

**United States Small Business Administration
Office of Hearings and Appeals**

CVE Protest of:

Fidelis Design & Construction, LLC,

Protester,

Re: Andros Contracting, Inc.

Solicitation No. 36C24419B0042

U.S. Department of Veterans Affairs

SBA No. CVE-143-P

Decided: November 21, 2019

APPEARANCES

Richard B. Bennett, President, Fidelis Design & Construction, LLC, Bridgeport, Pennsylvania

Megan C. Connor, Esq., PilieroMazza PLLC, Washington, D.C., for Andros Contracting, Inc.

Everett E. Shaver, Jr., Contracting Officer, U.S. Department of Veterans Affairs, Pittsburgh, Pennsylvania.

DECISION

I. Background

On July 3, 2019, the U.S. Department of Veterans Affairs (VA) issued Invitation for Bids (IFB) No. 36C24419B0042 for a construction project at the Corporal Michael J. Crescenz VA Medical Center in Philadelphia, Pennsylvania. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs). Bids were opened on August 21, 2019, and Andros Contracting, Inc. (Andros) was the lowest bidder. On September 19, 2019, the CO awarded the contract to Andros.

On October 16, 2019, a disappointed bidder, Fidelis Design & Construction, LLC (Protester), filed a protest challenging Andros's status as an SDVOSB. The CO forwarded the

protest to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA).¹

On October 24, 2019, Andros moved to dismiss the protest as untimely. Andros contends that, in a sealed bid procurement such as found here, “all bidders learn the identity of the apparent awardee at the bid opening based on the lowest-price bid.” (Motion at 2.) Protester's President personally attended the bid opening for the instant procurement. (*Id.* at 1 and Exh. A.) Thus, Protester knew or should have known, at bid opening on August 21, 2019, that Andros was the apparent awardee. Pursuant to 13 C.F.R. § 134.1004(a)(2)(i), any status protest was due within five business days, or by August 28, 2019. (*Id.* at 2-3.) Protester did not actually submit its protest until nearly two months later, so the protest is untimely.

On October 30, 2019, the CO responded to Andros's motion. The CO agrees with Andros that “Protester attended bid opening and had knowledge on that date of [the] apparent awardee.” (CO's Response at 1.) Based on 13 C.F.R. § 134.1004(a)(2)(i), the protest should be dismissed as untimely. (*Id.*)

On October 30, 2019, Protester opposed Andros's motion. Protester argues that, at the time of bid opening, there could have been additional bids in VA's mailroom that had not yet been transmitted to VA procurement staff. (Protester's Opp. at 1.) As a result, Protester could not have been certain that Andros was the low bidder.

On October 31, 2019, Andros requested leave to reply to Protester's Opposition and submitted its proposed Reply. A reply is warranted, Andros contends, to address Protester's new argument concerning possible additional bids. Accordingly, for good cause shown, Andros's request to reply to Protester's Opposition is GRANTED. 13 C.F.R. § 134.211(c).

In its Reply, Andros highlights that, on August 26, 2019, the CO issued Amendment 0003 to the IFB, which contained an abstract of all bids received. “[I]f there had been any additional bids in ‘the mailroom’, the VA would have listed these bidders on the Abstract.” (Reply at 2.) At the very latest, then, Protester knew that Andros was the apparent awardee by August 26, 2019, and its protest filed on October 16, 2019 is untimely. (*Id.*)

II. Discussion

I agree with Andros and the CO that the instant protest is untimely. Under 13 C.F.R. § 134.1004(a)(2)(i), an SDVOSB status protest must be filed within five business days after the protester learns the identity of the apparent awardee. An untimely protest must be dismissed. 13 C.F.R. § 134.1004(a)(4). Here, bid opening occurred on August 21, 2019, and Protester would have been aware at that point that Andros was the low bidder and apparent awardee. Section I, *supra*. Protester filed its protest almost two months later, on October 16, 2019, so the protest is plainly untimely.

¹ OHA adjudicates SDVOSB status protests pursuant to 38 U.S.C. § 8127(f)(8)(B) and 13 C.F.R. part 134 subpart J.

In its opposition to Andros's motion, Protester maintains that it need not have filed its protest within five business days after bid opening, because there was a possibility at that time that additional bids might surface. Protester, though, cites no authority for this proposition, and in any event, Protester would have been aware of the complete set of bids received when the abstract was published on August 26, 2019. Even assuming, for sake of argument, that Protester's window to file a status protest began on August 26, 2019 rather than on August 21, 2019, the instant protest was not filed until October 16, 2019, and therefore would still be untimely.

III. Conclusion

For the above reasons, Andros's motion is GRANTED and the protest is DISMISSED. This is the final agency action of the U.S. Small Business Administration. 38 U.S.C. § 8127(f)(8)(B); 13 C.F.R. § 134.1007(b).

KENNETH M. HYDE
Administrative Judge