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Decision

Matter of: Hamilton Pacific Chamberlain, LLC

File: B-422568.2

Date: August 14, 2024

P. Sean Milani-nia, Esq., and David Timm, Esq., Fox Rothschild LLP, for the protester. Brian R. Reed, Esq., Department of Veterans Affairs, for the agency. Heather Weiner, Esq., Dylan T. Silver, and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not an interested party to challenge agency's cancellation of solicitation where protester's bid was properly rejected as ineligible for award.

DECISION

Hamilton Pacific Chamberlain, LLC (HPC), a service-disabled veteran-owned small business (SDVOSB) of Waldorf, Maryland, protests the cancellation of invitation for bids (IFB) No. 36C25723B0061, issued by the Department of Veterans Affairs (VA) for the installation of new air handler units at the VA Medical Center in Amarillo, Texas. The protester contends that the VA did not have a compelling reason to cancel the procurement after opening bids and awarding the contract.

We dismiss the protest.

BACKGROUND

The IFB was issued as a set-aside for SDVOSB concerns. Agency Report (AR) Exh. 2, IFB at 1. After bids were opened, the VA determined that although HPC was the lowest bidder, it was not a small business under the relevant North American Industry Classification System (NAICS) code. Contracting Officer's Statement (COS) at 1. The agency awarded the contract to the next lowest bidder. *Id.* HPC subsequently filed a protest with our Office, contesting the award of the contract and the agency's size determination.

The agency reviewed the IFB in response to the protest and found that the solicitation was missing mandatory language from Veterans Affairs Acquisition Regulation (VAAR)

clause 852.219-75. COS at 2. In this regard, the solicitation included language instructing bidders that they needed to include a completed copy of the certification in clause 852.219-75 with their bids but did not include a copy of the certification.¹ As a result, none of the bidders had completed the Limitation on Subcontracting (LOS) certification contained in that clause. *Id.* The VA concluded that failure to submit the certification rendered all bidders ineligible for award and proposed to implement corrective action by cancelling the IFB and resoliciting the requirement. *Id.*; Memorandum of Law (MOL) at 2. Based on the agency's representation that it would cancel the IFB, we dismissed HPC's protest of the underlying award as academic. *Hamilton Pac. Chamberlain, LLC*, B-422568, May 13, 2024 (unpublished decision). HPC then filed this protest objecting to the proposed cancellation of the IFB.

DISCUSSION

HPC contends that the agency's cancellation of the IFB is contrary to the terms of Federal Acquisition Regulation (FAR) section 14.404-1, which sets forth the requirements for canceling an IFB.² Protest at 8-12. The protester further contends that if the agency were to proceed with the procurement, the only outcome in accordance with applicable procurement law would be award of the contract to HPC. *Id.* at 4-8. In response, the agency argues that it reasonably found HPC's bid ineligible for award under the current IFB and therefore HPC is not an interested party to challenge the proposed corrective action.

¹ Specifically, the solicitation provided the following:

[In accordance with] VAAR 852.219-75 each offeror will review the clause and complete the certificate included in the clause. This certificate will be complete prior to solicitation closing and submitted with the proposal, bid, or quote documents. Failure to comply with this requirement will result in removal from consideration for award.

IFB at 7.

² Section 14.404-1(e)(1) of the FAR provides that if an IFB is canceled for the reasons specified in subsections (c)(6) (all bids received are at unreasonable prices or the contracting officer cannot determine the reasonableness of the only acceptable bid received), (7) (bids were collusive or submitted in bad faith), or (8) (no responsive bid received from a responsible bidder) of FAR section 14.404-1, and the agency head authorizes completion of the acquisition through negotiation, the contracting officer shall proceed in accordance with subsection 14.404-1(f). Section 14.404-1(f) permits a contracting officer to negotiate in accordance with FAR part 15 and make award without issuing a new solicitation. In contrast, FAR section 14.404-1(e)(2) provides that if an IFB has been canceled for the reason specified, for example, in subsection (c)(10) (cancellation is in the public interest), the contracting officer shall proceed with a new acquisition.

After considering the arguments of the parties, the agency properly determined that HPC is not eligible for contract award under the current solicitation and thus HPC is not an interested party to protest the cancellation of the solicitation. We therefore dismiss the protest.

HPC's Eligibility for Award

As noted above, in response to HPC's initial protest, the agency found that the IFB was missing mandatory language from VAAR clause 852.219-75, and as a result, none of the bidders, including HPC, submitted the required LOS certification contained in that clause. As such, the agency concluded that the failure to submit this certification rendered all bidders, including HPC, ineligible for award under the IFB.

