

United States Government Accountability Office
Washington, DC20548

Decision

Matter of: Goel Services, Inc.

File: B-310822.2

Date: May 23, 2008

Abiye Tibebe, Esq., Quagliano & Seeger, PC, for the protester.

Lawrence M. Prosen, Esq., and Joel S. Rubinstein, Esq., Bell, Boyd & Lloyd LLP, for Grunley Construction Company, the intervenor.

Timothy C. Tozer, Esq., General Services Administration, Public Buildings Service, for the agency.

Paula A. Williams, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that the agency failed to apply the Historically Underutilized Business Zone (HUBZone) price evaluation preference is denied where the solicitation did not include the HUBZone price evaluation preference; to the extent the protester argues that the preference should have been included in the solicitation, the protest is untimely as the protester did not challenge the terms of the solicitation until after the agency made an award.

DECISION

Goel Services, Inc. protests the award of a contract to Grunley Construction Company under invitation for bids (IFB) No. GS-11P-07-MKC-0093 issued by the General Services Administration (GSA) for construction services. Goel contends that GSA improperly failed to apply the HUBZone price evaluation preference to the bids received which prevented the firm from receiving the award.

We deny the protest.

The IFB, issued on September 6, 2007 and amended several times, called for the demolition and construction of a security screening area at a Department of State federal building in Washington, DC. By the October 18 bid opening date, the agency

received four timely bids.¹ The total bid prices were as follows: Sigal Construction Corporation, \$4,360,819; Grunley, \$6,507,000; Southern Insulation, \$6,532,000; and Goel, \$7,129,692. Sigal subsequently was authorized by the agency to withdraw its bid, and on January 16, 2008, award was made to Grunley. By letter dated that same day, the agency notified Goel of the award and this protest followed.

In its initial protest, Goel challenges the award to Grunley alleging that under Federal Acquisition Regulation (FAR) § 19.1308 the agency should have applied a 10 percent price evaluation preference for HUBZone firms such as itself, and argues that, with the preference, it would have been next in line for award. In answer to the protest, the agency advised Goel, and our Office, that the solicitation mistakenly failed to include the clause implementing the HUBZone price evaluation preference. Agency Request for Dismissal at 1. Goel replies that even if the solicitation did not include the clause, the agency was required to apply the price preference here.

We disagree. Given that the agency did not include the clause in its solicitation, the agency did not violate the terms of the solicitation by failing to apply the preference. In addition, despite the protester's arguments to the contrary, there is no requirement that mandatory provisions must be incorporated into solicitations by operation of law when they have been omitted. See American Imaging Serv., Inc.--Recon., B-250861.2, Jan. 5, 1993, 93-1 CPD ¶ 13 at 2 (involving a mandatory preference for small disadvantaged business concerns); see also Parsons Precision Prod., Inc., B-249940, Dec. 22, 1992, 92-1 CPD ¶ 431 at 6 (involving omission of a clause implementing the Prompt Payment Act).

Moreover, to the extent the protester is now arguing that the HUBZone price evaluation preference should have been included in the solicitation, the protest is untimely. Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based upon alleged improprieties apparent on the face of the solicitation, such as Goel's challenge to GSA's failure to include the HUBZone price evaluation preference in the solicitation,² must be filed prior to bid opening. See Bid Protest Regulations, 4 C.F.R. § 21.2 (a)(1) (2008). Applying this rule, Goel's protest is untimely since it was not filed before the October 18, 2007 bid opening date.

¹ GSA rejected as late a bid received from Biscayne Contractors, Inc. after being informed by Goel that it believed the Biscayne bid was late. Protester's Opposition to Agency's Request to Dismiss at 5. On November 16, 2007, Biscayne filed a protest with our Office which was subsequently withdrawn (B-310822).

² A contracting agency is required to include FAR § 52.219-4, notice of price evaluation preference for HUBZone small business concerns, in solicitations using full and open competition procedures. FAR § 19.1308(b).

Goel argues, however, that our regulations permit us to consider an untimely protest “for good cause shown” or where we determine that a protest raises issues significant to the procurement system. 4 C.F.R. § 21.2(c). We conclude that neither exception is appropriate here.

Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129 at 2. In order to prevent these rules from becoming meaningless, exceptions are strictly construed and rarely used. Id. The “good cause” exception is limited to circumstances where some compelling reason beyond the protester’s control prevents the protester from filing a timely protest. Dontas Painting Co., B-226797, May 6, 1987, 87-1 CPD ¶ 484 at 2. The significant issue exception is limited to untimely protests that raise issues of widespread interest to the procurement community, and which have not been considered on the merits in a prior decision. Schleicher Cnty. Corps. Ctr., Inc., B-270499.3 et al., Apr. 18, 1996, 96-1 CPD ¶ 192 at 7.

Here, Goel has offered no compelling reason for its failure to protest prior to bid opening, thus the “good cause” exception has no application. We also see nothing in the record to suggest that Goel’s protest issue is of widespread interest to the procurement community warranting its resolution in the context of an otherwise untimely protest. As a consequence, we decline to address this protest issue here.

Finally, we note that Goel raises another basis of protest for the first time in its March 4, 2008, opposition to the agency’s request for dismissal of the protest. Specifically, Goel states that the IFB included a price evaluation preference for small disadvantaged business (SDB) concerns on which Goel relied to its detriment. According to the protester, had the agency applied the statutorily required HUBZone 10 percent price evaluation preference that GSA “concededly failed to include in the [s]olicitation” or the SDB 10 percent price evaluation adjustment “erroneously included in the [s]olicitation, Goel would be the low responsive bidder” entitled to the award. Protester’s Opposition to Agency Request to Dismiss at 2, 3-7. However, the protester acknowledges, and GSA agrees, that the SDB price evaluation preference was erroneously included in this solicitation because the SDB preference does not apply to civilian agencies. FAR § 19.1102(a).

The protest is denied.

Gary L. Kepplinger
General Counsel