



Decision

Matter of: Hawthorne Commercial Construction, LLC--Reconsideration

File: B-422032.3

Date: July 1, 2024

Peter A. Ianuzzi, for the protester.
Brian Reed, Esq., Department of Veterans Affairs, for the agency.
Cosette Vincent and Todd C. Culliton, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where the record shows that our Office did not make any factual or legal error when dismissing the protest as untimely.

DECISION

Hawthorne Commercial Construction, LLC, a service-disabled veteran-owned small business of Chelmsford, Massachusetts, requests reconsideration of our decision, *Hawthorne Com. Constr., LLC*, B-422032.2, Apr. 4, 2024 (unpublished decision), wherein our Office dismissed as untimely the protester's challenge to the Department of Veterans Affairs (VA)'s determination that its proposal in response to request for proposals (RFP) No. 36C24123R0073 was non-compliant with the terms of the solicitation. Hawthorne argues that our Office should reconsider its allegations because it asserts its protest was timely.

We deny the request for reconsideration.

BACKGROUND

On July 27, 2023, the VA issued the RFP for construction services. Req. for Dismissal, exh. 1, RFP at 1. The RFP was for a multiple award task order contract (MATOC) to provide on-going facilities construction, alterations, and repair of buildings, structures, and other real property. *Id.* at 1, 7. Such work would relate to civil, mechanical, plumbing, structural, electrical, heating, roofing, site work, heating ventilation and air conditioning. *Id.* at 7. The agency intended to award approximately 20 MATOC indefinite-delivery, indefinite-quantity construction contracts, each with a maximum limit of \$100 million over a 5-year period, whichever comes first. *Id.* at 1, 7-8.

The RFP also described a contract “seed” project, installing site security at a VA campus.¹ RFP at 8. The RFP explained that the project “will be utilized for price evaluation and is expected to be awarded as a Task Order in FY [(fiscal year)] 24.” *Id.* Further, the solicitation advised that “[a] bid bond is not required for the overall MATOC RFP. However, a bid bond is required for the seed project.” *Id.* at 1.

On August 9, 2023, the VA issued solicitation amendment 0003, advising that “[i]f an offeror has no interest in award of the seed project, the proposal must state ‘For price evaluation purposes only’ and a bid bond is not required.” Resp. to Req. for Dismissal, exh. 6, RFP amend. 0003 at 1.

On November 17, the VA issued solicitation amendment 0016, changing the approach to the bid bond set forth in amendment 0003. Req. for Dismissal, exh. 2, RFP amend. 0016 at 1. The RFP now advised that “[t]o be considered for a MATOC, all offerors must submit a proposal and bid bond on the seed project.” *Id.* The VA also extended the solicitation period to December 13. *Id.*

On December 6, the agency issued amendment 0017, which included responses to several offeror requests for information. As relevant here, the amendment included the following exchange:

4. Is a Bid Bond required if the Contractor does not want to be considered for award of “The Install Site Security Project,” and would only like to be considered for award of the MATOC?

Response: To be considered for the MATOC, all offerors must submit a proposal and bid bond on the seed project. Note, the new Instructions require all offerors to submit binding proposals and bid bonds for the seed project.

Req. for Recon., attach. 3, RFP, amend. 0017 at 1; Req. for Recon., attach. 4, Request for Information Responses at 1. On December 8, the agency confirmed that proposals were due on December 13. Req. for Recon., attach. 5, RFP, amend. 0018 at 1.

Hawthorne submitted a proposal prior to the close of the solicitation period. *Hawthorne Com. Constr., LLC, supra* at 2. On January 23, 2024, the VA notified Hawthorne that its proposal was non-compliant. Req. for Dismissal, exh. 4, Notice of Non-Compliance at 1. On January 29, the agency provided Hawthorne with a debriefing, and explained that its proposal was rejected because it did not provide a bid bond for the seed project as required by the RFP. Req. for Dismissal, exh. 5, Hawthorne Debriefing at 1.

¹ A “seed” project is the initial task order in construction contracts. See, e.g., *KWR Constr., Inc.*, B-412914.2, Feb. 3, 2017, 2017 CPD ¶ 47 at 2; *Vet Indus. Inc.*, B-419966, Oct. 6, 2021, 2021 CPD ¶ 338 at 2.

On February 8, Hawthorne filed the underlying protest with our Office. *Hawthorne Com. Constr., LLC, supra*. The protester asserted that the bid bond requirement for the seed project was unreasonable because the RFP did not initially include the bid bond requirement, and the amount of the bid bond (\$9 million) was too burdensome. Protest at 1. Hawthorne further explained that it understood that the RFP contained a bid bond requirement, but that it “could not risk a commitment for the seed project that [it] did not want” and, as a result, the firm “chose not to submit a bid bond.” *Id.*

On February 9, the VA requested dismissal of the protest. The VA argued that the protest constituted an untimely challenge to the terms of the RFP. Req. for Dismissal at 3. The VA explained that protests challenging the propriety of the terms of an RFP must be filed prior to the close of the solicitation period. *Id.* The VA then pointed out that Hawthorne did not challenge the reasonableness of the bid bond requirement before the December 13, close of the solicitation period, but rather delayed its challenge until its proposal was rejected. *Id.* at 4. Alternatively, the agency asserted that Hawthorne’s allegations were legally insufficient. *Id.* at 5.

