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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: ERC Inc.

File: B-405563

Date: November 18, 2011

Lawrence M. Prosen, K&L Gates, LLP, for the protester.
Michael J. Farr, Esq., Department of the Air Force, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected proposal as late where the actions of the driver for the commercial carrier delivering the proposal rather than any Government action were the paramount reason for the late submission.

DECISION

ERC, Inc., of Huntsville, Alabama, protests the rejection of its proposal, as late, under request for proposals (RFP) No. FA8721-10-R-0002, issued by the United States Air Force, for engineering and technology acquisition support services.

We deny the protest.

As finally amended, the RFP set the time for receipt of proposals as 12 p.m., Eastern Standard Time, August 8, 2011. The RFP instructed offerors to submit proposals to the following address: "Enterprise Acquisition Division (ESC/CAA) c/o [identified contract specialist], 20 Schilling Circle Bldg 1305, 3rd Floor, Hanscom AFB [Air Force Base], MA 01731." RFP amend. 2 at 1. In section L.2.10, the RFP stated that "[p]roposals shall be addressed to the CO [contracting officer] and mailed" to this address. See RFP § J, attach. 2, at 7. The RFP incorporated by reference FAR § 52.215-01, which provided, among other things, that proposals received at the Government office designated in the solicitation after the exact time specified for receipt of offers are "late" and will not be considered, except in certain circumstances not applicable here. FAR § 52.215-01(c)(3)(ii)(A).

On August 3, ERC sent the following electronic message to the Air Force contract specialist:

Reference Section L.2.10 Distribution: Will the government provide instructions for hand-delivering proposals, specifically the process to submit a visit request in order to gain base access to deliver proposals?

Agency Report (AR), Tab 5e, ERC Email to Air Force (Aug. 3, 2011). The Air Force responded the same day as follows:

“Proposals shall be addressed to the CO [contracting officer] and mailed to the address in Block 7 of Standard Form 33.”
“Hand-delivering” instructions are not provided as the Government requests all proposals to be mailed to the CO.

AR, Tab 5e, Air Force Email to ERC (Aug. 3, 2011).

On August 4, the Air Force issued amendment 2 to the RFP, which included revised cost forms. This amendment was sent to the offerors on Friday, August 5. According to ERC, the short turnaround time to complete these forms caused the firm significant logistical problems in light of the agency’s instructions to mail its proposal. ERC asserts that it was therefore precluded from using the United States Postal Service and was forced to use a commercial carrier, Federal Express (FedEx), to deliver its proposal. ERC explains that after completing its proposal, it sent the proposal by FedEx on August 6 at 9:53 a.m., using the highest priority, which guaranteed delivery no later than 8:00 a.m. local time on Monday, August 8.

ERC states that through monitoring the delivery, it learned that the FedEx driver, although arriving at the gate at Hanscom AFB on August 8 in sufficient time to timely deliver the proposal, decided to deliver it later to avoid waiting in a lengthy line at the gate. ERC states, following discussions with FedEx regarding the urgency to deliver the proposal by a certain time, the driver eventually returned and delivered the proposal to the designated proposal location in Hanscom AFB at 1:32 p.m. The Air Force rejected the proposal as late. This protest followed.

ERC asserts that the agency should not have rejected its proposal as late because the late delivery of its proposal was caused by not allowing ERC to self deliver its proposal with its own employee. ERC contends that other offerors were permitted to have their own employees or agents (as distinguished from third-party commercial carriers) hand deliver their proposals, yet ERC was not given the same opportunity to ensure that its proposal was timely delivered.

It is an offeror’s responsibility to deliver its proposal to the proper place by the proper time, and late delivery generally requires rejection of the proposal. Federal Acquisition Regulation § 15.208; The Staubach Co., B-276486, May 19, 1997, 97-1 CPD ¶ 190 at 3. A proposal delivered to an agency by a commercial carrier is considered to be hand-carried and, if it arrives late, can only be considered for award if it is shown that some government impropriety during or after receipt by the government

was the sole or paramount cause of the late arrival at the designated place. On-Site Env't'l, Inc.; WRS Infrastructure & Env't., Inc., B-294057, B-294057.2, July 29, 2004, 2004 CPD ¶ 138 at 3. Improper government action in this context is affirmative action that makes it impossible for the offeror to deliver the proposal on time. Caddell Constr., Co., Inc., B-280405, Aug. 24, 1998, 98-2 CPD ¶ 50 at 6. Nevertheless, even in cases where the late receipt may have been caused, in part, by erroneous government action, a late proposal should not be considered if the offeror significantly contributed to the late receipt by not acting reasonably in fulfilling its responsibility to deliver a hand-carried proposal to the proper place by the proper time. O.S. Sys., Inc., B-292827, Nov. 17, 2003, 2003 CPD ¶ 211 at 3.

ERC argues that it was treated unequally and prejudiced by the Air Force's instructions to mail, rather than self deliver, its proposal to the contracting officer at the address designated in the RFP. However, the record evidences that ERC did not follow this advice, but chose to have its proposal delivered by a commercial carrier. As indicated above, this is considered to be hand delivery of a proposal by an agent of the offeror. On-Site Env't'l, Inc.; WRS Infrastructure & Env't., Inc., supra.

Even conceding that the agency may have caused ERC to use a commercial carrier rather than self delivering the proposal by its own employees or agents, the record evidences that the delivery driver contributed significantly to the late delivery of the proposal. In this regard, ERC admits that the delivery driver arrived at the gate to Hanscom in sufficient time to deliver the proposal to the proper place at the proper time, but chose not to enter the base at that time to avoid waiting in a long line. It is apparent that this was the paramount cause that ERC's proposal was delivered late, not improper government action. Accordingly, we conclude that the Air Force properly rejected ERC's proposal as late.

The protest is denied.

Lynn H. Gibson
General Counsel