



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Seer Publishing, Inc.
File: B-237359
Date: February 12, 1990

E. Gene Wade, Esq., for the protester.
Dario DeAngelo, Forest Service, Department of Agriculture,
for the agency.
Peter A. Iannicelli, Esq. and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protest alleging that provisions in request for proposals (RFP) are overly restrictive and favor a particular offeror is untimely where the alleged RFP defects were apparent prior to the closing date for receipt of initial proposals but the protest was not filed with either the contracting agency or the General Accounting Office until well after the closing date.
2. Agency properly rejected late hand-carried proposal where the record establishes that the protester delivered the proposal to the depository room after the closing time; shows no evidence of wrongful government action or advice that caused the proposal to be delivered late; and reflects that the protester's own actions were the cause of the late delivery.

DECISION

Seer Publishing, Inc. protests award of a contract to any other offeror under request for proposals (RFP) No. R4-89-13, issued by the Forest Service, United States Department of Agriculture, to obtain an electronic, video-based recreational opportunity guide to market and promote outdoor recreation opportunities offered on government-administered lands throughout Utah. Seer contends that the RFP is unduly restrictive of competition because it contains a number of requirements that favor a particular offeror. Seer also asserts that the Forest Service improperly refused to

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consider Seer's offer because, according to Forest Service personnel, the offer was received after the time set in the RFP for receipt of initial proposals.

We deny the protest.

Issued on August 4, 1989, the RFP requested offers to provide services relating to compiling and updating a database for the proposed recreational opportunity guide, designing a network system so that the public can garner information about the recreation areas, providing hardware where necessary, and training government personnel in the use of the system, among other things. The RFP contemplated award of a fixed-price contract for a period of 1 year with options for 4 additional years and required that initial offers be submitted to the Forest Service by September 11 at 2 p.m., local time.

The president of Seer attempted to submit the firm's initial proposal by the time set for closing, but the Forest Service official to whom he handed the proposal told him that it was late. The Forest Service official then took the proposal from the president and wrote her initials and the following notation on the face of the envelope containing the proposal:

"late proposal
recd 1401 09/11/89"

Seer states that its president returned to the Forest Service office to talk to the contracting officer to lodge an informal protest and to see if there was anything Seer could do to get the contracting officer to consider the offer. According to Seer, the contracting officer initially stated that the offer would be considered, but later that same day the contracting officer notified Seer that the firm's offer was late and would not be considered.

By letter of September 14, Seer filed a protest with the Forest Service alleging only that the contracting officer had improperly rejected its proposal as late. By letter of September 28, the contracting officer denied the protest. On October 10, Seer filed its protest in our Office, alleging both that the RFP was overly restrictive and therefore favored a particular firm and that the rejection of its offer as late was improper.

Seer protests that a number of the requirements set forth in the RFP are overly restrictive because they give a competitive advantage to a particular offeror, Utah Information Network (UIN). For example, the protester

asserts that one RFP provision requires the contractor to collect data from various sources for inclusion in the guide and to secure legal authorization to use such materials. According to the protester, one obvious source of information would be the Utah Travel Council, an entity with which UIN is affiliated. Seer does not explain why this would give UIN a competitive advantage, but, presumably, the advantage arises because UIN already has permission to use materials obtained from the Utah Travel Council, or can get permission more easily and at a lower cost than can firms that are not affiliated with the Utah Travel Council.

We find Seer's protest that the RFP provisions are overly restrictive and favor UIN to be untimely. Under our Bid Protest Regulations, protests based upon improprieties in a solicitation that are apparent prior to the closing date for receipt of initial proposals must be filed before the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1989). Here, all of the alleged RFP defects were apparent from the RFP, but Seer did not file a protest alleging that the RFP was defective until well after the September 11 closing date. Accordingly, we will not consider these arguments further.

