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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Shubhada, Inc.

File: B-292437

Date: September 18, 2003

Bob Metgud for the protester.

Jonathan D. Brawn, Titan Machine Products, Inc., for the intervenor.

Robert L. Mercadante, Esq., and Marlene Surrena, Esq., Defense Logistics Agency, for the agency.

Henry J. Gorczycki, Esq., and Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where an agency rejects an offeror's submission as technically unacceptable for failing to include a technical proposal required by the solicitation, but the agency actually may have received the proposal and lost it, a protest of the agency's evaluation and award decision generally will not be sustained, absent a systemic failure in the agency's proposal-receipt process. Since the content of a lost proposal is known only to the protester, it would be inconsistent with maintaining a fair competitive system to allow the protester to establish the content of its proposal after the closing date has passed.

DECISION

Shubhada, Inc. protests the rejection of its proposal as technically unacceptable, and the award of a contract to Titan Machine Products, Inc., under request for proposals (RFP) No. SPO560-02-R-0336, issued by the Defense Logistics Agency (DLA), Defense Supply Center Philadelphia, Pennsylvania, for lock release levers for .50 caliber M2 machine guns

We deny the protest.

The RFP, issued on September 17, 2002, contemplated award of a fixed-price contract. The RFP stated that contract award would be on a "best value" basis, with technical factors being significantly more important than price. The technical factors—past performance and technical ability—were of equal importance.

The solicitation required that proposals include detailed information related to each technical factor. For example, under the technical ability factor, the RFP required, in part, that proposals provide detailed documentation evidencing an offeror's forging and machining capabilities for at least five similar and complex items. RFP at 25.

Proposals were due October 17. The agency received five proposals by that date, including submissions by Shubhada and Titan. The agency determined that four proposals, including Shubhada's, which was also the lowest-priced proposal, did not include any information for review under the technical factor and thus were technically unacceptable.¹ The agency determined that Titan's proposal was acceptable. The agency eliminated all but Titan's proposal from the competitive range, conducted discussions with Titan and, on December 13, awarded a contract to that firm. Subsequently, Shubhada protested to our Office,² essentially alleging that its proposal was technically acceptable and should have been selected for award.

The agency report on the protest states that Shubhada's proposal was technically unacceptable because it did not include the technical information required by the RFP. In response, Shubhada states that it had hand-delivered a proposal consisting of two large envelopes banded together, one of which contained a binder with all of the technical and past performance information required by the RFP. Comments at 2, Second Supplemental Comments at 1. Shubhada supports this statement with a copy of a receipt showing that a "bid package" was received by the agency prior to closing. Comments at 2, attach. 1, Receipt For Handcarried Offer.

Both parties' related arguments largely are based on current recollections of events that occurred many months ago. For example, the agency's personnel recall that Shubhada submitted only one envelope. Supplemental Agency Submission, Affidavit of Bid Room Attendant (Aug. 18, 2003). The agency states that the envelope was not

¹ All of these proposals consisted of copies of the RFP with various certifications completed. One proposal also included a cover letter. Another proposal did not offer a price.

² Many months separate the protest date and the agency's competitive range determination and award decision. In mid-November, DLA prepared letters advising Shubhada and three other offerors that their proposals were not in the competitive range and would not be considered for award. Agency Report, Tab 5, Letters. Shubhada states that it did not receive this letter. Protester's Response to Dismissal Request, at 1. After award, the agency did not prepare a letter notifying the unsuccessful offerors of the award until April 30, 2003. Agency Report, Tab 7, Notice of Award. As evidenced by the postmark on the envelope received by Shubhada, the agency did not mail the notice of award until May 29. Protest at 1, enclosure, at 2. Shubhada received the notice on June 4, and timely filed this protest in our Office on June 13 (Shubhada did not request a debriefing).

large enough to, and did not, contain a binder of past performance and technical information. Agency Supplemental Report at 2.

