

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
ITS, Inc.) ASBCA No. 52802
)
Under RFP No. 244-97-0018-JLB)

APPEARANCE FOR THE APPELLANT: Ms. Phyllis P. Egan
President

APPEARANCE FOR THE GOVERNMENT: Gary Fahlstedt, Esq.
Assistant Regional Counsel
Department of Health & Human Services
Region VIII
Denver, CO

OPINION BY ADMINISTRATIVE JUDGE STEMLER

Appellant, ITS, Inc., appeals a final decision issued by the Department of Health and Human Services, Department of Indian Health Service (“IHS”), which denied appellant’s claim for costs incurred in connection with a solicitation that was canceled before a contract award was made. IHS has moved to dismiss the appeal for lack of jurisdiction. It argues that the appeal, in the nature of a bid protest, does not arise from or relate to a contract pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended. We grant IHS’s motion and dismiss the appeal.

STATEMENT OF FACTS

1. The process which led to issuance of the subject RFP commenced on 14 August 1997, when a representative of the Small Business Administration (SBA) contacted IHS’s Billings, Montana, area office and asked IHS to identify requirements that might be suitable for performance by appellant pursuant to Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (app. R4 supp., tab 17). On 3 September 1997, appellant submitted an unsolicited proposal to Mr. Jerry Black, an IHS contracting officer. In its proposal, appellant informed IHS of its recent section 8(a) certification and offered to provide CT scanning services in two Montana IHS clinics. (R4, tab 10)

2. After receiving appellant’s unsolicited proposal, IHS’s Billings office notified SBA by letter dated 8 October 1997 of its intent to award a contract to ITS on a sole-source basis. That letter - which did not list appellant as an addressee or recipient - provided in its entirety as follows:

Pursuant to Section 8(a), of the Small Business Act (15 U.S.C. 637(a)), the Billings Area Indian Health Service is offering to contract with ITS Inc., 305 West Mercury, Butte, Montana 59701, through the 8(a) program. The proposed contract is to provide the following medical services:

1. CT scanner service, this includes all equipment, interpretation to a radiologist
2. Maintenance
3. Training
4. Installation

Our intent is to award a fixed-price contract to perform the above referenced services at the PHS Indian Hospital in Crow Agency and the PHS Indian Hospital in Browning, Montana.

In accordance with FAR Subpart 19.102, the Standard Industrial Classification (SIC) Code for this acquisition is 8099. The magnitude is estimated at approximately \$168,000 per year, with a base year and four option years totaling approximately \$840,000.

Enclosed is a copy of the specifications for the above referenced acquisition.

If you have any questions, please call Mr. Jerry L. Black, Senior Contract Specialist, at (406) 247-7252.

(R4, tab 11) By letter dated 10 October 1997, SBA authorized IHS to negotiate directly with appellant, reserving the right to approve the terms and conditions of any proposed contract. There is no evidence that SBA ever delegated contracting authority to IHS, permitting IHS to contract directly with ITS. (R4, tab 12)

3. Between 5 November 1997 and January 1998, appellant and IHS conducted active negotiations as they attempted to agree on a statement of work for delivery of CT scanning services at the two IHS clinics (R4, tabs 14 through 16). On 23 February 1998, IHS finalized a statement of work and issued the RFP that is the subject of this appeal (R4, tab 2; app. R4 supp., tab 11). Appellant submitted its initial response to this RFP on 2 April 1998 (R4, tab 18). On 17 April 1998, IHS forwarded an amended version of the RFP to appellant, and requested that appellant furnish its Best and Final Offer (BAFO) by close of

business 22 April 1998, which deadline was later extended to 24 April 1998 (R4, tabs 19, 22). On 22 April 1998, the parties conducted negotiations relating to the RFP via telephone (R4, tab 20). Appellant submitted its initial BAFO to IHS on 23 April 1998 (R4, tab 22).

4. On or around 12 May 1998, Mr. Donal Raymond, an official employed by IHS's Office of Health Care Programs, forwarded to IHS's contracting officer a memorandum stating that he was "unable to complete" a technical evaluation on the BAFO as submitted, noting the need for substantial additional information to demonstrate compliance with IHS's statement of work (R4, tabs 23, 24). At IHS's request, appellant submitted additional information to supplement its BAFO in an attempt to make the necessary clarifications (R4, tab 27).

5. Mr. Raymond submitted his analysis on appellant's revised BAFO to IHS's contracting officer by memorandum dated 21 July 1998. In that memo, Mr. Raymond stated that appellant's BAFO, as revised and clarified to date, did not demonstrate compliance with the RFP in two areas, Space Requirements and Power Requirements. Mr. Raymond's memorandum went on to state as follows:

Upon consultation with the Service Unit Directors at Browning and Crow Agency, it is their wish to cancel the contract request. The Browning facility will be going through a multi-million dollar renovation in the near future and does not wish to spend any funds for construction at this time. The Crow facility does not have any additional space to dedicate to this project or funds for construction.

(R4, tab 29)

6. By letters to IHS's contracting officer dated 21 July 1998 and 12 August 1998, appellant expressed its concern regarding IHS's lack of progress in awarding a contract pursuant to the RFP, and requested an expedited response to its proposal (R4, tabs 30, 31). By letter dated 16 October 1998, IHS's contracting officer notified appellant that IHS had decided to cancel the RFP in its entirety, based on the reasons set forth in Mr. Raymond's memorandum dated 21 July 1998 (R4, tab 3).

7. By letter to IHS's contracting officer dated 8 September 1999,* appellant submitted a claim seeking \$240,237 for: (1) bid and proposal costs incurred in connection with the RFP; and (2) revenues appellant estimated it would have received during the first year of performance under a contract awarded pursuant to the RFP (R4, tabs 5, 7).

* The record does not reflect that this claim was certified pursuant to the CDA.

8. By letter dated 6 March 2000, IHS issued a contracting officer's final decision denying appellant's claim *in toto* (R4, tab 1). Appellant filed a timely appeal with this Board, and the Government moved to dismiss on the grounds that we lack jurisdiction.

DECISION

Our jurisdiction arises from the Contract Disputes Act of 1978, as amended, which gives us the authority to hear only those disputes arising from or relating to a contract. This provision limits our jurisdiction "to express or implied contracts for the procurement of services and property and for the disposal of personal property." *Coastal Corporation v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983). We therefore lack jurisdiction over an appeal filed in connection with a solicitation that was canceled before award. *See Coastal, supra; Ammon Circuits Research*, ASBCA No. 50885, 97-2 BCA ¶ 29,318; *RC 27th Avenue Corporation*, ASBCA No. 49176, 97-1 BCA ¶ 28,658; *Julian Freeman, M.D.*, ASBCA No. 42130, 91-2 BCA ¶ 23,772. Here, the solicitation was cancelled before award. Accordingly, appellant's appeal must be dismissed.

CONCLUSION

Because no contract between the parties existed, we lack jurisdiction to consider the appeal. The Government's motion is granted, and the appeal is dismissed for lack of jurisdiction.

Dated: 7 December 2000

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 52802, Appeal of ITS, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals