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# Decision

**Matter of:** Veterans Contracting Group, Inc.

**File:** B-415747

**Date:** January 12, 2018

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Joseph A. Whitcomb, Esq., and Andrew R. Newell, Esq., Whitcomb, Selinsky, McAuliffe, PC, for the protester.

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## DIGEST

Protest is dismissed where the matter involved was the subject of litigation before a court of competent jurisdiction.

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## DECISION

Veterans Contracting Group, Inc. (VCG), a small business, of Mamaroneck, New York, protests the terms of invitation for bids (IFB) No. VA242-17-B-1221, issued by the Department of Veterans Affairs (VA), for a roof replacement at the Northport VA Medical Center in Northport, New York. The protester argues that the agency unreasonably failed to consider setting aside the procurement for service-disabled veteran-owned small business (SDVOSB) concerns. VCG further challenges the agency's decision to resolicit the requirement, rather than making award to the protester based on a prior, cancelled procurement.

We dismiss the protest.

## BACKGROUND

On June 16, 2017, the VA issued IFB No. VA242-17-B-0723 for roof replacement work at the Northport VA Medical Center. Request for Dismissal, exh. No. 1, Contracting Officer's Narrative Statement, at 1. The original IFB was set-aside for SDVOSB concerns. Id. The closing date for bids was July 28. Id.

On July 18, the Small Business Administration (SBA) sustained a size appeal challenging VCG's SDVOSB eligibility that was filed by a disappointed offeror on an unrelated procurement. See Veterans Contracting Grp., Inc. v. United States, 133 Fed. Cl. 613, 617 (2017). As a result of SBA's determination that VCG did not satisfy the SDVOSB eligibility requirements, the VA Center for Verification and Evaluation (CVE) notified VCG on July 21 that the firm would be removed from the agency's Vendor Information Pages (VIP) database, thus making the firm ineligible for participation in the SDVOSB program. Id. On July 28, VCG filed a bid protest with the United States Court of Federal Claims challenging the VA's decision to remove it from the VIP database and the underlying determination by SBA that the firm was ineligible to compete as a SDVOSB. Id.

Meanwhile, VCG and three other firms submitted bids in response to the roofing IFB by the July 28 deadline. Request for Dismissal, exh. No. 1, Contracting Officer's Narrative Statement, at 1. The contracting officer determined that two of the four bids, including the bid submitted by VCG, were ineligible for award because the firms were not certified SDVOSBs in the VIP database. Id. The agency then evaluated the two responsive bids and determined that the bids, which significantly exceeded the independent government estimate and funds budgeted by the agency for the project, were unreasonably high. Id., exh. No. 3, Contracting Officer's Determinations & Findings Memo. (Aug. 11, 2017), at 1. As a result, the agency decided to cancel the original IFB and re-solicit the requirement. Id. at 2. VCG subsequently amended its complaint before the Court of Federal Claims to protest the cancellation of the IFB. See Veterans Contracting Grp., Inc. v. United States, No. 17-1015C (Fed. Cl. Dec. 15, 2017), at 2.

On August 22, the Court of Federal Claims issued a preliminary injunction directing the VA to restore VCG to the VIP database of approved SDVOSB concerns pending resolution of the protester's request for a permanent injunction. Veterans Contracting Grp., Inc., 133 Fed. Cl. at 624. On October 30, the VA issued the IFB at issue, No. VA242-17-B-1221, for the identical roof replacement work as a small business set-aside. Request for Dismissal, Exh. No. 1, Contracting Officer's Narrative Statement, at 2. The VA subsequently received six bids in response to the new IFB, including from five small business concerns and one SDVOSB concern; VCG did not submit a bid. Id. at 2.

On November 29, VCG filed this pre-award protest with our Office challenging the agency's issuance of the new roofing IFB. The protester alleged that the agency unreasonably failed to follow the SDVOSB set-aside requirements of 38 U.S.C. § 8127(d), which requires a contracting officer on acquisitions conducted by the VA to set-aside procurements where the contracting officer "has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States." VCG also alleges that the cancellation of the original IFB and resolicitation using the new IFB were unreasonable because there was no compelling basis to reopen the competition after the previously submitted bids were opened.

