



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Phoenix Research Group, Inc.

File: B-240840

Date: December 21, 1990

William A. Shook, Esq., and James C. Caine, Esq., Preston Gates Ellis & Rouvelas Meeds, for the protester.

William E. Baum for BRTRC Technology Research Corp., an interested party.

Craig R. Schmauder, Esq., Department of the Army, for the agency.

Jacqueline Maeder, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Best and final offer (BAFO) which was received late at location designated for receipt of proposals was properly rejected where the offeror telefaxed its BAFO too late to allow a reasonable time for it to be timely received.

DECISION

Phoenix Research Group, Inc. protests the rejection of its offer under request for proposals (RFP) No. DACA76-90-R-0002, issued by the Army Corps of Engineers, Engineer Topographic Laboratories (ETL), Fort Belvoir, Virginia, for the Army Materiel Command, Field Assistance in Science and Technology Office (AMC/FAST). The solicitation was to procure broad-based assistance for AMC/FAST in system integration, analytical and engineering support services and coordination. Phoenix's proposal was not considered for award because its best and final offer (BAFO) was received late.

We deny the protest.

Eight initial proposals were received by the March 5, 1990, closing date and two were included in the competitive range. Negotiations were conducted with these two offerors and, by letter dated August 2, 1990, the contracting officer requested BAFOs "by 3:00 p.m., EDT, Wednesday, August 8, 1990." Although the solicitation incorporated by reference Federal Acquisition Regulation (FAR) § 52.215-9, prohibiting the submission of offers by facsimile, the contracting officer stated in her August 2 letter that BAFOs "may be sent by telecopier," and provided the telecopier number. The letter

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cautioned that "[r]evisions which are received in this office after the time and date specified . . . shall be treated as a late proposal in accordance with the 'Late Proposal' provision of the RFP solicitation" The Late Proposal provision incorporated by reference, provides in relevant part that BAFOs received after the time and date specified will not be considered unless received before award and the late receipt is due solely to mishandling by the government after receipt at the government installation. FAR § 52.215-10(c).

By telephone on August 8, a Phoenix representative informed the contract specialist at or about 2:30 p.m. that the company's BAFO was being telefaxed and the contract specialist told the Phoenix representative that she would wait for the transmission. The Phoenix representative then telefaxed its 38-page BAFO. Upon receipt of the complete document, the contract specialist carried all of the pages approximately 200 feet from the telecopier machine located in the ETL Information Management Office to the ETL Contracts Office. The original telefaxed pages indicate that Phoenix's transmittal began at 2:44 p.m. and the last page was transmitted at 3:05 p.m. The ETL telefax logbook shows that the agency began receiving the transmission at 2:47 p.m. and that the total transmission time for all 38 pages was 22 minutes and 31 seconds, with the last page received at approximately 3:09 p.m.^{1/} The logbook shows that no malfunction occurred during transmittal.

By letter dated August 15, the contracting officer notified Phoenix that ETL could not accept its BAFO because the document had not been received in its entirety by 3:00 p.m., and had not been delivered to the Contracts Office by 3:00 p.m. This protest followed.

Phoenix argues that its BAFO was timely received by the agency since the contract specialist was in possession of the pages comprising Phoenix's BAFO prior to the deadline, at the location provided for receipt of BAFOs. In the alternative, Phoenix argues that late receipt was due to government mishandling.

As to timely receipt of its BAFO, Phoenix concedes that not all pages of its telefaxed transmission were received by the

^{1/} Approximately 80 percent of Phoenix's transmission, or 30 pages of 38, was received in ETL's telecopy room before 3:00 p.m. The pages comprising Appendix D, which consist of a sample subcontract instrument that Phoenix indicated it would use, with government approval, if it were awarded the contract, were received after 3:00 p.m.

3:00 p.m. deadline. It argues, however, that the 30 pages that were received prior to 3:00 p.m. constitute its complete BAFO-and that the other pages are not needed for review or evaluation purposes. Phoenix says that the pages received after 3:00 p.m. consist only of its sample subcontract instrument, which was neither required by the solicitation nor a necessary part of its BAFO. Phoenix states that in a similar situation involving a prior procurement with another agency, that agency simply evaluated those telecopied pages that were transmitted and received before the deadline for receipt of BAFOs and rejected the pages received after the deadline. Therefore, the protester contends that the agency should accept and evaluate the 30 pages received prior to the deadline.

Phoenix also contends that the BAFO was timely received at the telecopy machine since the agency letter requesting BAFOs did not clearly indicate that the ETL telefax machine was not located in the ETL Contracts Office. According to the protester, it reasonably interpreted language requiring that BAFOs be received "in this office" to mean the office where the telecopy machine was located and argues that this language implies that an "acceptable location for receipt of best and final offers was the facsimile machine."