On February 12, Hawthorne responded to the agency’s request. While the protester nakedly asserted that its protest was timely, see Resp. to Req. for Dismissal at 1, it did not offer any specific argument as to why the firm did not need to challenge the propriety of the bid bond requirement prior to the close of the solicitation period. Instead, Hawthorne largely explained that the VA added the bid bond requirement well after the RFP was originally issued on July 27, 2023, and that the firm had expended significant effort preparing its proposal under the impression that the bid bond was optional. Resp. to Req. for Dismissal at 2-6. The firm also argued that adding the bid bond requirement at such an advanced stage of the solicitation period was unreasonable. *Id.* at 6.

On April 4, we issued the underlying decision, wherein we agreed with the agency that the protest was untimely. *Hawthorne Com. Constr., LLC, supra* at 1. We explained that any alleged impropriety in the RFP must have been protested before the closing date for receipt of proposals. *Id.* at 2. We also explained that amendment 0016 made clear that “[t]o be considered for a MATOC, all offerors must submit a proposal and bid bond on the seed project.” *Id.* at 3. Thus, we dismissed the protest as untimely because Hawthorne did not file its protest before the December 13, closing date, but rather delayed filing its protest until after it learned that its proposal was rejected. *See id.*

Additionally, we pointed out that the protester had 26 days to file a protest with our Office between the issuance of amendment 0016 and the close of the solicitation period, and that the firm offered no argument as to why it did not challenge the bid bond requirement prior to the December 13, closing date. *Hawthorne Com. Constr., LLC, supra* at 3. Further, we noted that the protester was fully aware of the bid bond requirement and chose to submit a proposal it knew did not comply with the terms of the solicitation. *Id.*

On April 13, Hawthorne requested reconsideration of our decision, arguing that our decision contained an error. Req. for Recon. at 1-2.

DISCUSSION

Hawthorne argues that our decision incorrectly failed to apply the exception to our timeliness rule. According to Hawthorne, we overlooked the fact that the firm had only a four-day period to challenge the reasonableness of the bid bond requirement. In this regard, Hawthorne explains that the agency did not confirm that a bid bond was required until the VA responded to the offeror requests for information on December 6, and that the agency did not confirm the proposal due date until December 8. Req. for Recon. at 2. Thus, Hawthorne explains that it was excused from challenging the bid bond requirement prior to the December 13, close of the solicitation period because it had an insufficient amount of time to file a protest. *Id.*

Under our Bid Protest Regulations, a party requesting reconsideration must either show that our decision contains an error of fact or law, or present information not previously considered, that warrants reversal or modification. 4 C.F.R. § 21.14(a); *Triple Point Sec., Inc.--Recon.*, B-419375.2, Feb. 11, 2021, 2021 CPD ¶ 80 at 3. We have reviewed the request and conclude that our decision does not contain any error.

Put simply, the “short” period between when the agency issued its response to the offeror requests for information and the December 13, close of the solicitation period did not excuse Hawthorne from complying with our timeliness requirements. Although we recognize an exception to the requirement that a protest of the terms of a solicitation must be filed prior to the solicitation’s closing time when a protester faces extreme circumstances, such circumstances are not present here. See, e.g., *Ling Dynamic Sys., Inc.*, B-252091, May 24, 1993, 93-1 CPD ¶ 407 at 3 (protester learned basis for challenging solicitation only 2 hours before bid opening); *G. Davidson Co., Inc.*, B-249331, July 14, 1992, 92-2 CPD ¶ 21 at 2 n.1 (concluding that 2 hours and 45 minutes was not a reasonable period of time within which to file a protest); *The Big Picture Co.*, B-210535, Feb. 17, 1983, 83-1 CPD ¶ 166 at 2 (amendment received 1 day before bid opening).

Instead, the record shows that the agency incorporated the bid bond requirement on November 17, 2023, which was 26 days before the close of the solicitation period. Further, the record shows that the agency confirmed the bid bond requirement on December 6, which was a full week ahead of the proposal due date. Thus, we disagree with the protester that it faced extreme circumstances because it had more than only a few hours to file its protest. Compare *Washington Patrol Serv.*, B-228180, Sept. 30, 1987, 87-2 CPD ¶ 317 at 3-4 (concluding that 6 calendar days prior to bid opening was adequate time for protester to file a protest), with *Ling Dynamic Sys., Inc.*, *supra* (protester learned basis for challenging solicitation 2 hours before bid opening), *G. Davidson Co., Inc.*, *supra* (protester had 2 hours and 45 minutes to file protest), and *The Big Picture Co.*, *supra* (amendment received 1 day before bid opening).

Accordingly, we deny the request because our Office correctly did not apply the exception to our timeliness rule.

In any event, even if we were to find that the protester faced extreme circumstances, a protester must still challenge the alleged solicitation impropriety no later than 10 days from the time it knew or should have known of its basis for protest. *See, e.g., Ling Dynamic Sys., Inc., supra; The Big Picture Co., supra; G. Davidson Co., Inc., supra.* Here, Hawthorne did not file its protest by December 16, 2023, (*i.e.*, 10 days after the agency confirmed the bid bond requirement), but rather delayed filing until after it learned that its proposal was unsuccessful on February 8, 2024.

The request is denied.

Edda Emmanuelli Perez
General Counsel