On December 15, the Court of Federal Claims issued an opinion and order that made its August 22 injunction permanent. Veterans Contracting Grp., Inc., No. 17-1015C, at 11. The court, however, rejected the protester's contention that the cancellation of the roofing IFB was arbitrary and capricious, or that retroactive application of the permanent injunction, which would have required the agency to in effect award the resulting contract to VCG based on its lowest-priced responsive bid, was appropriate under the circumstances. As the court explained:

The contracting officer looked only to the fact that CVE had removed [VCG] from the VIP database and could not have known that CVE had acted arbitrarily. He followed the normal procedures for handling the procurement. Because [VCG] did not meet the requirements of a solicitation, it was ineligible to compete for the contract. With Veterans disqualified, the remaining responsive bids were sufficiently above the IGE that the officer had discretion to cancel and resubmit the solicitation. He did so. In short, there was a rational connection between the facts as the contracting officer understood them and the choices he made. By acting rationally and following the proper procurement procedures, he neither acted arbitrarily nor capriciously, and this court cannot overturn his decision.

Id. at 12 (internal citation omitted).

The court concluded that “[w]hile the court does not believe that retroactive injunctive relief sought by [VCG] is proper, the court does award [VCG] its reasonable bid preparation and proposal costs for the roofing solicitation.” Id.

## DISCUSSION

The VA requests dismissal of VCG's protest because the matters presented were the subject of the previous litigation before the Court of Federal Claims. VCG opposes dismissal because it contends that the matters protested before our Office are legally distinct from the matters litigated before the court. For the reasons that follow, we dismiss the protest.

With respect to VCG's protest allegation that the VA's cancellation of the original IFB and issuance of the present IFB are unreasonable, this matter clearly was the subject of litigation before the Court of Federal Claims and, therefore, is not appropriate for our consideration. Our Office will not consider a protest where the matter involved is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction. 4 C.F.R. § 21.11(b). As set forth above, VCG filed a complaint before the Court of Federal Claims that, among other matters, specifically challenged the agency's cancellation of the original roofing IFB and sought the same relief requested before our Office, namely, that the agency should have made award to VCG based on its bid submitted in response to the original IFB. The court specifically found that the agency's

cancellation of the original IFB was reasonable under the circumstances and rejected the protester's contention that the agency should have made award to VCG based on its bid submitted in response thereto. Veterans Contracting Grp., Inc., No. 17-1015C, at 12. Where, as here, the court's decision constitutes a final adjudication on the merits with respect to a procurement, it is conclusive and bars further consideration of the issue by our Office. Warvel Products, Inc., B-281051.5, July 7, 1999, 99-2 CPD ¶ 13 at 8.

Similarly, VCG's remaining allegation that the new IFB should have been set-aside for SDVOSB concerns also fails. As addressed above, 38 U.S.C. § 8127(d) requires that applicable procurements be set-aside where the contracting officer has a reasonable expectation of receiving two or more responsive bids or proposals at fair and reasonable prices. In this regard, the sole basis for VCG's protest allegation that the agency unreasonably failed to follow the applicable SDVOSB set-aside requirements was that the bids received in response to the initial IFB demonstrated a reasonable likelihood that the agency would receive two or more responsive and reasonable bids in response to a new SDVOSB set-aside procurement. Specifically, VCG contends, in its entirety, that:

The Original Solicitation provides definitively that the Rule of Two can and will be met here. Multiple SDVOSBs have already submitted final bids in response to a functionally identical solicitation earlier this year. It is difficult to understand how the VA could determine otherwise, or hope to justify such a determination.

Protest at 3.

As addressed above, however, the court found that the agency reasonably cancelled the original SDVOSB set-aside procurement because, setting aside the improperly excluded bid submitted by VCG, the remaining two bids from SDVOSB concerns were unreasonably high. Veterans Contracting Grp., Inc., No. 17-1015C, at 12. Thus, setting aside VCG's bid, the agency received no responsive bids at fair and reasonable prices in response to the original SDVOSB set-aside procurement. As explained above, our Office will not revisit this issue that was decided by the court.

Therefore, even assuming for the sake of argument that VCG's bid in response to the original IFB would have been found reasonable, the protest is devoid of any allegation, let alone evidence demonstrating that the agency had a reasonable expectation of receiving two or more responsive bids at fair and reasonable prices had it again set-aside this procurement for SDVOSB concerns. The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Cybermedia Tech., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated

be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3. Therefore, this protest does not include sufficient information to establish the likelihood that the agency in this case violated applicable procurement laws or regulations, and is dismissed.

The protest is dismissed.

Thomas H. Armstrong  
General Counsel