Maj. Jamal A. Rhinehardt, and Scott N. Flesch, Esq., Department of the Army, 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 that agency lacked a compelling basis to cancel invitation for bids after bid opening and contract award is denied where contracting officer reasonably determined that solicitation contained an ambiguous specification that may have overstated that agency's minimum requirement and thus limited competition.

DECISION

Retro Environmental, Inc., of Sykesville, Maryland, a small business, protests the cancellation of invitation for bids (IFB) No. W912K6-15-B-0001 by the Department of the Army for asbestos abatement services at the Maryland Air National Guard operational and training facility building at Martin State Airport in Baltimore, Maryland. Retro argues that the cancellation of the IFB is improper.

We deny the protest.

BACKGROUND

The Army issued the solicitation on March 25, 2015, seeking bids to perform asbestos abatement services. IFB at 1 (Standard Form 33). On the announced bid opening date, April 9, the contracting officer conducted a public bid opening at which six bids were read. The bid from San Dow Construction, Inc. was \$170,000, while three other bidders submitted lower prices. Contracting Officer's Statement at 1. After the concluding the bid opening, the contracting officer realized that there had been a seventh bid, submitted by Retro on April 8, which had been left in the

contracting officer's office, unopened. Id. The contracting officer opened the bid and sent an e-mail to the other bidders, stating that a seventh bid, from Retro, had the lowest price of \$104,700. Id.

On April 24, the contracting officer awarded the contract to Retro. San Dow filed a protest with our Office the same day, arguing that other lower-priced bidders lacked required licenses, and that Retro's bid was ineligible because the bid was delivered late, or was otherwise invalid because it had not been opened publicly. San Dow also argued that the other lower-priced bidders lacked the required license.

During San Dow's protest, the agency reviewed Retro's bid, and concluded that it should have been rejected as nonresponsive because, the contracting officer explains, Retro had failed to submit an acceptable description of its "method on how the job would be accomplished."¹ Contracting Officer's Statement at 2. Specifically, the contracting officer calls attention to a handwritten notation at the bottom of Retro's bid schedule, which stated simply "24 WORK DAYS."² Id.

Also during San Dow's protest, the Army concluded that the IFB overstated the agency's minimum needs by stating that "the contractor" had to be licensed to perform asbestos abatement by the State of Maryland, whereas the agency should have stated only that the firm actually performing the abatement work (whether prime contractor or subcontractor) was required to hold the state license. Id. On May 20, the contracting officer concluded that the flaw in the IFB provided a compelling reason to cancel the IFB, and announced that the agency would take corrective action by doing so. AR, Tab 12, Corrective Action Memorandum, at 2. Our Office subsequently dismissed San Dow's protest as academic.

Retro filed this protest on May 26, arguing that cancelation of the IFB was improper. Protest at 1.

¹ As part of the statement of work (SOW), the IFB directed that "[t]he Contractor shall describe in his or her proposal how they will manage the project." IFB at 6 (SOW ¶ 2.3). The SOW also directed that the bidder "shall identify what s/he considers the performance period to be . . . in the Cost Proposal," although the IFB elsewhere specified a delivery date as "45 d[a]ys" after date of contract. Id. at 6 (SOW ¶ 2.4), 10. The IFB also incorporated by reference the provision at Federal Acquisition Regulation (FAR) § 52.214-21 (descriptive literature will be reviewed to assess whether the product offered conforms to the requirements of the solicitation). IFB at 31.

² The IFB specified that work was permitted Tuesday through Friday only (excluding holidays), unless the contracting officer approved an exception. Id. at 4 (SOW ¶¶ 1.8, 1.9).

ANALYSIS

Retro argues that it submitted the lowest bid, and that any error in the IFB does not provide a compelling reason to cancel the IFB because multiple bidders correctly inferred that a subcontractor license would be acceptable, and because Retro, which holds a license, was and would remain the lowest-priced bidder under the IFB, both as issued and as the agency proposes to revise it. Protest at 4.

The Army argues that the circumstances here provide a compelling basis to cancel the IFB for two reasons. First, the restrictive terms of the IFB may have prevented competition by additional bidders that might have submitted a lower bid than Retro, but were discouraged by the apparent requirement that the license be in the prime contractor's name. AR, at 8-9. The Army argues that the goal of achieving full and open competition requires an IFB that does not overstate the agency's requirements, and thus the flaw in the IFB constitutes a compelling reason to cancel the IFB. Id. at 8. Second, the Army also argues that Retro's bid was unacceptable because it did not describe an acceptable approach to performing the work and contained a pricing error (entering a price for one line item as "\$12,0000" rather than \$12,000). Id. at 10-11. The Army argues that Retro's bid therefore should have been rejected, and the impropriety of awarding a contract in response to an unacceptable bid further justifies the decision to cancel the IFB--or at least renders Retro not an interested party to protest the cancellation. Id. at 12.

In response, Retro argues that the alleged defects in its bid were identified only after it filed this protest, whereas at the time of award, the defects had been properly waived as minor informalities or minor mistakes. Protester's Comments at 1-2. Retro also argues that the Army's main claim, that the allegedly misleading state license requirement justifies cancellation of the IFB, is not a valid legal basis to cancel the IFB because an ambiguous specification is only a basis to cancel an IFB before award, not after. Id. at 1 (citing Federal Acquisition Regulation (FAR) § 14.404-1(c)). Retro also argues that the IFB resulted in full and fair competition, and it questions the credibility of the Army's claim that a revised IFB would result in more competition. Id. at 2.

A contracting agency must have a compelling reason to cancel an IFB after bid opening because of the potential adverse impact on the competitive bidding system of resoliciting bids after prices have been exposed. FAR § 14.404-1(a)(1). Where a solicitation contains inadequate or ambiguous specifications, or otherwise does not contain specifications that reflect the agency's actual needs, those circumstances provide a sufficient reason to cancel the IFB. FAR § 14.404-1(c)(1). Contracting officials have broad discretion to determine whether a compelling reason to cancel exists; our Office's review is limited to considering the reasonableness of their decision. Brickwood Contrs., Inc., B-292171, June 3, 2003, 2003 CPD ¶ 120 at 4-5.

Specifications must be sufficiently definite and free from ambiguity so as to permit competition on an equal basis. An ambiguity exists if a solicitation requirement is subject to more than one reasonable interpretation when read in the context of the solicitation as a whole. Id. In our view, the contracting officer reasonably determined that there was a compelling reason to cancel the solicitation because the IFB included an ambiguous specification; that is, the IFB here could be reasonably interpreted as limiting competition only to prime contractors that held a state asbestos abatement license, which exceeded the agency's minimum needs. While Retro points out that the specification could also be interpreted as allowing either the prime contractor or the subcontractor doing the abatement work to possess the license, the contracting officer reasonably concluded that the IFB was susceptible to more than one reasonable interpretation, and thus may have limited competition. The contracting officer's judgment that the IFB should be canceled is thus reasonable.

The protest is denied.

Susan A. Poling
General Counsel