



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

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

Decision

Matter of: Emagine IT, Inc.

File: B-416344.3; B-416344.5; B-416344.6

Date: December 21, 2018

Thomas K. David, Esq., Kenneth D. Brody, Esq., and Katherine A. David, Esq., David, Brody & Dondershine, LLP, for the protester.

John R. Tolle, Esq., and H. Todd Whay, Esq., Baker, Cronogue, Tolle & Werfel, LLP, for VMD Systems Integrators, Inc., the intervenor.

Anthony E. Marrone, Esq., and Tony A. Ross, Esq., Department of Health and Human Services, for the agency.

Evan D. Wesser, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision to exclude the protester's expired proposal from the competition is denied where the record shows that the protester failed to exercise reasonable diligence to ensure the continuing viability of its proposal, and to allow revival of the proposal would compromise the integrity of the competitive bidding system.

DECISION

Emagine IT, Inc., a small business, of Fairfax, Virginia, protests the award of a task order to VMD Systems Integrators, Inc., a small business, of Reston, Virginia, by the Department of Health and Human Services, National Institutes of Health (NIH), under task order request for proposals (TORP) No. C-43269-SB, issued under the CIO-SP3 Small Business (SB) governmentwide acquisition contract (GWAC), for professional business analysis, advisory, and assistance support services for the Secretary of the Air Force, Information Dominance & Chief Information Officer. Emagine challenges the agency's decision to exclude its proposal from the competition on the basis that the proposal had expired.

We deny the protest.

BACKGROUND

The TORP, which was issued on February 23, 2018, and subsequently amended twice, sought proposals from holders of the CIO-SP3-SB indefinite-delivery, indefinite-quantity (IDIQ) GWAC, for professional business analysis, advisory, and assistance support services for the Secretary of the Air Force, Information Dominance & Chief Information Officer. The TORP anticipated the award of a fixed-price task order, with a 1 year base period, and four 1-year option periods. TORP at 1. Award was to be made on a best-value tradeoff basis, considering price and the following five non-price factors: (1) technical understanding and management approach; (2) staffing plan; (3) small business participation commitment; (4) personnel qualifications; and (5) past performance. Id. at 12, 17.

NIH received three proposals in response to the TORP, including from Emagine and VMD. Following clarifications, the agency made award to VMD on April 27. Contracting Officer's Statement (COS) at 2. On May 7, Emagine and the other unsuccessful offeror filed protests with our Office challenging the award to VMD. Subsequent to the filing of the protests, the agency represented its intent to take corrective action. Specifically, the agency committed to, at a minimum, reconsider the evaluation of proposals, conduct discussions, as necessary, and document a new cost/technical tradeoff and source selection decision. Based on NIH's proposed corrective action, we dismissed the protests as academic. Emagine IT, Inc., B-416344, June 8, 2018 (unpublished decision); Evoke Research and Consulting, LLC, B-416344.2, June 8, 2018 (unpublished decision).

Following our dismissal, NIH e-mailed the three offerors on August 23 to request that they extend their respective proposals through September 23. Agency Report (AR), Tab 11.3, E-mail from Contracting Officer to Offerors (Aug. 23, 2018, 4:56 PM), at 1. All three offerors, including Emagine, timely responded and affirmed that they granted the requested extension. COS at 3. On September 18, the agency again contacted the three offerors, using the same e-mail addresses used in the August 23 e-mail, to ask that the offerors: (1) confirm whether the key personnel stated in their proposals were still available and committed to serve as key personnel; and (2) extend their proposals through September 30. The contracting officer's e-mail further stated that "a refusal to extend the acceptance period of your proposal may result in the proposal not being considered for award." AR, Tab 11.1, E-mail from Contracting Officer to Offerors (Sept. 18, 2018, 11:31 AM), at 1. Also on September 18, the contracting officer received a "read receipt" indicating that Emagine had received and opened the agency's e-mail. AR, Tab 11.2, E-mail Read Receipt, at 1.¹

¹ A "read receipt" is a type of e-mail tracking functionality that provides for the sender of an e-mail to receive confirmation of the receiver having opened the e-mail message. Dell Servs. Fed. Gov., Inc., B-405244, B-405244.2, Sept. 30, 2011, 2011 CPD ¶ 200 at 2 n.1