Alternatively, the protester argues that late receipt in the Contracts Office was due to government mishandling. Phoenix contends that, once the contract specialist agreed to wait for Phoenix's BAFO, she had a duty to ensure that the BAFO was delivered to the proper location for receipt of BAFOs prior to the deadline. The protester contends that the contract specialist was obligated to carry the portion of its telefaxed transmission that was received prior to 3:00 p.m. to the Contracts Office before the deadline, arguing that "[g]overnment mishandling occurred when the [c]ontract [s]pecialist chose to remain at the telefax machine until after the deadline in order to receive material that went only to Phoenix's responsibility." The protester asserts that once the contract specialist had agreed to pick up and deliver the BAFO, "it was incumbent on her to ensure that she returned to the proper location for receipt of best and final offers prior to the deadline" and, had she done so, the documents comprising Phoenix's BAFO would have been timely received. Phoenix asserts that late receipt resulted from "the agency's failure to use a transmittal procedure that would have permitted the bid to be delivered to the bid opening location within a reasonable time before bid opening" and suggests that any reasonable procedure "would have required the recipient of telefaxed bids to return to the bid room prior to the bid opening."

Finally, Phoenix argues that it is in the government's best interest to consider its BAFO since only two offerors were determined to be within the competitive range and Phoenix's initial technical score was only four points lower than BRTC's score, and Phoenix believes that it is the lower priced offeror.

We find that the agency properly rejected Phoenix's BAFO because the BAFO was not timely received and the paramount cause for the late receipt was Phoenix's failure to begin sending the BAFO until 16 minutes before the deadline rather than mishandling by ETL.

Phoenix's contention that ETL could simply evaluate the 30 pages of its transmission that arrived before 3:00 p.m. is unreasonable. First, we note that Appendix D, which Phoenix argues is not a necessary part of its BAFO, is referenced on page 2 of Phoenix's transmission, that is, in the 30 pages which Phoenix argues comprises its actual BAFO. Additionally, Phoenix's "Facsimile Header," the cover page which accompanies its transmittal, indicates that the pages to follow are the BAFO for this RFP and that there are 35 pages. Phoenix clearly intended more than the first 30 pages of the transmission as its BAFO and may not credibly maintain, after learning that not all pages were timely received, that only the first 30 of the pages were its BAFO. To accept Phoenix's argument would unreasonably shift responsibility for timely receipt of its BAFO to the person receiving the transmission to determine in his judgment when the essential part of the BAFO has been received.

Regarding Phoenix's contention that in a prior procurement issued by a different agency, it telecopied a BAFO and the agency accepted the timely-received portion of the BAFO while rejecting the late portion, this alleged action in a past, unrelated procurement is not relevant to the acceptability of Phoenix's BAFO in this case. Jennings Int'l Corp., 68 Comp. Gen. 79 (1988), 88-2 CPD ¶ 472.

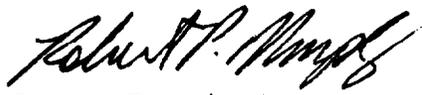
Phoenix is incorrect in its contention that receipt of its BAFO at the telecopy machine by the 3:00 p.m. deadline satisfies the requirement that BAFOs be received "in this office." The solicitation required that offers be received at the ETL Contracts Office. The August 2 letter permitting facsimile BAFOs does not relieve the offeror of insuring delivery of BAFOs to the Contracts Office, it merely permits the use of a telecopy machine for the offerors' convenience. The letter did not suggest any change in the required place of delivery. The letter was signed by the contracting officer and the words "Contracts Office" appear under the letterhead, thus reasonably affirming that "this Office" refers to the Contracts Office. In any event, receipt was late at either

location; the complete BAFO was not received at the telecopy machine until 3:09 p.m. and was therefore late. The BAFO was delivered to the Contracts Office immediately after 3:09 p.m., and was similarly late.

We find no evidence of mishandling on the part of the agency. Phoenix's arguments regarding agency mishandling are premised on the theory that, when the contract specialist indicated that she would wait for the "fax" transmittal, the contract specialist assumed the protester's responsibility for timely submission of its BAFO. Although Phoenix was still transmitting beyond the 3:00 p.m. deadline, it contends that agency personnel were obligated to cut off the transmission and take the pages received to the Contracts Office. ETL reports that it has established procedures for its facsimile operation which include prompt notification of incoming transmissions, but do not require that office personnel interrupt transmissions to return to the bid room before bid opening. Phoenix is attempting to shift its responsibility as an offeror onto the agency. FAR § 15.412(b) places the responsibility to insure timely delivery on offerors, and the late proposal clause only provides specifically delineated exceptions under which late submissions may be considered. Here, Phoenix did not satisfy its responsibility to insure timely delivery of its BAFO, since the late receipt was caused solely by Phoenix's failure to allow a reasonable length of time for the facsimile transmission, not by government mishandling. See Bomem, Inc., B-234652, May 17, 1989, 89-1 CPD ¶ 475. Because Phoenix's 38-page BAFO was telefaxed only 16 minutes before the deadline for receipt of BAFOs, the entire BAFO was not in the possession of ETL until after the 3:00 p.m. deadline, and the rejection of the BAFO was proper. Id.

Regarding Phoenix's suggestion that ETL should accept its BAFO because it is in the best interests of the government, we realize that by application of its late proposal rules the government at times may lose the benefit of proposals that offer terms more advantageous than those received timely. However, the purpose of the late proposal rules is to insure that the government conducts its procurements so that fair and impartial treatment is guaranteed and maintaining confidence in the competitive system is of greater importance than the possible advantage to be gained by considering a late proposal in a single procurement. Silvics, Inc., B-225299, Feb. 24, 1987, 87-1 CPD ¶ 204.

The protest is denied.


for James F. Hinchman
General Counsel