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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Eastern Forestry

File: B-411848

Date: November 9, 2015

Donna Harter, for the protester.

Evan C. Williams, Esq., and Scott N. Flesch, Esq., Department of the Army, for the agency.

Frank Maguire, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency did not provide sufficient time for submission of bids is sustained where a substantive amendment to the solicitation was posted at 7:00 p.m., the evening before the scheduled bid opening, and was first seen by the protester at 9:15 a.m. on the day of bid opening, leaving the protester insufficient time to hand-deliver a hard copy and compact disc by the scheduled 10:00 a.m. bid opening.

DECISION

Eastern Forestry, of Spring Grove, Virginia, protests the terms of invitation for bids (IFB) No. W91QF5-15-B-0007 (IFB-0007), issued by the Department of the Army for landscaping services at Fort Lee, Virginia. Eastern Forestry asserts that the IFB, as amended, did not provide sufficient time to prepare and submit a bid.

We sustain the protest.

BACKGROUND

The IFB, issued and posted on the Federal Business Opportunities (FBO) website on July 16, 2015, provided for issuance of a requirements contract, for a base year with four option years, for tree maintenance and landscaping (including pruning, cutting, and chipping stumps) at Fort Lee. The IFB as issued set bid opening for July 30, 2015, at 10:00 a.m., Eastern Standard Time (EST). With regard to bid submission, the IFB provided:

2. DATE AND TIME QUESTIONS & BIDS ARE DUE: Bids are due by the date specified on the first page of the solicitation in Block 8 and are to be delivered to: MICC Fort Lee 1830 Quartermaster Road, Bldg 7124 Fort Lee, VA 23801.

* * * * *

5. BIDS: All bids must be submitted in hard copy and an electronic copy. The electronic copy shall be submitted in a PDF file format on a compact disc (CD), and also be properly labeled with the solicitation number, company name, and bid due date. Bids can be mailed or hand delivered. The IFB contains provisions and other items required to be completed by the bidder and returned with its bid. Failure to provide this information in hard copy and electronic copy may render the bid non-responsive and therefore ineligible for award.

IFB at 75.

On July 21, the Army issued and posted on FBO amendment No. 1, which changed the quantity for one of the line items (from 40 hours to 200 hours), but did not change the bid opening time. AR, Tab 4, Amend. No. 1. On July 23, the Army issued amendment No. 2, which corrected a typographical error in two line items, changing the unit of measure from “Horsepower days” to “Hours.” Agency Report (AR), Tab 5, Amend. No. 2; see AR at 2-3. The time for bid opening remained unchanged at 10:00 a.m. on July 30. The Army reports that while amendment No. 2 was released to the Army Single Face to Industry (ASFI) website on July 23, “due to technical difficulties affecting AFSI’s transmission of the amendment to FBO,” the amendment was not posted on FBO until July 29 at 7:00 p.m. AR at 3.¹ Eastern Forestry states, without challenge from the agency, that it first saw amendment No. 2 on FBO at 9:15 a.m. on July 30, 45 minutes before bids were due. Protest at 1. The protester submitted its signed and dated email acknowledgement of

¹ The official public medium for providing notice of contracting actions by federal agencies is the FBO website, which has been designated as the government-wide point of entry (GPE) for procurements valued over \$25,000. Federal Acquisition Regulation (FAR) §§ 2.101, 5.101(a)(1), 5.201(d); see The Creative Mobility Group, LLC, B-410380.2, Dec. 19, 2014, 2014 CPD ¶ 376 at 3 n.2. In contrast, the ASFI website is not a government-wide point of entry designated for the publication of solicitations. Thus, while offerors are charged with constructive notice of procurement actions published on FBO, they are not generally charged with constructive notice of postings on the AFSI, which is not the GPE. See Latvian Connection, LLC, B-411489, Aug. 11, 2015, 2015 CPD ¶ 251 at 5; DBI Waste Sys., Inc., B-400687, B-400687.2, Jan. 12, 2009, 2009 CPD ¶ 15 at 2. Also, there is no dispute here that the value of this acquisition is well over \$100,000.

amendment No. 2 shortly before 10:00 a.m. on July 30. AR, Tab 7, Acknowledgement of Amend. No. 2; Contracting Officer Statement at 1.