Also, on October 21, 4 days after closing, Shubhada's representative called the agency; the agency's contracts specialist returned his calls. Agency Report, Tab 9, Conversation Record (Oct. 22, 2002). The contracts specialist states that Shubhada's representative asked to submit technical data to attach to Shubhada's proposal, but she told him that the agency would get back to him with a decision as to whether the submission of additional information would be permitted. Supplemental Agency Report, encl. 1, Affidavit of Contracts Specialist, at 1. Shubhada's representative states that he only inquired whether the contracts specialist had received Shubhada's proposal and whether she needed any additional information; according to Shubhada, the contracts specialist stated that she had received everything and did not need additional information. Second Supplemental Comments (Aug. 22, 2003), at 2.

Finally, Shubhada's representative states that he called the contracts specialist almost every month following the October conversation, through May 2003, to inquire as to the status of the procurement, and that the contracts specialist stated each time that Shubhada's proposal was still under consideration. Shubhada states that at no time prior to it receiving the notice of award did the agency inform Shubhada either that the firm's proposal was incomplete, or that an award had been made in December. Comments at 3; Second Supplemental Comments at 2. The contracts specialist states that at no time after the October conversation did she either discuss the status of Shubhada's offer with the firm's representative, or advise the representative that Shubhada's proposal was still under evaluation.³ Supplemental Agency Report, encl. 1, Affidavit of Contracts Specialist, at 1-2.

This protest thus presents a significant factual dispute. We need not resolve the dispute, however, because even if the protester's proposal did include additional information, the agency does not have any record (or recollection) of receiving it—at best, the information must be considered to have been lost. As explained below, the circumstances here do not provide a basis to sustain the protest.

Agencies have a fundamental obligation to have procedures in place to receive submissions from competitors under a solicitation, to reasonably safeguard submissions received, and to fairly consider all submission received. As a practical

³ The contracts specialist further states that, in general, she never responds to status calls in terms of the requester's proposal, but only identifies the status of the acquisition itself, such as, "The acquisition is still under evaluation." Supplemental Agency Report, encl. 1, Affidavit of Contracts Specialist, at 2. We note that the contracts specialist's statement does not clearly rule out any additional conversations with Shubhada on other matters, or suggest that the agency ever orally informed Shubhada that a contract had been awarded in December.

matter, however, even with appropriate procedures in place, an agency may lose or misplace a submission, and such occasional loss—even if through agency negligence—generally does not entitle an aggrieved competitor to relief. American Material Handling, Inc., B-281556, Feb. 24, 1999, 99-1 CPD ¶ 46 at 3; Marine Hydraulics Int’l, Inc., B-240034, Oct. 17, 1990, 90-2 CPD ¶ 308 at 3.

This arguably harsh result is justified by the unique circumstances arising in protests concerning lost information. The only means generally available to establish the content of lost information is for the protester to reconstruct that information. However, allowing an offeror to establish the content of its lost proposal after the closing date has passed would be inconsistent with maintaining a fair competitive system.⁴ Marine Hydraulics Int’l, Inc., *supra*. Here, the only evidence of the content of the information that the protester may have submitted prior to closing is a copy of that information produced by Shubhada during this protest process. The record does not contain any pre-closing evidence of the content of Shubhada’s technical proposal that the agency properly could evaluate. We therefore will not disturb the agency’s rejection of Shubhada’s incomplete proposal as technically unacceptable, the exclusion of Shubhada’s proposal from the competitive range, and the award to Titan. *See id.* at 2-3.

Our Office has recognized limited exceptions to the rule that negligent loss of proposal information does not entitle the offeror to relief. The exception generally applies where the loss was not an isolated act of negligence, but rather arises out of a systematic failure in the agency’s procedures that typically results in multiple or repetitive instances of lost information. *See S.D.M. Supply, Inc.*, B-271492, June 26, 1996, 96-1 CPD ¶ 288 at 4. The exception does not apply here. There is no evidence that the agency, for example, lost the proposal information submitted by other offerors,⁵ or previously has lost proposal information.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ Compare this to our decisions requiring the agency to consider a “late” submission if, among other things, it can be established that the offeror has not had a post-closing opportunity to alter the content of the submission. *E.g., Tishman Constr. Corp.*, B-292097, May 29, 2003, 2003 CPD ¶ 94 at 3-4.

⁵ Our Office independently has confirmed that the other offerors submitted incomplete proposals, ruling out the possibility that a systemic failure may have occurred here.