Notwithstanding Emagine's apparent receipt of the e-mail, only VMD and the third offeror responded to NIH's e-mail. Based on their responses, the agency opened discussions with the two offerors and requested and received final proposal revisions. After the evaluation of the two eligible final proposals received by the agency, VMD's proposal was selected as offering the best value to the government. On October 1, NIH notified Emagine that the award to VMD had been reaffirmed, and that the stop work order that had been in place since the filing of Emagine's initial protest with our Office had been lifted. The notice to the protester explained that its proposal was not considered for award because Emagine failed to extend its proposal and confirm the continuing availability of its key personnel per the request sent via e-mail on September 18. See Protest, exh. B, Unsuccessful Offeror Notice, at 4. On October 3, Emagine contacted the contracting officer to convey its intent to revive its proposal, arguing that its prior protest filed with our Office and previous participation in the procurement demonstrated its intent to have remained in the competition. Specifically, Emagine stated, in relevant part, that:

Please be advised that EIT reiterates its previously displayed and conveyed desire to have its proposal for [this procurement] extended and considered for award. In addition to other viable indicators and communications, EIT's participation in the bid protest process provides clear evidence of our intent to extend our offer and continue our outstanding services to [the Air Force] if the protest is resolved favorably. The company believes its prior actions clearly evidenced its clear intent for the government to continue in its corrective action while also assessing the regulatory flaws that we claimed were present in the construction of VMD's proposal. The government continuation of its announced corrective action will not compromise the integrity of the competitive bidding system.

Protest, exh. G, E-mail from Emagine to Contracting Officer (Oct. 3, 2016, 12:46 PM), at 1. This protest to our Office followed on October 9.²

DISCUSSION

Emagine primarily argues that it was unreasonable for the agency not to consider its proposal because the protester had effectively communicated its intent to remain in the competition when it filed its initial protest challenging the first award decision to VMD, and subsequently granted an extension of its proposal through September 23. Based on this conduct, the protester alleges that the agency could not have reasonably inferred that Emagine's failure to respond to the September 18 request to extend the

² The awarded value of the task order, which is \$77,008,409, exceeds \$10 million. Accordingly, this procurement is within our statutory grant of jurisdiction to hear protests in connection with task and delivery orders valued in excess of \$10 million issued under civilian agency multiple-award IDIQ contracts. 41 U.S.C. § 4106(f).

acceptance period of its proposal or to take any action upon the expiration of the proposal on September 23 was indicative of its intent to no longer participate in the competition. Alternatively, Emagine contends that the agency erred in failing to allow the protester to revive its expired proposal because allowing the protester to have done so would not have compromised the integrity of the competitive bidding system. For the reasons that follow, we find that NIH reasonably excluded Emagine's proposal from further consideration where the protester failed to exercise reasonable diligence to ensure the continuing viability of its proposal and allowed the proposal to expire. Additionally, we find that the agency's decision not to allow the protester to revive its proposal was also reasonable under the circumstances. Therefore, we find no basis on which to sustain the protest.³

A solicitation's minimum acceptance period is a material requirement. Banknote Corp. of Am., Inc., B-278514, Feb. 4, 1998, 98-1 CPD ¶ 41 at 3. An offeror's compliance with a solicitation's acceptance period is required so that all offerors share the same business risks of leaving their bid or proposals open for acceptance by the government for the same amount of time. Global Automotive, Inc., B-406828, Aug. 3, 2012, 2012 CPD ¶ 228 at 3-4. We have recognized that when an agency requests that an offeror or bidder extend its acceptance period, it is the responsibility of each offeror or bidder that desires to extend its acceptance period to communicate assent, either by ensuring that the agency receives an express extension or by conduct from which the agency can infer the offeror's or bidder's intent. M.J.S., Inc., B-244410, Oct. 17, 1991,

