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Decision

Matter of: ICI Services, Inc.

File: B-409231.2

Date: April 23, 2014

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Marvin D. Rampey, Esq., and Philip Lazarus, Esq., Department of the Navy, for the agency.

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DIGEST

An agency's rejection of a revised proposal as "late" is unreasonable and inconsistent with the terms of the solicitation where the record shows that the installation designated for receipt of proposals was in receipt of ICI's revised proposal by the closing time for receipt of revised proposals.

DECISION

ICI Services, Inc., of Virginia Beach, Virginia, protests the rejection of its proposal as late under request for proposals (RFP) No. N00024-13-R-3222, issued by the Department of the Navy for engineering support services for the Naval Surface Warfare Center in Port Hueneme, California. ICI contends that its proposal was timely received in accordance with the RFP's instructions.

We sustain the protest.

BACKGROUND

The RFP, which provides for the issuance of a cost-plus-incentive-fee task order, was issued to vendors holding SeaPort-e multiple award indefinite-delivery/indefinite-quantity (ID/IQ) contracts in Southwest Zone 6 (Arizona, California, Colorado, Nevada, New Mexico, and Utah). The solicitation, which was amended several times, was issued on the SeaPort-e Proposal Event Website on April 1, 2013. The closing date for submission of initial proposals was May 8.

Detailed instructions for the submission of proposals were provided, stating, as relevant here, that offerors were required to submit their proposals through the agency's online SeaPort-e portal. RFP at 103. The RFP also instructed offerors:

In the rare event the portal is down or inaccessible, Offerors shall immediately notify the Contracting Officer via e-mail prior to the solicitation closing date and time. Offerors shall also contact the SeaPort helpdesk to register a help ticket/notice that the portal is down or inoperable.

* * * *

In the rare event of a portal malfunction, arrangements must be made with the Contracting Officer prior to the solicitation closing date and time in order to submit a proposal electronically outside the portal.

Id. Further, offerors were cautioned that a failure to notify the contracting officer that the portal was inoperable, or to submit a complete proposal prior to the closing date and time, would result in the proposal being considered late and unacceptable.

The Navy received several proposals by the May 8 closing date, including those from ICI and Basic Engineering Concepts and Technology (BECTech).¹ The RFP was amended three times after receipt of initial proposals. Amendment 4 opened discussions and requested that offerors submit final proposal revisions by October 11. Agency Report (AR) at 2. Amendment 5 extended the date for submission of final proposal revisions to October 16. The agency states that it was having technical difficulties with the SeaPort-e portal, and in posting the amendment to the portal. See Protest, exhib. B, Decl. of ICI Vice President, at 1; AR at 2. The agency's email notice also stated,

If you have any difficulties uploading your response in the Seaport-e portal, please email me the documentation.

Protest, exhib. D, October 11 Emails.

Because ICI was unable to view the amendment on the portal, ICI contacted the contract specialist and advised him that ICI did not see the amendment. Protest, exhib. B, Decl. of ICI Vice President, at 2. The contract specialist agreed that ICI

¹ The record does not indicate how ICI submitted its initial proposal, beyond ICI's unrefuted statement that its proposal was timely submitted on May 8, 2013. Protest, exhib. B, Decl. of ICI's Vice-President, at 1. This protest concerns the submission of ICI's final proposal revision.

could submit its final proposal revision by email directly to the contract specialist, outside the portal. The contract specialist received ICI's final proposal revision by email by the October 16 closing time. See Protest, exhib. E, October 16 Emails; AR at 4 (the contract specialist "accepted ICI's email-submitted FPR as being timely and submitted [in accordance with] the RFP and Amendment 0005 on the assumption that it had experienced technical difficulties").

On October 22, the Navy issued amendment 6, requesting that offerors re-submit their final revised proposals through the SeaPort-e portal. AR at 4. ICI re-submitted its final revised proposal through the portal that same day (as did BECTech). On October 25, the task order was issued to ICI. Id. at 5.

On November 5, BECTech protested the issuance of the task order to ICI to our Office. BECTech argued, among other things, that the Navy treated offerors in an unequal manner, speculating that ICI had missed the deadline for submitting its final revised proposal and that ICI had improperly been given an opportunity to alter and submit its revised proposal after the due date. On December 3, prior to the submission of the agency's report, the Navy informed our Office that it would take corrective action. We dismissed the protest as academic.² See Basic Eng'g Concepts-Tech's, Inc., B-409231, Dec 3, 2013.

The Navy decided that ICI's final revised proposal was submitted "late" and was therefore unacceptable. AR at 5-6. This conclusion was based upon the agency's judgment that ICI "did not upload its proposal as mandated into the SeaPort-e system on the date required by Amendment 5," nor did it comply with the RFP's instructions for how to proceed if the portal was "down or inaccessible." Id. at 6. In this regard, the Navy argues that ICI did not comply with the RFP's requirements, even if the SeaPort system was not operational or had technical difficulties, such that the contractor was temporarily unable to access or use the system. AR at 6.