The balance of Seer's protest concerns the allegation that the Forest Service improperly rejected Seer's proposal as late. At the protester's request, we held a conference to discuss the merits of the protest; to determine whether Seer's hand-carried proposal was delivered after the time set for closing; and, if in fact the proposal was submitted late, to determine whether the Forest Service's wrongful or improper actions were the paramount cause of the offer being submitted late. Based upon the evidence adduced at the conference and the written record, we find that: (1) Seer's proposal was submitted after the time set for receipt of initial proposals; (2) there were no wrongful or improper actions by Forest Service personnel that caused the Seer proposal to be submitted late; and (3) Seer caused the late delivery of its proposal by failing to allow sufficient time to deliver the proposal to the designated depository by the 2 p.m. closing.

The Forest Service reported that the designated depository, room 4411, is actually a large room which has several doors and is divided into several cubicles used by various employees of the contracting activity, including the contracting officer. The contracting officer was engaged in a meeting shortly before closing, and another Forest

Service employee was designated as bid opening officer.^{1/} The bid opening officer stated that just 4 or 5 minutes before 2 p.m., she checked the hall outside room 4411 and ascertained that no potential offerors were there. She then looked at the wall clock in room 4411, observed that it was 2 p.m., and announced that the RFP was closed. After an additional moment's delay looking for the key to the library, she was about to leave the room when she noticed the president of Seer for the first time standing in the room with an envelope in his hand. She asked him if it was an offer, and, when he stated that it was, she told him that the RFP was officially closed and that his offer was late. She then initialed the envelope containing the offer and noted the time as 2:01 p.m. The Forest Service acknowledges some initial confusion as to whether the Seer proposal could properly be considered, but ultimately determined that, in accord with Federal Acquisition Regulation § 15.412(c), the offer could not be considered.

During the conference on the protest, the president of Seer recounted his actions on September 11, the closing date, as follows. He was delayed in leaving his office to submit Seer's proposal to the Forest Service, because his accountant had mailed him information for inclusion in the proposal and the mail still had not been received about 1 hour before the 2 p.m. closing time. The president searched around the neighborhood to find the postman and get the mail before he left for the Forest Service. Seer's president arrived in front of the Forest Service building at 1:58 p.m., parked illegally, and entered the building. As there was no time to look for a directory of offices, the president climbed the stairs to the second floor where he asked someone where the contracting officer's office was. He was directed to the 4th floor and entered the depository room through a door marked room 4404. In an effort to find the contracting officer, he passed the bid opening officer's cubicle. When he could not locate the contracting officer, he returned to the desk nearest the door he had originally entered, and waited for the bid opening officer and another Forest Service employee to finish their conversation. The bid opening officer then asked him if that was a proposal in his hand, and upon his affirmative reply, she told him it was late.

^{1/} While this was a negotiated procurement, the Forest Service used sealed bidding terminology to describe the events of September 11. Thus, this official was called a bid opening officer even though she was accepting initial proposals.

Seer first argues that the Forest Service should be required to consider its proposal because there was no depository or receptacle of any kind in room 4411. Seer asserts that, because the RFP stated that hand-carried offers "will be received . . . in the depository located in Item 7," there should have been a depository or box of some kind located in room 4411, which was the office specified in RFP item 7. Seer concludes that, as there was no box in the room, no offeror could have complied with the strict requirements of the RFP, and, therefore, all offers must be considered. Furthermore, the protester argues that all offerors were necessarily delayed in presenting their offers when they looked for a receptacle which was not there or when they, like Seer's president, went to look for the contracting officer. Seer also contends that the Forest Service offices were not clearly marked with their individual room numbers so that Seer's president was caused additional delay trying to find room 4411. We find Seer's arguments unpersuasive.

It is the responsibility of the offeror to deliver its proposal to the proper place at the proper time, and late delivery generally requires that a proposal be rejected. See Robert R. Nathan Assocs., Inc., B-230707, June 28, 1988, 88-1 CPD ¶ 615. By choosing a method of delivery other than those methods specified in the late proposal clause (registered mail, certified mail or telegram where authorized), an offeror assumes a high degree of risk that its proposal will be rejected if untimely delivered. Systec, B-209483, Apr. 8, 1983, 83-1 CPD ¶ 374. The reason for the rules governing late proposals is that the manner in which the government conducts its procurements must be subject to clearly defined standards that apply equally to all offerors so that fair and impartial treatment is ensured. Robert R. Nathan Assocs., Inc., B-230707, supra.

