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Decision

Matter of: Wichita Falls Tri-Tech, LLC

File: B-420461

Date: April 18, 2022

Kristin Zachman, Esq., and Johnathan Bailey, Esq., Bailey & Bailey, P.C., for the protester.

Natasha Reed, Esq., Department of Veterans Affairs, 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 the awardee's bid as nonresponsive for failing to include a copy of a Federal Contractor Veterans' Employment Report, VETS-4212, at the time of bid submission is denied. Submission of a VETS-4212 report is a matter of bidder responsibility, not bid responsiveness, and, therefore, the agency reasonably allowed the awardee to provide the required documentation prior to award.

DECISION

Wichita Falls Tri-Tech, LLC, a small business of Wichita Falls, Texas, protests the award of a contract to Double Bronze Star Marketing and Consulting Inc., LLC (DBS), a small business of Collin County, Texas, under invitation for bids (IFB)

No. 36C78621B0024, which was issued by the Department of Veterans Affairs, for renovations at Fort Sam Houston National Cemetery. The protester contends that the agency unreasonably found the awardee's bid responsive despite failing to include a VETS-4212 report.

We deny the protest.

BACKGROUND

On November 16, 2021, the agency issued the IFB as a service-disabled veteran-owned small business set-aside for the renovation of the historical wall at Fort Sam Houston, Texas. All bids were due by December 15. IFB at 1.

The IFB instructed bidders that “[l]ate or incomplete” bids would be considered nonresponsive. *Id.* at 69. The IFB included a list of documents to be submitted with a complete bid. Among other things, the list of documents called for bidders to include a VETS-4212 report.¹ *Id.* at 70.

The agency opened the sealed bids during a teleconference conducted on December 15. During the bid-opening, the contracting officer read aloud the contents and price of each bid. The contracting officer noted that DBS’s bid did not contain a required VETS-4212 report, despite listing the report in its table of contents. The contracting officer requested that DBS forward the report via email during the call. Contracting Officer’s Statement at 1-2. DBS sent the contracting officer its VETS-4212 report before the end of the bid-opening process. During the teleconference, the contracting officer announced DBS as the apparent low bidder.

On January 10, the agency sent a notice of unsuccessful bid to the protester. Agency Report (AR), Tab 6, Unsuccessful Bid Notice at 1. The next day, on January 11, the agency issued the award to DBS. AR, Tab 10, Source Selection Decision at 2. On January 13, this protest followed.

DISCUSSION

The protester argues that DBS’s initial bid was incomplete because it failed to include a VETS-4212 report, and, therefore, was nonresponsive. Protest at 4. The protester supports its argument by pointing to the section of the IFB that states “[l]ate or incomplete [bids] will also be considered to be nonresponsive.” Protest at 2 (*quoting* IFB at 69). Further, the protester cites the IFB’s requirement for a “copy of latest VETS-4212” within the bid itself. *Id.* Without a copy of its latest VETS-4212, the protester argues DBS’s bid was incomplete, nonresponsive and, therefore, unawardable.

The agency counters that the awardee’s failure to submit a copy of its VETS-4212 report was not a matter of responsiveness, but rather, presented a matter of responsibility. Memorandum of Law at 5. Because the VETS-4212 report documents a company’s employment of protected veterans, the agency argues that the report is one of the many representations and certifications a contractor is required to make in order to be eligible for award, and that such matters concern a bidder’s responsibility, not the responsiveness of the bid itself. *Id.* According to the agency, the VETS-4212 report is

¹ The Federal Contractor Veterans’ Employment Report, VETS-4212, is annually reported to the Secretary of Labor and consists of a documented list of both the number of employees in a contractor’s workforce that belong to the categories of veterans protected under 38 U.S.C. § 4212(d), and the employees hired during the period covered by the report. 41 C.F.R. § 61-300.1(a). This report must be filed by each contractor or subcontractor entering into a contract or subcontract in the amount of \$100,000 or more with any department or agency of the United States for the procurement of personal property and non-personal services (including construction). *Id.*

akin to the certification of System for Award Management registration, which our Office has previously found to be a matter of a bidder's responsibility, rather than the responsiveness of the bid itself. *Id.* We agree. We find no basis on which to sustain the protest because, pursuant to Federal Acquisition Regulation (FAR) section 14.405, we find that the agency correctly allowed the awardee to supply its VETS-4212 report during bid opening.

Generally, a responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. FAR 14.301; *B&M Cillessen Constr. Co., Inc.*, B-287449.2, June 5, 2001, 2001 CPD ¶ 100 at 3. In contrast, bidder responsibility pertains to a bidder's ability and capacity to perform the contract requirements, and is determined not at the time of bid opening, but at any time prior to award, based on any information received by the agency up to that time. *SourceLink Ohio, LLC*, B-299258, Mar. 12, 2007, 2007 CPD ¶ 50 at 3.

Our Office has found that in the context of an IFB, matters concerning contractor representations and certifications generally pertain to a bidder's responsibility, not the responsiveness of a bid, because they do not concern the material obligations of a bidder, *i.e.*, they do not affect the price, quantity, quality, or delivery terms of the bid. Section 14.405 of the FAR expressly defines a defect as immaterial when it has little impact on "price, quantity, quality, or delivery." In other words, for a defect to have a material impact, it must be one that has a more than negligible effect on price, quantity, quality, or delivery. *Master Pavement Line Corp.*, B-419111, Dec. 16, 2020, 2020 CPD ¶ 404 at 4. Accordingly, we have found that the failure of a bidder to include completed standard representations and certifications with its bid does not render the bid nonresponsive. *Id.* at 5; *Charter Envtl., Inc.*, B-297219, Dec. 5, 2005, 2005 CPD ¶ 213 at 4.

As noted above, the VETS-4212 report provides for a count of the number of employees in a contractor's workforce who belong to the categories of veterans protected under 38 U.S.C. § 4212(d). It has no impact on price, quantity, quality, or delivery of the contractual requirements specifically required by the IFB. Therefore, we find that the agency reasonably allowed DBS to supply its VETS-4212 report during the telephonic bid opening process.

Finally, the protester argues that the terms of the IFB contained a mandatory provision stating that "[l]ate or incomplete" bids would be considered "nonresponsive" and therefore, DBS's initial incomplete bid should be deemed nonresponsive for failing to satisfy the IFB's material requirements. Protest at 2. We find this argument to be unavailing. While the IFB included language stating that "incomplete" bids would render a bid nonresponsive, the terms of a solicitation cannot convert a matter of eligibility or responsibility into one of responsiveness. *Master Pavement Line Corp.*, *supra* at 5-6.

Again, the VETS-4212 report pertains to bidder responsibility, and not bid responsiveness, and therefore could be addressed at any point before award.

This protest is denied.

Edda Emmanuelli Perez
General Counsel