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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Immediate Systems Resources, Inc.

File: B-292856

Date: December 9, 2003

Michael A. Stover, Esq., Whiteford Taylor & Preston, for the protester.
Jeffri Pierre, Esq., Department of Health and Human Services, for the agency.
Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected protester's best and final offer as late where the record shows that the proposal was not under government control prior to the time set for the receipt of proposals.

DECISION

Immediate Systems Resources, Inc. protests the rejection of its proposal under request for proposals (RFP) No. CMS-HPMS-03, issued by the Department of Health and Human Services (HHS), Centers for Medicare and Medicaid Services (CMS), to develop, maintain and support the implementation of the Health Plan Management System (HPMS) and its software modules.

We deny the protest.

The RFP contemplated the award of a time-and-materials type contract for a base year with 4 option years. The RFP included a street address and mail stop number for delivery of offers in Block 7, and, in Block 9, included the following language:

> Sealed offers in original and 5 copies for furnishing the supplies or services in the Schedule will be received at the place spelled out in Item 8, or if hand-carried, contact the contract specialist until May 1, 2003 prevailing local time 10:00 a.m.

The technical evaluation factors listed in the RFP were (1) soundness of approach, (2) understanding of the HPMS and its role in the Medicare + Choice program, (3) management plan, and (4) corporate experience and past performance. The first

and second technical factors were equally weighted, and each was more important than either of the other two technical factors, which were also equally weighted. The totality of the technical factors was significantly more important than price. The RFP contemplated that the offerors whose proposals were included in the competitive range would conduct an oral presentation, the purpose of which was "to enable the technical evaluation panel [TEP] to assess each offeror's relative level of familiarity with and understanding of the work that it would have to perform under the prospective task order" and would "be used to supplement and provide the Government a more thorough understanding of the offeror's written proposal utilizing the same technical evaluation factors." RFP § M.2.

CMS received 15 proposals, including Immediate's, in response to the RFP. The TEP established a competitive range of five proposals, including Immediate's. Immediate's proposal was the lowest rated of those included in the competitive range; Immediate's proposal was rated at the upper end of satisfactory, as compared to one proposal rated outstanding, and three proposals rated very good. Immediate's proposal also failed to include prices for the option years as required.

The competitive range offerors each made an oral presentation to the TEP on June 17 or 18. There was some problem in scheduling Immediate's oral presentation because messages could not be left at Immediate's published phone number; it was not until June 17 that Immediate was notified that its oral presentation was scheduled for June 18. Immediate's oral presentation was found by the TEP to be a "rambling, disjointed, and chaotic presentation that did not address any of the concerns about the proposal, but instead raised questions about [Immediate's] capabilities and the scope of its subcontracting." TEP Chairperson's Declaration at 2. After the oral presentations, on July 2, the agency removed Immediate's proposal from the competitive range. After a debriefing, Immediate persuaded the agency to place its proposal back into the competitive range by addressing some of the concerns raised by its oral presentation.

On July 16, the agency submitted written discussion questions to the competitive range offerors, advising each offeror of the areas of concern in its proposal that needed to be addressed, and requesting a best and final offer (BAFO) addressing these concerns be submitted no later than 2 p.m., July 21. On July 17, the agency, at Immediate's request, extended the due date for submission of BAFOs to 2 p.m. on July 24. On July 21, the agency conducted oral discussions with Immediate at that firm's request. During this meeting, according to the contracting officer, he explained that Immediate was expected to provide five BAFO technical and past performance volumes, and five separate red-lined copies of the same volumes

indicating any changes to its earlier proposal.[1] Declaration of the Contracting Officer at 6.

On July 24, sometime between 12:30 p.m. (according to the protester) and 1:10 p.m. (according to the agency), Immediate's president contacted the contract specialist regarding proposal submission and asked if the redlined and edited copies could be submitted in the same volume, and was advised that they should be submitted in separate volumes; Immediate states that this was the first time it was made aware of this requirement. While Immediate complained that this would make it almost impossible to meet the 2 p.m. deadline, it apparently did not expressly request an extension but said it would endeavor to meet the deadline.

What happened over the ensuing hour or so is disputed by the parties. Immediate's president arrived at the guard station, either at or slightly before 2 p.m. (according to the protester) or a few minutes after 2 p.m. (according to the agency). Immediate's Comments at 2; Agency Report, Tab 30, Memorandum to the File (July 24, 2003). More important than the disagreement on the arrival time, however, is that the parties agree that Immediate's president, after having the guard log in and date-stamp the package, took the proposal back from the guard, drove to the CMS central building, and then handed the proposal to the contract specialist in the lobby of the CMS building at 2:13 p.m.

The agency determined that Immediate's BAFO was late and could not be considered. The contracting officer instructed the TEP to treat Immediate's initial proposal, as clarified during discussions, as its BAFO. The TEP again rated Immediate's proposal at the upper end of satisfactory, which was lower rated than the other three proposals. The TEP determined that the proposal of Fu Associates, which was rated outstanding, represented the best value to the government and made award to that firm. Immediate was notified of this decision on August 28 and was debriefed on September 4. It was at this debriefing where Immediate first learned that its BAFO had been considered late and was not considered. This protest was filed on September 15.

The protester first contends that its BAFO was not late and should have been considered. In this regard, the protester contends that there were no specific directions in the RFP that instructed offerors to hand deliver proposals to a specific location within the CMS facility and that the BAFO was timely delivered because she arrived at the guard station at the facility entrance at exactly 2 p.m. on July 24.

It is an offeror's responsibility to deliver its proposal to the proper place at the proper time, and late delivery generally requires rejection of a proposal. Federal

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[1] The contracting officer states that he had already told the protester about the format requirements on July 17; the protester denies this.

Acquisition Regulation (FAR) § 15.208(b); Slates Roofing Corp., B-286052, Nov. 8, 2000, 2000 CPD ¶ 182 at 4. The time when the proposal is submitted is determined by the time that the offeror relinquishes control of the proposal to the government. The Haskell Co., B-292756, Nov. 19, 2003, 2003 CPD ¶ __ at 4.

The dispositive question here is when Immediate's president relinquished control of its proposal. Even if we agree with the protester that Immediate's BAFO was properly logged in by the guard at 2 p.m., Immediate's president retained control of the proposal after the guard signed for the package, because the president (not the guard) delivered the proposal to the contracting specialist. We do not agree with the protester that the brief exchange between the guard and Immediate's president qualifies as relinquishment of control. See J.C.N. Constr. Co., Inc., B-250815, Feb. 23, 1993, 93-1 CPD ¶ 166 at 3. Since Immediate's president did not relinquish control of the BAFO until 2:14 p.m., after the time set for the receipt of BAFOs, to the contract specialist, its BAFO was properly rejected as late.

Immediate argues in the alternative that even if its BAFO was considered to be late, this was caused by the improper actions of the agency of imposing new proposal formatting requirements shortly before the time set for receipt of BAFOs. It is true that where affirmative government action makes impossible timely delivery to the location identified in the solicitation for receipt of proposals, it may be appropriate under certain limited circumstances to consider the late submitted proposal. See Weeks Marine, Inc., B-292758, Oct. 16, 2003, 2003 CPD ¶ __ at 4-5. However, we do not think that allegedly onerous requirements concerning the format of proposals, even if we assume, arguendo, that they were imposed shortly before the closing date, are the type of improper or affirmative agency action that provide any exception to the late proposal requirements.

What Immediate is really protesting here is either the imposition of the formatting requirements, given the late date that the requirements were imposed, or the shortage of time allowed for the submission of BAFOs. Such protest grounds constitute complaints about alleged improprieties that did not exist in the initial solicitation which were subsequently incorporated into the solicitation. See East Penn Mfg. Co., Inc., B-261046, Aug. 1, 1995, 95-2 CPD ¶ 50 at 50. Generally, in order to timely protest such improprieties, the protest must be filed prior to the next closing time for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2003). However, where, as here, the protester does not have a reasonable opportunity to file such a protest prior to the next closing time, 4 C.F.R. § 21.2(a)(1) is not applicable and the protester is required to protest the impropriety no later than 10 days from the time it knew or should have known of its basis for protest, in this case, when it learned of the formatting requirement and closing date for receipt of BAFOs. Morrison Knudsen Corp., B-247160, Jan. 7, 1992, 92-1 CPD ¶ 35 at 2; see 4 C.F.R. § 21.2(a)(2). Since Immediate did not protest until after award on September 15, this protest ground is untimely and will not be considered. See Cherokee Info. Servs., B-287720, Apr. 12, 2001, 2001 CPD ¶ 77 at 4 n.4.

Finally, Immediate contests the evaluation of its proposal. Immediate notes that weaknesses found in its proposal were essentially the same that were given when its proposal had been eliminated from the competitive range and therefore its evaluation must be unreasonable, because the agency had reinstated the proposal into the competitive range, and because this evidences that the agency did not consider the firm's explanations concerning these evaluated weaknesses.

We disagree. The record shows that Immediate received detailed discussion questions after its proposal's reinstatement into the competitive range and these responses were to be part of the BAFO that was not considered; Immediate does not challenge the legitimacy of the concerns expressed in these questions. The evaluation did not consider Immediate's oral presentation, but the record shows that if it had done so there would only have been a negative impact on Immediate's proposal's rating. The evaluation also, reasonably we think, did not consider Immediate's exchanges with the agency concerning its proposal after it had been eliminated from the competitive range because Immediate's responses to the agency's concerns were to be documented in its BAFO. As noted above, Immediate's was the lowest rated of the competitive range proposals and its relative position did not change as a result of the evaluation of the BAFOs submitted by the other offerors. In addition, Immediate's proposal offered no price advantage (because of its high labor rates); as noted, Immediate did not offer prices for the option years but the record shows that if its basic contract price were projected for the 5-year contract term it would be the highest priced of the competitive range proposals. Based on our review of the evaluation, we find no basis to find unreasonable the evaluation of Immediate's proposal or the award to Fu Associates.[2]

The protest is denied.

Anthony H. Gamboa
General Counsel

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[2] In response to Immediate's complaints about the lack of documentation concerning the evaluation, the agency provided further documentation, the adequacy of which has not been questioned by Immediate. Similarly, in response to Immediate's questioning of certain alleged discrepancies in the evaluation documentation, the agency provided detailed responses supporting the reasonableness of its evaluation, which similarly have not been questioned by the protester. While Immediate also complains that its proposal was unfairly evaluated because it had not been provided the HPMS source codes and then was penalized for its proposal's lack of details, it did not protest the agency's failure to provide the source codes prior to the closing date for receipt of proposals, 4 C.F.R. § 21.2(a)(1), and it has not shown that its higher priced proposal would have been rated at Fu Associates' proposal's outstanding level, even if the concern about the lack of details in Immediate's proposal were ignored, given the other weaknesses found in its proposal.