This protest followed the rejection of ICI's proposal.³

² The Navy now states that it took corrective action because the contract specialist "had mistakenly assumed, based on ICI's submission of the [final proposal revision] via email, that it had experienced technical difficulties or that ICI was unable to access or use the SeaPort-e system to upload ICI['s] [final proposal revision]." See AR at 5.

³ Although ICI's proposed task order cost is less than \$10 million, the value of all the remaining offers exceeds \$10 million. We conclude that this procurement is within our jurisdiction to hear protests related to the issuance of task orders valued in excess of \$10 million under multiple-award ID/IQ contracts. See 10 U.S.C. § 304c(e)(1)(B) (2006). In this regard, no party argues that we do not have jurisdiction.

DISCUSSION

ICI challenges the rejection of its proposal, arguing that the agency's position is based on an overly rigid interpretation of the RFP's proposal submission instructions and a strained reading of the undisputed facts. ICI argues, citing our decision in Tishman Constr. Corp., B-292097, May 29, 2003, 2003 CPD ¶ 94, that the Navy should not have considered the submission of its revised proposal as being late. The crux of ICI's position is that its final revised proposal was not late, given that ICI requested and was granted leave to submit its proposal by email, which it did well before the closing time for receipt of proposal revisions. ICI further states that it timely resubmitted its final revised proposal through the e-portal when instructed to do so by amendment 6.

The Navy responds that the contracting specialist's acceptance of ICI's revised proposal by email was invalid "because the [contract specialist] had mistakenly assumed, based on ICI's submission of the [final proposal revision] via email, that [ICI] had experienced technical difficulties or that ICI was unable to access or use the SeaPort-e system to upload ICI[s] [final proposal revision]." AR at 5. The agency suggests that the contract specialist was misled by ICI, because ICI did not demonstrate that the firm had difficulty in submitting its revised proposal through the portal. AR at 8. The Navy also argues that because ICI did not submit its proposal to the "Government installation designated for receipt of proposals," that is, through the SeaPort-e portal, the proposal was late, although received by the agency prior to the closing time for submission of revised proposals.

Generally, a proposal received after the time set for receipt may not be considered for award. In this regard, "[o]fferors are responsible for submitting proposals, and any revisions, and modifications, so as to reach the Government office designated in the solicitation by the time specified" Federal Acquisition Regulation § 15.208(a). The late proposal rule alleviates confusion, ensures equal treatment of offerors, and prevents one offeror from obtaining a competitive advantage as a result of being permitted to submit a proposal later than the deadline set for all competitors. Inland Serv. Corp., Inc., B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266 at 3.

Although there is much disagreement in the record about such things as whether technical difficulties prevented ICI from uploading its proposal through the portal and whether the contract specialist was misled with respect to authorizing ICI's submission of its proposal by email, we need not resolve these disagreements. As relevant and dispositive here, the record shows that the Navy installation designated for receipt of proposals was in receipt of ICI's revised proposal by the closing time for receipt of revised proposals. In this regard, the record establishes the following facts: (1) the RFP provided an alternative means for submitting proposals when there were difficulties with the portal; (2) several offerors (including

ICI and BECTech), and the agency itself, encountered technical difficulties with the portal; (3) ICI requested and received permission to submit its proposal by email and did so before the closing time for receipt of proposals; and (4) the Navy amended the RFP to allow re-submission of revised proposals, and both ICI and BECTech submitted revised proposals through the portal by the amended closing time.

We agree with ICI that our decision in Tishman Constr. Corp., *supra*, is applicable here. In that case, we found that the procuring agency improperly rejected the protester's proposal as late. The solicitation in Tishman required the submission of both paper and electronic versions of proposals. Although the agency timely received the electronic version of the protester's proposal, the paper version was not received until after the time set for receipt of proposals. Because the agency had received a timely, complete copy of the electronic version of the protester's proposal, we found the agency's rejection of the proposal to be unreasonable. We affirmed, as we do here, that the policy underlying the late proposal rule is to ensure fair and equal competition and avoid confusion. Although the Navy argues that accepting ICI's proposal "without evidence that [ICI] even attempted to upload its proposal . . . would have put the other offerors at a competitive disadvantage," AR at 11, the agency does not explain or show how other offerors would be disadvantaged, nor do we see any such possibility here.

The protest is sustained.

RECOMMENDATION

We recommend that the Navy include ICI's proposal in the competition. We further recommend that the protester be reimbursed its reasonable costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). The protester's certified claims for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. §21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel