



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Gunter Construction, Inc.

File: B-412039

Date: November 30, 2015

Christopher Solop, Esq., and Lynn Patton Thompson, Esq., Biggs, Ingram & Solop, PLLC, for the protester.

Steven J. Koprince, Esq., Matthew T. Schoonover, Esq., and Matthew P. Moriarty, Esq., Koprince Law LLC, for Keiland Construction, LLC, the intervenor.

Scott N. Flesch, Esq., and Frank A. March, Esq., Department of the Army, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly failed to evaluate protester's final proposal revision is denied where discussions letter directed protester to use agency's online tool to submit its final proposal revision as an electronic document, and to provide notice to two e-mail addresses, but protester only successfully notified one recipient, who did not retrieve the document, and the agency's security protocol automatically subsequently destroyed the document.

DECISION

Gunter Construction, Inc., of Sulphur, Louisiana, a small business, protests the award of a contract to Keiland Construction, LLC, of Lake Charles, Louisiana, by the Department of the Army, Mission and Installation Contracting Command, under request for proposals (RFP) No. W91247-15-R-0004, for construction services at Fort Polk, Louisiana. Gunter argues that the Army improperly failed to evaluate its final proposal revision (FPR), and awarded the contract to Keiland at a higher price.

We deny the protest.

The Army issued the RFP on February 27, 2015, seeking proposals for a job order contract (JOC) for the “[s]ustainment, [r]estoration and [m]odernization of [p]ost[-w]ide [c]onstruction [e]fforts of real property facilities located at Fort Polk” RFP at 1. Competition was limited to participants in the Small Business

Administration (SBA) section 8(a) program that were located within the Louisiana SBA district. Id. at 1, 76, 89-90. The Army was to award a single indefinite-delivery/indefinite-quantity contract for a base year and two option years to the firm submitting the lowest-priced technically acceptable proposal. RFP at 118.

The RFP stated that initial proposals were to be submitted using a secure electronic system called AMRDEC SAFE.¹ To use this system, the offeror was required to upload its proposal and then enter an e-mail address for each individual to whom automated e-mail notifications were to be sent. The system then would send an e-mail notification to the intended recipient(s), stating that the document was available to be downloaded from the AMRDEC SAFE system, and providing a unique 1-time-use password within 14 days.² The Army received initial proposals from Gunter, Keiland, and three other firms. Agency Report (AR) at 5.³

The initial evaluation concluded that Gunter submitted an acceptable proposal at the lowest evaluated price of \$16.7 million. Keiland's proposal was rated unacceptable, with an evaluated price of \$17.5 million. However, the Army did not award a contract based on the initial proposals but, instead, issued amendment 3 to the RFP and held discussions with all five offerors. Much of amendment 3 repeated sections of the RFP verbatim, but it also revised all performance dates outward three months to conform to a new expected contract award date of September 1, 2015. AR at 5; RFP amend. 3 at 28-30. The proposal submission instructions in amendment 3 also changed the e-mail addresses to which AMRDEC SAFE notifications were to be sent. The addresses were listed in lowercase type in the Times New Roman font, and appeared essentially⁴ as follows:

[firstname].l.[lastname]12.civ@mail.mil and [firstname].z.[lastname].civ@mail.mil

RFP amend. 3 at 61.

¹ AMRDEC is an acronym for the Army Aviation and Missile Research Development and Engineering Center. SAFE is an acronym for Safe Access File Exchange. See AMRDEC SAFE website (<https://safe.amrdec.army.mil/safe/About.aspx>) (last visited November 9, 2015).

² The system allows the entity submitting a file, such as Gunter, to select the automatic deletion date no more than 14 days from the date of submission, which the system offers as the default.

³ With agreement of counsel, our Office treated the Army's dismissal request as the agency report because the request and its attachments thoroughly presented the relevant factual record and legal arguments.

⁴ Our decision has anonymized the e-mail addresses, but retained the portions relevant to the protest issues.

On the same day the agency issued amendment 3, the contracting officer issued a discussions letter to each offeror. The letter directed the offeror to submit its FPR through the AMRDEC SAFE system by August 5, with notification to two e-mail addresses, and stated that “[n]o other recipients should be specified.” Id. at 6; Protest attach. D, Discussions Letter to Gunter, July 29, 2015, at 1. Although the FPR notification recipient in amendment 3 (above) included the contracting officer who signed the discussions letter, she did not include herself in the instruction in the discussions letter.⁵ Instead, the two addresses in the discussions letter, which were once again listed in lowercase type in the Times New Roman font, appeared essentially as follows:

[firstname].l.[lastname]12.civ@mail.mil and [firstname].r.[lastname].civ@mail.mil

Protest exh. D, Discussions Letter to Gunter, July 29, 2015, at 1.

On August 4 at 11:53 a.m., Gunter submitted its FPR to the Army by uploading it to the AMRDEC SAFE website. AR at 6. Gunter then entered the first notification e-mail address from the discussions letter by correctly using a lowercase “L” in the position between the first and last names, but incorrectly using a lowercase “L” again at the character preceding the numeral “2.” Id. at 6-7. In fact, while the valid e-mail address did have an “L” between the first and last names, it had the numeral “1” between the final letter of the last name and the numeral “2,” not another lowercase letter “L.”⁶ Id. at 7. Gunter entered the second notification e-mail address from the discussions letter accurately. Id. at 6. As a result, the AMRDEC SAFE system did not successfully notify the first addressee that the system had received Gunter’s FPR, but it did send the proper notification to the second addressee as intended. Id. at 7-8.

The discussions also letter stated that “[i]f final proposal revisions are not received by the due date indicated above, your firm’s initial submission will be used to determine award.” AR, Tab 11, Discussions Letter to Gunter, at 1. After the FPR submission time had passed, the contracting officer (the same one who had signed the discussions letter) concluded that Gunter had not submitted an FPR, that an evaluation of the firm’s initial proposal showed that Gunter had not acknowledged

⁵ Although not identified by title in the discussions letter, the Army identifies the first addressee as a contracting specialist and the second as a contracting officer. See, e.g., AR at 7.

⁶ As suggested above, the error appears to have occurred because the font used in the discussions letter showed virtually identical typographic images (as illustrated above) for both the lowercase letter “L” and the numeral “1.” The AMRDEC SAFE system does not indicate when an e-mail address is invalid.

amendment 3 (because it was issued later), that amendment 3 was material, and that Gunter's initial proposal had therefore become unacceptable. AR at 10-11.

The second addressee received the AMRDEC SAFE notice of Gunter's FPR on August 4, but he did not open the e-mail or retrieve the FPR from storage in the AMRDEC SAFE system.⁷ AR at 8, 10-11. The second addressee acknowledges that he is a contracting officer who had been assigned to this procurement until July 6, and states that he was unaware that his successor had provided his e-mail address, instead of her own, for FPR submissions in the July 29 discussions letter. AR Tab 12, Declaration of Second Addressee, at 1. He explains that he did not open the AMRDEC SAFE notification because he was "very busy." Id.

On August 18 (14 days after receiving the file), the AMRDEC SAFE system automatically destroyed the only copy of Gunter's FPR in the Army's possession.

On August 28, the contracting officer awarded the contract to Keiland as the firm whose FPR was the lowest-priced technically acceptable offer. On August 31, the contracting officer notified Gunter of the award, and explained that Gunter's proposal had been rejected because, although it had been technically acceptable and remained lower-priced than the awardee, Gunter had not acknowledged amendment 3 and had not offered a price for the contractor manpower reporting contract line item that was added by amendment 3. Protest exh. A, Letter from Contracting Officer to Gunter, Aug. 31, 2015, at 1. This protest followed.

ANALYSIS

Gunter argues that the Army received but improperly failed to evaluate the firm's FPR. Even if not, Gunter argues the instructions for submitting FPRs contained a latent ambiguity regarding the first addressee's e-mail address because they used a font that did not distinguish between the lowercase "L" and the numeral "1" in the address. Protest at 3. Gunter also argues that its FPR arrived at the Army's designated depository (the AMRDEC SAFE system) and notification of its availability arrived with the second addressee, so the Army's failure to evaluate the FPR was due to mishandling by the Army's systems or personnel. Protest at 4-5.

⁷ The second addressee opened the notification e-mail on September 1 after an inquiry from the contracting specialist. That inquiry was apparently prompted by questions from the protester. The e-mail states that the AMRDEC SAFE system had received a file described as "Fort Polk JOC BAFO," from an individual using a Gunter Construction e-mail address. See AR Tab 12, Declaration of Second Addressee, at 2 (copy of August 4 AMRDEC SAFE notification e-mail). The notification also identified the subject as "Job Order Contract for Department of Public Works for Fort Polk," and stated that the file would be available to the addressee through August 18. Id. at 2-3.

The Army counters that the FPR submission instructions in the discussions letter were clear⁸ or, at worst, constituted a patent ambiguity. Therefore, the Army maintains, it was Gunter that failed to request clarification of (or to file a protest about) the proper addresses to notify upon submitting its FPR through the AMRDEC SAFE system. AR at 17-18.

The second contracting officer (who was the second addressee) explains that although the AMRDEC SAFE system notified him that a document had been submitted for retrieval, he did not open the notification e-mail and did not retrieve Gunter's FPR. AR, Tab 12, Declaration of Second Addressee, at 1-2. He states that although he had been assigned to this RFP as the contracting officer when discussions were being held, he had been reassigned to other duties by the time that FPRs were due, and he was not aware that the contracting officer had provided his e-mail address (rather than her own) for FPR submissions. Id. Furthermore, he did not communicate with the responsible contracting officer or contracting specialist about his receipt of the notice about Gunter's FPR until after award, on September 1. Id. at 2.

Ultimately, the Army argues, even if the agency mishandled or lost Gunter's FPR, it is no longer possible to know with certainty the contents of the FPR submission because the AMRDEC SAFE system performed as designed: it destroyed the FPR submission 14 days after it was submitted. AR at 13.

Agencies have a fundamental obligation to have procedures in place not only to receive proposals, but also to reasonably safeguard the proposals received, and to give them fair consideration. S.D.M. Supply, Inc., B-271492, June 26, 1996, 96-1 CPD ¶ 288 at 4, recon. denied, Dep't of the Army--Recon., B-271492.2, Nov. 27, 1996, 96-2 CPD ¶ 203; see also Federal Acquisition Regulation (FAR) § 15.207. However, as a practical matter, even with appropriate procedures in place, an agency may lose or misplace a proposal. We have held that such an occasional loss--even if it occurs due to negligence of the agency--generally does not entitle the bidder or vendor to relief. Id.; Interstate Diesel Serv., Inc., B-244842.2, Sept. 27, 1991, 91-2 CPD ¶ 304 at 2. Thus, for example, we have held that an agency's rejection of a quotation was reasonable where the protester e-mailed its quotation to the agency, but the agency never actually received the submission before the deadline. Turner Consulting Group, Inc., B-400421, Oct. 29, 2008, 2008 CPD ¶ 198 at 4.

⁸ The Army argues that there was no actual ambiguity because the type images of the lowercase "L" and the numeral "1" are not truly identical, but have slight differences; the Army contends that if Gunter had magnified the text, the differences would have become "more pronounced." AR at 7 n.3.

The Army does not dispute that Gunter delivered its FPR to the agency system designated for receipt of FPRs a day before it was due. Even though Gunter's effort to notify one contracting official was unsuccessful, the firm used the system to notify one of the agency officials properly. AR Tab 12, Declaration of Second Addressee, at 1. Since it was apparently following the instructions in the discussions letter, Gunter did not attempt to send a notification to one of the addressees listed in amendment 3. Nevertheless, we need not consider whether Gunter bears the responsibility for failing to perceive the ambiguity in the intended e-mail address for the first addressee because we conclude that Gunter submitted its FPR to the Army, and properly notified the agency through the second addressee, in compliance with the contracting officer's direction.

The second addressee has provided no reasonable explanation for failing to open the AMRDEC SAFE notification e-mail, which stated that a sender from a Gunter Construction e-mail address had submitted a "Fort Polk JOC BAFO" for him. Id. at 2 (copy of August 4 AMRDEC SAFE notification e-mail). The Army's explanation for failing to retrieve Gunter's FPR (which the Army should have been expecting) is thus unreasonable. Likewise the failure of the contracting officer to contact that colleague promptly is also unreasonable--particularly because she had instructed offerors to submit their FPRs to him, rather than to herself, and could have asked whether the expected FPR from Gunter had reached him. We also recognize that if Gunter had attempted to follow the FPR submission instructions in amendment 3, instead of those in the discussions letter, it is likely that notification of the FPR would have reached the contracting officer. Under these circumstances, however, we conclude that the Army received the protester's FPR, but failed to use reasonable procedures to preserve and evaluate it. See Dep't of the Army--Recon., supra (affirming sustained protest where protester's quotation was submitted to agency computer system but not evaluated because contracting officer was not notified of its receipt).

Nevertheless, we do not sustain the protest because the AMRDEC SAFE system destroyed the only copy of Gunter's FPR. As noted previously, even where an agency negligently destroys an offeror's proposal, that fact does not entitle the bidder or vendor to relief. Project Resources, Inc., B-297968, Mar. 31, 2006, 2006 CPD ¶ 58 at 2 (denying protest where agency signed for but then lost proposal). This result is justified by the unique circumstances arising in protests concerning lost information. Id. The only means generally available to establish the content of lost information is for the protester to reconstruct that information, but 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. Id.

Nevertheless, when deciding whether to exercise options under the contract, the Army may wish to consider, among the "other factors" under FAR § 17.207, whether the integrity of the procurement system and the potential for significantly lower

prices would justify holding a new competition for the remainder of the JOC requirement.

The protest is denied.⁹

Susan A. Poling
General Counsel

⁹ Gunter also argues that even if the FPR was not evaluated, the Army still should have accepted the firm's initial proposal, and made award on that basis. Protest at 5. This argument lacks merit because amendment 3 changed the dates of contract performance and was thus material. See W.S. Jenks & Son, B-240865, Nov. 28, 1990, 90-2 CPD ¶ 440 at 3 (bid that failed to acknowledge amendment changing performance dates was properly rejected). Thus, Gunter's initial proposal could no longer be accepted.