Here, the RFP included the standard late proposals clause, Federal Acquisition Regulation (FAR) § 52.215-10, which states that, generally, any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered. The clause also states that the only acceptable evidence to establish the time of receipt at the government installation is the time/date stamp of that installation or other documentary evidence of receipt maintained by the installation.

The RFP specifically listed the depository for receipt of hand-carried offers as "USDA Forest Service, 324 25th Street, Room 4411, Ogden, Utah." This did not mean that a box had to be in the room as Seer contends. Rather, it should have been clear to Seer that delivery was to be made

to room 4411, where Forest Service employees would accept proposals. The record shows that there were at least two employees in room 4411 at all times just before and after the closing time of 2 p.m., and that the Forest Service representatives were vigilant in looking for offerors and accepting offers.

Moreover, both FAR § 52.215-10, the standard late proposals clause in the RFP, and FAR § 15.412(c), entitled "Late proposals and modifications," specifically state that offers are to be received in the "office" designated in the solicitation by the closing time. Thus, it should have been clear to Seer that room 4411 itself was the depository and that there was no need to look for the contracting officer. Regarding Seer's charge that the room numbers were poorly marked, the evidence proffered at the conference showed that not only was the room number marked on each door, but also above each door.

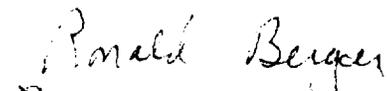
In her affidavit and at the conference, the bid opening officer stated that, after ascertaining from the wall clock, above her cubicle, labeled "Official Bid Opening Clock," that it was 2 p.m., she announced that the procurement was closed at least 1 minute before she even saw Seer's president in the area of room 4411. The Forest Service produced two other employees who were in the room, both of whom confirmed that they heard the bid opening officer close the procurement before they saw Seer's president deliver the proposal to the bid opening officer. There is no evidence that any of these employees had any reason to try to exclude Seer's bid. Thus, we see no reason to doubt the veracity of the three Forest Service representatives in this case. Based upon the statements of all of the witnesses, and because the bid opening officer marked and initialed the envelope in a manner that indicated that the proposal was received at 2:01 p.m., we conclude that the proposal was late. See International Steel Erectors, B-233238, Feb. 13, 1989, 89-1 CPD ¶ 146; Robert R. Nathan Assocs., Inc., B-230707, supra.

While Seer challenges the accuracy of the clock used by the bid opening officer, we have held that, unless it is shown to be unreasonable, the contracting official's declaration that a procurement is closed is determinative. See Gull's, Inc., B-232599, Jan. 25, 1989, 89-1 CPD ¶ 74. Moreover, the Forest Service reported that the official bid opening clock has since been checked for accuracy and it is within 1 second of the time registered on the Naval Observatory's master clock. See Robert R. Nathan Assocs., Inc., B-230707, supra.

We have held that a late proposal should not be considered for award if the offeror significantly contributed to its late receipt by not acting reasonably in fulfilling its responsibility of delivering a hand-carried offer to the proper place at the proper time, even where lateness may have been caused, in part, by erroneous government action or advice. See Int'l Steel Erectors, B-233238, supra. Here, we find no evidence of any government action or advice that contributed to Seer's proposal being submitted late. Rather, we find that Seer did not act reasonably since, by its president's own account, he left only 2 minutes to get into the federal building, find the correct office, and deliver the offer. In sum, Seer's own actions were the cause of the late delivery.

Finally, Seer contends that the Forest Service has waived its right to reject the proposal even if it was submitted late, because the bid opening officer accepted the offer from Seer's president and the offer has been evaluated by the Forest Service. The record simply does not support Seer's argument. Instead, the record shows that Seer's proposal was accepted and marked as late by the bid opening officer, and that the proposal was held by contracting officials while they determined whether the offer could properly be considered. There is no evidence that the offer was evaluated or even read by contracting officials. In any event, it appears that the Forest Service merely accepted the late offer and properly is holding it until award is made as required under FAR § 15.412(f).

The protest is denied.


James F. Hinchman
General Counsel