The protester disagrees with the agency's finding of ineligibility, arguing that the LOS certification requirement was satisfied by the IFB's inclusion of another VAAR clause. The protester also contends that the missing VAAR clause should be read into the contract by operation of the *Christian* doctrine, even though it was omitted from the IFB.

Based on our review, the agency properly found HPC's bid ineligible for award because it failed to include a signed LOS certification that complied with the requirements of 38 U.S.C. § 8127(l) and the applicable implementing regulations in the VAAR. Section 8127(l)(2) states that the Secretary of Veterans Affairs may award a set-aside contract for veteran-owned (and service-disabled veteran-owned) businesses "only after the Secretary obtains from the offeror a certification that the offeror will comply" with "[t]he requirements applicable to a covered small business concern under [15 U.S.C. § 657s]." *Id.* § 8127(l)(1)(A), (2). That certification must "(A) specify the exact performance requirements applicable" and "explicitly acknowledge that the certification is subject to [18 U.S.C. § 1001]." *Id.* § 8127(l)(2). Subpart 819.7004 of the VAAR, which implements the above statute, states that "a contracting officer may award a contract under this subpart only after obtaining from the offeror a certification that the offeror will comply with the limitations on subcontracting requirement as provided in the solicitation and which shall be included in the resultant contract." *Id.* 819.7004(b). As pertinent to this protest, LOS certification requirements impose substantial legal obligations on a contractor and are considered material solicitation terms. *Daniels Bldg. Co., Inc.*, B-421680, July 24, 2023, 2023 CPD ¶ 177 at 3. Without an appropriate certification, the agency may not award a contract. See 38 U.S.C. § 8127(l)(2).

The protester does not dispute the agency's interpretation that 38 U.S.C. § 8127(l)(2) conditions contract award on receipt of a bidder's LOS certification. See Comments at 7-10. Rather, HPC contends that the LOS certification requirement was satisfied by the inclusion of VAAR clause 852.219-73 in the IFB. Protest at 8-9; IFB at 50-53. HPC asserts that the language of VAAR clause 852.219-73 "functionally requires the same compliance" as VAAR clause 852.219-75. Protest at 8 n.4.

We disagree. As the agency explains, VAAR clause 852.219-75 addresses the requirements of 38 U.S.C. § 8127(l)(2). It specifies the "exact performance

requirements” which apply to the given contract. VAAR 852.219-75(a)(1)(i)-(iii) (directing contracting officer to check the box before the specific LOS which apply to the procurement); see § 8127(l)(2)(A).³ Clause 852.219-75 also requires the offeror to acknowledge that the certification is subject to 18 U.S.C. § 1001.⁴ VAAR 852.219-75(a)(2), (3)(iii); see 38 U.S.C. § 8127(l)(2)(B). Finally, it requires the bidder to complete and sign a certification acknowledging the above-described provisions. VAAR 852.219-75(d).

In contrast, VAAR clause 852.219-73 contains no such requirements. As its name (“VA Notice of Total Set-Aside for Verified Service-Disabled Veteran-Owned Small Businesses”) implies, it puts bidders on notice of the applicable LOS requirements, but it does not require signature or certification from the bidder acknowledging that those requirements apply. Moreover, it notifies bidders that certification requirements (like VAAR clause 852.219-75) with which bidders must comply may exist elsewhere in the contract.⁵ See VAAR 852.219-73(d). We agree with the agency that these differences distinguish VAAR clause 852.219-73 from the certification required by 38 U.S.C. § 8127(l)(2), and therefore, that the LOS certification required by VAAR clause 852.219-75 was not satisfied by the inclusion of VAAR clause 852.219-73 in the IFB.

Alternatively, the protester contends that VAAR clause 852.219-75 should be read into the contract by operation of the *Christian* doctrine, even though it was omitted from the IFB. Protest at 9; Comments at 7-8. As relevant here, the *Christian* doctrine provides for incorporation by law of certain mandatory contract clauses into otherwise validly

³ The protester argues that differences between the two clauses on this point are “nominal,” because VAAR clause 852.219-73 refers to LOS requirements in underlying regulations at 13 C.F.R. §§ 121.406(b) and 125.6 and summarizes the applicable LOS requirements. Protest at 8; Comments at 9. We disagree. A reference to generally applicable LOS requirements cannot satisfy the terms of § 8127(l)(2)(A). If it did, the word “exact” would be meaningless. See *Alaska Dep’t of Env’t Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004) (“[A] statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant.” (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001))).

