

SIZE PROTEST DEADLINES DO NOT APPLY IF AGENCY FLOUTS SEALED BIDDING PROCEDURES

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Agencies must strictly adhere to the procurement method as set forth in the Federal Acquisition Regulation (“FAR”). Failure to do so may result in a sustained protest. The FAR provides two principal methods of procurement, sealed bidding (Part 14 of the FAR) and contracting by negotiation (Part 15 of the FAR). Although the majority of the contract dollars awarded by the government are through negotiated procurement, sealed bidding is still quite important. The elements of sealed bidding leave very little room for discretion on the part of a contracting officer making an award, and are as follows:

- Agency prepares the solicitation, an Invitation for Bids (“IFB”), that describes the requirements clearly, accurately and completely
- Agency publicizes the IFB
- Offerors submit sealed bids to the agency by the time and date in the IFB
- Agency opens bids at the time and place stated in the IFB for the public opening of bids
- Agency prepares an abstract of bids received as soon as practicable after bid opening, and the abstract shall be available for public inspection. The abstract shows the name of each bidder, acceptance time, business size, each contract item, quantity and price, and delivery time, taken from the bids themselves.
- Bids are evaluated without discussions.
- Agency makes award with reasonable promptness to that responsible bidder whose bid conforms to the IFB and is most advantageous to the government, considering only price and price related factors (usually transportation to delivery point) in the IFB. (Essentially, the lowest price conforming bid submitted by a responsible bidder shall receive award).
- Within 3 days of contract award, the Agency must notify each unsuccessful bidder in writing or electronically that its bid was not accepted.

The Small Business Administration (“SBA”) Office of Hearings and Appeals (“OHA”) recently considered a size appeal involving a sealed bidding procurement. *Size Appeal of Penn Enterprises*, Size Determination No. 04-2018-036. The Army held a public bid opening (fourth bullet above) on May 8, 2018, but attendance was not mandatory. On May 9, 2018, Penn Enterprises, a bidder, contacted the Army and requested the name and amount of the low bidder. Having received no response, Penn inquired again on May 21, 2018, and Army stated that it would “provide the information soonest” but did not provide it. Penn requested the information again on May 29, 2018, and the Army finally provided the abstract of bids (fifth bullet above). Penn filed a size protest on June 4, 2018, alleging that the low bidder was a large business and ineligible for award. The Area office of the Small Business Administration dismissed the protest because size Protests must be filed by the fifth business day after bid opening. 13 C.F.R. § 121.1004; FAR 19.302(d)(1).

OHA disagreed, noting that attendance at the bid opening was not mandatory, and the Army failed to follow the procedures in FAR 14.403 to complete and certify the bid abstract “as soon as possible” after bid opening, and make it available for public inspection. OHA noted that Penn

constantly requested information from the Army as to the identity of the low bidder, but the Army did not furnish that information until May 29, 2018. OHA noted that based on *NEIE Med. Waste Servs, LLC*, SBA No. VET-141 (2008), Penn's situation meets OHA's precedent establishing an exception to the timeliness requirement, when a procuring agency fails to follow sealed bid procedures in the FAR. Here, Penn's protest was timely because it was submitted within 5 days of being notified of the identity of the lowest bidder.

The takeaway: Contracting Officers and SBA Area offices should carefully examine whether Agencies have complied with sealed bid procedures in FAR Part 14 when considering timeliness of a size protest. When an agency ignores or fails to comply with the FAR's sealed bid procedures for making information available, the regular size protest deadline (within 5 days after bid opening) is no longer operative.

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