Eastern Forestry states that on the morning of July 30, it emailed the agency's contract specialist "with its changed prices (reduced prices) prior to 10:00 a.m.," but that all but one page of its submission were returned as "undeliverable" and its efforts to contact the contract specialist were unsuccessful. Protest at 1-2.² Later that day, around 2:00 p.m., Eastern Forestry personnel drove to the contracting office at Fort Lee and requested to speak in person with the contract specialist and the contracting officer. Protest at 2; see Comments at 1-2. The protester states that, at the ensuing July 30 meeting at the Fort Lee contracting facility, it proffered the remaining pages of its bid to the contracting officer, but the contracting officer refused to accept them. Comments at 2. The agency, however, denies that Eastern Forestry attempted to submit a hard copy of its bid at this meeting. AR at 17; Contracting Officer Statement at 1. This protest followed on July 31.

DISCUSSION

Eastern Forestry asserts that the agency gave parties insufficient time from the posting of amendment No. 2 on FBO to respond to the amended solicitation. The Army argues that the protest was untimely filed since it amounted to a challenge to the terms of the solicitation, which had to be filed not later than the next closing time for receipt of proposals. AR at 6.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to bid opening must be filed before that time. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1). We have recognized an exception to this requirement, however, when, as a result of extremely limited time periods, circumstances do not permit filing before bid opening. See, e.g., Ling Dynamic Sys., Inc., B-252091, May 24, 1993, 93-1 CPD ¶ 407 at 3 (protester learned basis for challenging solicitation only 2 hours before bid opening); G. Davidson Co., Inc., B-249331, July 14, 1992, 92-2 CPD ¶ 21 at 2 n.1 (concluding that 2 hours and 45 minutes was not a reasonable period of time within which to file a protest); The Big Picture Co., B-210535, Feb. 17, 1983, 83-1 CPD ¶ 166 at 2 (amendment received one day before bid opening). In such cases, we have applied the rule that the protester must challenge the asserted impropriety no later than 10 days from the time it knew or should have known of its basis for protest. See, e.g., The Big Picture Company, supra; G. Davidson Co., Inc., supra.

² We note that any email submission would have been unavailing in any case, since emailed bids were not contemplated under the IFB. See IFB at 75.

Here, as indicated above, amendment No. 2 was not posted on FBO until after business hours on July 29, and it is undisputed that Eastern Forestry first became aware of amendment No. 2 the next morning, approximately 45 minutes before the scheduled bid opening. In these circumstances, given the extremely limited amount of time available before bid opening, we find that it is appropriate to apply the 10-day test for timeliness.³ Since Eastern Forestry's protest was filed on July 31, one day after bid opening, the protest is timely.

Turning to the merits of the protest, under section 14.202-1 of the FAR, contracting agencies are to allow a reasonable period of time for prospective bidders to prepare and submit their bids. A bidding time (the time between the issuance of the solicitation and the opening of bids) of at least 30 calendar days shall be provided. FAR § 14.202-1(a). Further, when specifications must be changed, agencies are required to accomplish this by amendment. FAR § 14.208(a). Before issuing an amendment, contracting officials must consider the period of time remaining until bid opening and whether there is a need to extend it. FAR § 14.208(b). Where a protester contends that the agency allowed insufficient time, we require a showing that the time allowed was inconsistent with statutory or regulatory requirements or otherwise unreasonable, or that it precluded full and open competition. See Coyol International Group, B-408982.2, Jan. 24, 2014, 2014 CPD ¶ 40 at 2-3. What constitutes a reasonable opportunity to respond will depend on "the circumstances of the particular acquisition, such as complexity, commerciality, availability, and urgency." FAR § 5.203(b); see Latvian Connection, LLC, supra, at 5-6 (less than 2 business days prior to revised closing date not sufficient time to respond).

