



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gardy McGrath International, Inc.

File: B-231913

Date: September 29, 1988

DIGEST

Protest of the necessity for and terms of a solicitation amendment is dismissed as untimely when not filed prior to the next closing date for the receipt of proposals.

DECISION

Gardy McGrath International, Inc., protests the award of a contract to Mobile Video under request for proposals (RFP) No. N00600-87-R-6309, issued by the Department of the Navy to procure audiovisual services for the United States Naval Academy.

We dismiss the protest.

The RFP was issued on November 30, 1987, and provided, in section M, that the award would be made to the lowest priced, technically acceptable offeror. The RFP required a company to offer a fixed price to supply all labor, equipment, tools, materials, supervision and other items or services needed to provide the described effort.

The Navy received seven offers, evaluated the technical proposals, placed four in the competitive range, held discussions with those four offerors, and requested best and final offers. After best and final offers were evaluated, only Gardy and Mobile Video remained in the competitive range.

In subsequently reviewing the final cost proposals, the evaluators became concerned that offerors did not include costs for all the necessary supplies and materials listed in Technical Exhibit 7.4, which was entitled "Historical Materials/Supplies (Annual Average)." The Navy determined that the offerors may have misinterpreted RFP amendment No. 6, which stated that, historically, approximately \$15,000 per year was spent on audiovisual parts, repairs and

supplies; the Navy thought that offerors might have viewed the amendment as providing the historical cost data for all the items listed in Technical Exhibit 7.4 when, in fact, amendment No. 6 provided the costs for the items on only two of the exhibit's seven pages. As a result, on May 26 the Navy issued amendment No. 9, which required Mobile Video and Gardy (the offerors remaining) to include \$70,000 as a not-to-exceed amount for materials, and which requested each offeror to submit a second best and final offer by May 27. The best and final cost offers were \$1,118,515 for Mobile Video and \$1,259,251 for Gardy, and the Navy therefore awarded the contract to Mobile Video as the lower priced, technically acceptable offeror.

By letter dated June 15, 1988, Gardy submitted a protest to the Navy. Gardy argued that: (1) amendment No. 9, by providing a not-to-exceed amount for materials, in effect converted part of the contract from a fixed-price to a cost reimbursement one, so that the Navy should have included in the selection decision a relative assessment of the technical proposals instead of awarding the contract on the basis of cost; (2) amendment No. 9 was not necessary because it was clear from the solicitation that amendment No. 6 did not cover the cost of all materials listed in Technical Exhibit 7.4; and (3) if there was a need to include a not-to-exceed amount for materials, a not-to-exceed amount also should have been provided for overtime. The Navy denied the protest by letter dated June 29.

Gardy filed its protest with our Office on July 7. Gardy reasserts its position that the award should not be based on cost and that a not-to-exceed amount should have been included for overtime. Gardy also complains that if Mobile Video did not include costs for all the necessary materials, its offer should be rejected as nonresponsive.^{1/}

Under our Bid Protest Regulations, a protest based on an alleged solicitation impropriety that is incorporated into the RFP after it was issued must be filed with our Office,

^{1/} Gardy also initially alleged that the Navy was required to evaluate the proposals on a "greatest value" basis in accordance with Office of Federal Procurement Policy Letter No. 3. The agency responded to Gardy's protest in a report explaining why this was not so, and in its further comments, Gardy did not attempt to rebut the Navy's position. We therefore consider the issue abandoned and we will not consider it on the merits. See Spectrum Analysis & Frequency Engineering, Inc., B-222554, Aug. 1, 1986, 86-2 CPD ¶ 136.

or with the contracting agency, no later than the next established closing date for the receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1988). If a protest was filed initially with the contracting agency, any subsequent protest to our Office will be considered timely only if the agency-level protest was filed in accordance with this requirement. 4 C.F.R. § 21.2(a)(3).

Gardy filed its protest with the Navy on June 15. When amendment No. 9 was issued on May 26 with a closing date of May 27, however, it was clear that the Navy intended to award the contract to the lower-priced, technically acceptable offeror--amendment No. 9 specified that the evaluation factors in section M remained unchanged and that cost would be evaluated using \$70,000 as the cost of materials. It was also clear from amendment No. 9 that a not-to-exceed amount was not included for overtime. Consequently, Gardy was required to protest these issues by May 27.

Further, Gardy's protest is untimely on these issues even if we conclude that the 1 day afforded to respond to amendment No. 9 did not give Gardy sufficient time to file a pre-closing date protest. The only other timeliness rule in our Regulations (for protests that do not involve apparent solicitation improprieties) requires filing within 10 working days after the protester knows or should know the protest basis. 4 C.F.R. § 21.2(a)(2). At the latest then, Gardy should have protested within 10 working days after the closing date, that is, by June 11.

Accordingly, we dismiss the protest on these matters as untimely. In doing so, we point out that we will not consider an untimely protest even where, as here, the procuring agency has issued a decision on the merits. See Industrial Pump and Compressor, Inc., B-229975.2, Feb. 10, 1988, 88-1 CPD ¶ 137.

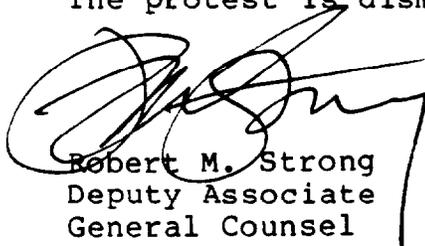
Gardy also asserts that it correctly interpreted amendment No. 6 to include all the material costs required by Technical Exhibit 7.4, so that the only reason for issuing amendment No. 9 was that Mobile Video, the only other offeror in the competition at that point, must have misread the amendment. Gardy protests that the Navy, instead of giving Mobile Video the chance to correct its error, should have rejected the firm's proposal as nonresponsive.

This issue is untimely also. In its protest, Gardy acknowledges that it was informed, prior to May 26 when amendment No. 9 was issued, that the Navy intended to amend the RFP because the agency was concerned that the proposals

submitted did not include all the material costs. Under the same analysis set forth above, any protest of the propriety of issuing amendment No. 9 therefore had to be filed by May 27 or, at the latest, by June 11. 4 C.F.R. § 21.2(a)(2). No complaint about the necessity for the amendment was raised until Gardy filed its protest with the Navy on June 15, however.

In any case, the concept of responsiveness is not technically applicable in a negotiated procurement. CDA Inc., B-224971, Feb. 13, 1987, 87-1 CPD ¶ 163. Instead, the issue is whether the proposal submitted by Mobile Video should have been rejected as technically unacceptable because the Navy questioned whether the firm included all the material costs in its proposal. Since the Navy determined that the reason for any omission of costs was that amendment No. 6 caused the solicitation to be ambiguous, and because we have no reason to question this position, the Navy was not required to reject Mobile Video's proposal.

The protest is dismissed.



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