⁴ The protester also argues that the “explicit acknowledgement” required by statute is achieved by the IFB’s inclusion of FAR provision 52.214-4, which states that “[t]he penalty for making false statements in bids is prescribed in 18 U.S.C. 1001.” Comments at 9. But like above, FAR provision 52.214-4 describes the consequences of making false statements in bids generally, whereas 38 U.S.C. § 8127(l)(2)(B) requires an acknowledgment specific to the certification.

⁵ The protester contends that VAAR clause 852.219-73(d) “integrates VAAR 852.219-75 by reference into the Solicitation.” Comments at 8. This is a strained reading of the clause, which states that a bidder “agrees to comply with the required certification requirements in this solicitation.” VAAR 852.219-73(d). If this language integrates anything, it is the requirement to certify, not the act of certification itself, which requires action by the bidder.

awarded government contracts; it does not stand for the proposition that provisions are similarly incorporated into solicitations. *ORBIS Sibro, Inc.*, B-418165.7 *et al.*, Apr. 12, 2021, 2021 CPD ¶ 167 at 5 n.10.

Based on our review, we find nothing improper regarding the agency's determination that HPC was ineligible for award. VAAR clause 852.219-75 by its own terms must be "completed, signed and returned with the offeror's bid" for that bid to be eligible for award. *Id.* 852.219-75(d); *see also* VAAR 819.7004(b)(1) (describing the means by which the LOS certification must be completed). Moreover, as discussed previously, 38 U.S.C. § 8127(l)(2) does not permit the VA to award a contract before it obtains the certification discussed here from a potential awardee.⁶ HPC did not complete the certification before submitting its bid, or at all. There is thus no validly awarded contract into which the clause could have been incorporated, and the incorporation would not render HPC's bid eligible for award.

In sum, the agency properly determined that HPC's bid is not eligible for award because it failed to include a signed LOS certification that complied with the requirements of 38 U.S.C. § 8127(l).

Interested Party

Finally, the protester argues that the agency has not complied with the terms of FAR section 14.404-1 in canceling the solicitation. The protester asserts several reasons FAR section 14.404-1 precludes the agency from cancelling the procurement: (1) the contract had already been awarded (albeit to a bidder other than the protester); (2) the agency did not determine in writing that the procurement should be cancelled; and (3) the failure to include VAAR clause 852.219-75 was not a compelling reason for cancellation. Protest at 9-12. In response, the agency requests dismissal of the protest, arguing that HPC is not an interested party to challenge the agency's corrective action. For the reasons discussed below, we agree with the agency and dismiss the protest on this basis.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). A protester is not an interested party if it would not be eligible to receive a contract award were its protest to be sustained. *Win Aviation, Inc.*, B-422037, B-422037.2, Dec. 21, 2023, 2024 CPD ¶ 12 at 6.

⁶ The protester also argues that the agency could "issue a bi-lateral modification to the Contract requesting that the awardee certify compliance" with the applicable LOS requirements. Protest at 9. This argument fails for the same reason; the agency cannot modify a contract to require a certification when it is not permitted to award the contract in the first place. *See* 38 U.S.C. § 8127(l)(2).

Here, we agree with the agency that HPC is not an interested party because it did not submit a signed LOS certification with its bid that complied with the requirements of 38 U.S.C. § 8127(l). In this regard and as discussed above, were we to sustain HPC's protest of the proposed cancellation, HPC would be ineligible for award. As such, HPC is not an interested party to challenge the agency's corrective action. See *Win Aviation, Inc.*, B-422037, B-422037.2, *supra* at 6; *cf. Hugo Key & Son; Alco Env't Servs., Inc.*, B-251053.4, B-251053.5, July 15, 1993, 93-2 CPD ¶ 21 at 5, 8 (protesters whose bids were properly rejected as nonresponsive under canceled solicitation are not interested parties to challenge cancellation since protesters would not be in line for award if protests sustained); *Municipal Leasing Sys., Inc.*, B-242648.2, May 21, 1991, 91-1 CPD ¶ 495 at 4 (protester is not an interested party to challenge the cancellation of the IFB where its bid was properly rejected as nonresponsive and therefore, protester would not be eligible to receive award under the solicitation even if we were to sustain its protest against the cancellation of the IFB).⁷

The protest is dismissed.

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General Counsel

⁷ We also note that, according to the agency, it has not yet canceled the solicitation. Agency Addl. Briefing at 4. Rather, the agency explains, "[a]t this point . . . the only action the contracting officer has taken is to suspend performance under the award that was made." *Id.* Until the agency takes steps to cancel the IFB, the protester's argument that the agency has not complied with the terms of FAR section 14.404-1 in canceling is premature.