Here, we conclude that Eastern Forestry was not allowed sufficient time to submit its bid. The after-hours publication of amendment No. 2 effectively left Eastern Forestry with only a very limited, unreasonably short time on the morning of July 30--whether counted from the time of its discovery of amendment No. 2 on FBO at 9:15 a.m. or from earlier that morning--to amend its bid as necessary and to deliver the amended bid, in hard copy and on a CD, to the base contracting office on a secure⁴ military base some distance from its office. In this regard, we find unpersuasive the Army's contention that the fact that the protester was able to email its acknowledgement of amendment No. 2 and attempted to submit its bid by email prior to the deadline, showed that Eastern Forestry had a reasonable opportunity to

³ Although the agency points out that Eastern Forestry was able to email its acknowledgement of amendment No. 2 prior to closing, AR at 5, we note that a two-sentence acknowledgement is not comparable to a bid protest, which, in contrast, must clearly set forth facts and arguments establishing a valid basis for protest. 4 C.F.R. § 21.1(c); see, e.g., Siebe Envtl. Controls, B-275999.2, Feb. 12, 1997, 97-1 CPD ¶ 70 at 2.

⁴ See "Installation Access," <http://www.lee.army.mil/pmo/access.aspx>.

submit its bid after the posting of amendment No. 2 on FBO. AR at 5. As an initial matter, we note that the protester's acknowledgment of amendment No. 2 was a two-sentence email, delivered five minutes before bid opening, and its efforts to submit its bid by email were unsuccessful, encountering problems that could not be resolved within the time available. AR, Tab 7. Neither of these communications serves to demonstrate that Eastern Forestry had a reasonable opportunity to deliver a hard copy revised bid, with CD, to the base contracting office on a secure military base in the limited time available.⁵

The Army also argues that amendment No. 2, which corrected a "typographical error" in two line items, changing the unit of measure from "Horsepower days" to "Hours," did not require Eastern Forestry to "substantially alter[]" its bid. AR at 7. Nevertheless, the amendment clearly did require revision of Eastern Forestry's bid, and given the requirement for a bidder to deliver a hard copy revised bid, with CD, to the base contracting office on a secure military base, the agency failed to allow a reasonable period of time for prospective bidders to prepare and submit their revised bids after the posting of the amendment on FBO. We note in this regard that Eastern Forestry's office is in Spring Grove, Virginia, approximately 26 miles by road from Fort Lee. A commonly-used internet application advises that the travel time between Spring Grove and Fort Lee, "without traffic," is 35 minutes. <https://www.google.com/maps>.

CONCLUSION

We sustain the protest on the basis that the Army failed to allow a reasonable period of time for prospective bidders to prepare and submit their revised bids after the posting of amendment No. 2 on FBO. We recommend that the Army amend the IFB to establish a new bid opening date, providing sufficient time for submission of

⁵ Eastern Forestry claims that it was advised at the July 30 meeting "that one contractor from Tennessee was able to change his bid (reduction of his prices)," Protest at 2; according to the protester, it was "improper" for the contracting officer to "disclose another contractor's response." Id.; see Comments at 2. The disclosure of source selection information, including an offeror's price, during the course of a procurement is improper and the agency may take remedial steps, including canceling the procurement, if it reasonably determines that the disclosure harmed the integrity of the procurement process. Information Ventures, Inc., B-241441.4, B-241441.6, Dec. 27, 1991, 91-2 CPD ¶ 583 at 4-5. Here, however, the protester does not explain how it was prejudiced by the release of another offeror's information after the closing time for submission of bids, and thus this protest ground does not set forth a valid basis for protest. Y&K Maintenance, Inc., B-405310.6, Feb. 2, 2012, 2012 CPD ¶ 93 at 9 (unfair competitive advantage is a necessary element of a procurement integrity allegation since it relates to the resulting prejudice).

new bids. We also recommend that the protester be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting 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