

Curcio



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Health Research Associates, Inc.
File: B-237075.2
Date: June 8, 1990

George E. Crevar, Ph.D., R.Ph., for the protester.
Dr. Gloria M. Bertacchi, for National Medical Staffing, Inc., an interested party.
Charles J. Mcmanus, Esq., and Douglas P. Larsen, Jr., Esq., Office of the General Counsel, Department of the Navy, for the agency.
Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protest that agency improperly rejected protester's proposal as late is not filed with the procuring agency or General Accounting Office until more than 10 working days after the protester received notice of the rejection, it is dismissed as untimely.

DECISION

Health Research Associates, Inc. (HRA), protests the rejection as late of the offer it submitted in response to request for proposals (RFP) No. N68836-89-R-0145, issued by the Department of the Navy for the services of a registered pharmacist.

We dismiss the protest.

The RFP was issued on June 29, 1989, with a closing date for the receipt of proposals of July 31, and specified that mailed offers were to be sent to the "Contracting Department, Naval Supply Center, Box 97A, NAS, Jacksonville, FL. 32212-0097." On August 1, the agency states that its contracting department received a plain white envelope with no postmark or other information to indicate how it was mailed, addressed to the attention of "Felicia Eller, Code 2010.03, Naval Supply Center, Bldg. 110, Jacksonville, FL." The Navy opened the envelope and discovered HRA's proposal. By letter dated August 3, the contracting officer notified HRA that the proposal was received late and could

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not be considered for award. Subsequently, on September 29, the Navy issued amendment No. 0001 to the RFP, which requested offerors to submit best and final offers (BAFO) by October 20. Since HRA had been eliminated from consideration for award, HRA was not sent a copy of amendment No. 0001. On October 20, the Navy issued amendment No. 0002, which extended the due date for the submission of BAFOs until October 27; the Navy inadvertently sent a copy of amendment No. 0002 to HRA.

In late January 1990, HRA contacted the Navy regarding the status of its BAFO and was informed by the contract specialist that its initial proposal had been received late and that no BAFO from HRA had been received. HRA stated that another contract specialist (who is no longer employed by the Navy) agreed to accept HRA's late submission and also sent HRA a letter which identified the weaknesses and deficiencies in the firm's offer, and further that HRA had sent a BAFO by telefax. The contract specialist requested that HRA provide a copy of the BAFO and the other correspondence.^{1/} After receipt of HRA's materials, on February 23, by phone, and on February 27, by letter, the contracting officer notified HRA that the information it had submitted did not demonstrate that its initial late offer had been accepted or that discussions were held with HRA. The contracting officer further informed HRA that the Navy's August 3, 1989, letter was correct and HRA's initial offer as well as its BAFO were late. On March 5, we received HRA's protest in our Office.^{2/}

^{1/} For the record, we note that in its protest report the Navy stated that in response to its request for a copy of its BAFO, HRA submitted a BAFO which showed a different solicitation number crossed out and the current solicitation number inserted. The Navy therefore concluded that HRA had falsified the document. HRA has explained, however, that it received amendment No. 0002 on October 26, at 3 p.m., and a response was due by October 27. To save time, HRA states that it therefore took materials from a solicitation it had responded to for similar services, changed the solicitation number on those papers, and submitted them in response to the current solicitation.

^{2/} HRA also initially alleged that the Navy told HRA that it was not considered qualified. In its protest report the Navy denied this statement and asserted that it never evaluated HRA qualifications because its proposal was submitted late. Since HRA did not reply to the Navy's position in its report comments, we consider the issue
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HRA alleges that it mailed its proposal by U. S. Postal Service Express mail prior to 5 p.m. on July 28, 1989, in sufficient time for it to be received by the July 31 deadline, and that in response to its telephone call on August 1, the Navy contract specialist informed HRA that its proposal had been received on time. HRA further asserts that after it received the August 3 letter informing HRA that its proposal was late, HRA made numerous calls to the Navy in which it requested that its proposal be considered, and that it was left with the impression that its proposal would be accepted. HRA states that while this was never confirmed in writing, HRA interpreted its receipt of amendment No. 0002 on October 26 as an indication that its initial proposal had been accepted. HRA also complains that it submitted a BAFO by telefax on October 27, and on that date was informed that the telefax was received before the deadline; on February 27, 1990, however, it was informed that its BAFO was never received.

Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1990), to be timely a protest such as HRA's must be filed with our Office or the procuring agency within 10 working days after the protester knows or should have known the basis for protest. Here, the Navy informed HRA, in early August 1989, that its proposal would not be considered for award because it was received late. Since HRA did not protest the rejection of its proposal until March 5, 1990, the protest is untimely and will not be considered on the merits. Turbo Mechanical, Inc., B-232483, Jan. 9, 1989, 89-1 CPD ¶ 14. In this regard, HRA's attempt to plead its case with the Navy, by telephone after receipt of the August 3, 1989, letter advising that its proposal was received late, does not constitute a protest which would make a subsequent protest to our Office timely, since oral protests are not provided for under Federal Acquisition Regulation (FAR) § 33.101 (FAC 84-40). Garden State Brickface & Stucco Co., B-237153, Oct. 31, 1989, 89-2 CPD ¶ 410. Further, HRA's general statement that its discussions with the contracting specialist in September 1989 left it with the "impression that [its] proposal would be acceptable" simply is not sufficient to show that it was misled into thinking that the Navy had changed its position and now regarded the initial proposal as timely received. Moreover, HRA could not reasonably interpret its subsequent receipt of amendment No. 0002 as an indication that its initial proposal had been accepted, in light of the explicit

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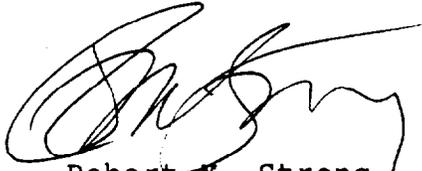
abandoned and will not consider it on the merits. Precision Echo, Inc., B-232532, Jan. 10, 1989, 89-1 CPD ¶ 22.

determination in the August 3 letter that its proposal had been received late.

In any case, to the extent that HRA maintains that its proposal was received by the July 31 due date, HRA has submitted no evidence to refute the Navy's position that it was not in fact received until August 1. In addition, since no circumstances permitting acceptance of a late offer appear to apply, the contract specialist could not properly agree to accept HRA's late proposal. In this regard, under FAR § 52.215-10 (FAC 84-53), a late proposal sent by U.S. Postal Service Express mail may be considered if it was mailed not later than 5 p.m. at the place of mailing, 2 working days prior to the date specified for the receipt of proposals. Working days do not include weekends or holidays. Here, HRA's offer was sent on Friday, July 28, and was due on Monday, July 31. The proposal therefore does not fall within the provisions of the regulation under which a late proposal can be considered, since it was not sent 2 working days in advance of the closing date, nor is there any evidence to demonstrate that the Navy mishandled HRA's proposal in the process of receiving it. See Southeastern Enters. Inc., B-237867, Mar. 21, 1990, 90-1 CPD ¶ 314.

Finally, since HRA's initial proposal is not for consideration, there is no basis on which its BAFO may be considered. S.H.E. Corp., B-205417.2, Sept. 30, 1982, 82-2 CPD ¶ 298. Accordingly, we need not reach the issue whether HRA's BAFO was received timely.

The protest is dismissed.



Robert M. Strong
Associate General Counsel