³ Emagine raises other collateral arguments. While our decision does not specifically address every argument, we have considered all of the protester's arguments and find that they do not provide a basis on which to sustain the protest. For example, the protester alleges that VMD should have been eliminated from the competition because VMD's proposed program manager, a key person, became unavailable sometime between VMD's initial proposal submission and the first award in April 2018. See Emagine Comments & Second Supp. Protest at 24-26. We have explained that offerors are obligated to advise agencies of changes in proposed staffing and resources, even after the submission of proposals. General Revenue Corp., et al., B-414220.2 et al., Mar. 27, 2017, 2017 CPD ¶ 106 at 22. When the agency is notified of the withdrawal of a key person, it has two options: either evaluate the proposal as submitted, where the proposal would be rejected as technically unacceptable for failing to meet a material requirement, or open discussions to permit the offeror to amend its proposal. Id. Here, the agency elected to reopen discussions and permit offerors to submit revised proposals. Thus, the protester's allegations fail to demonstrate that the agency violated any applicable procurement law or regulation, and therefore are without merit. Similarly, Emagine argues that the agency failed to reasonably implement the promised corrective action that resulted in the dismissal of Emagine's initial protest when the agency failed to engage the protester in discussions. Protest at 18-19. As discussed herein, however, the agency did open discussions with the offerors, but Emagine was not invited to participate where it failed to respond to the agency's request to extend the validity of its proposal and otherwise allowed its proposal to expire.

91-2 CPD ¶ 344 at 4; Pegasus Alarm Assocs., Inc., B-225597, Apr. 16, 1987, 87-1 CPD ¶ 417 at 3. Our Office has long explained that the burden of ensuring agency receipt of the extension is on the offeror. Western Star Hosp. Auth., Inc., B-414198.2, B-414198.3, June 7, 2017, 2017 CPD ¶ 183 at 8-9; Discount Machinery & Equip., Inc., B-244392, Oct. 15, 1991, 91-2 CPD ¶ 334 at 3. Here, the record shows that Emagine took no reasonable affirmative steps to extend the acceptance period of its proposal.

As discussed above, NIH e-mailed Emagine to request an extension of its proposal and confirm the availability of its proposed key personnel. AR, Tab 11.1, E-mail from Contracting Officer to Offerors (Sept. 18, 2018, 11:31 AM), at 1. The agency received a read receipt indicating that Emagine received the e-mail, but otherwise did not receive a response from the protester addressing the agency's two requests. AR, Tab 11.2, E-mail Read Receipt, at 1. Emagine offers no reasonable rebuttal to the agency's evidence that it had, in fact, requested an extension of the protester's proposal, and had received a read receipt indicating that Emagine had received the request. For example, the protester does not argue that the e-mail was misaddressed, or offer any forensic analysis, compelling alternative explanation for the generation of the read receipt, or declaration from the Emagine representative who received the e-mail. Rather, the protester merely suggests that the Emagine representative "does not recall receiving this e-mail from the agency." Protest at 12. In the absence of any meaningful rebuttal, we find that the record fully supports the agency's reasonable inference that Emagine did not intend to extend its proposal based on its failure to respond to the extension request that the agency has confirmation was received by the protester.

In any event, beyond failing to respond to NIH's extension request, the fact remains that Emagine knew, or reasonably should have known, that its proposal was only valid through September 23, which was the last extension granted by Emagine.

Notwithstanding that its proposal expired on September 23, the protester made no effort to contact the contracting officer regarding the status of the procurement or to express its intent to extend the acceptance period of its proposal until after the protester was notified of its exclusion from the competition on October 1. Thus, in our view, any blame for Emagine's failure to timely extend the acceptance period of its proposal properly lies with Emagine, not the agency.⁴

⁴ Emagine argues that NIH should have inferred its intent to remain in the competition based on its incumbency, prior protest to our Office, and grant of at least one extension during the pendency of the corrective action. This argument is devoid of merit. In rare instances, we have found that an agency may infer an extension of a bid or offer acceptance period only where the bidder has taken some affirmative step that provides clear evidence of its intent to extend, and the contracting agency has been fully aware of this action. For example, a party's active participation in a bid protest tolls its bid acceptance period until the protest is resolved. Western Star Hosp. Auth., Inc., *supra*, at 9. This limited exception is inapplicable here, where the protest was resolved months before Emagine's proposal expired. Similarly, we have applied the limited exception where a firm fails to explicitly grant an extension, but takes other affirmative measures,

(continued...)

Notwithstanding its failure to proactively take any measures to ensure the ongoing viability of its proposal, Emagine alternatively contends that NIH unreasonably failed to allow the protester to revive its proposal. Where a proposal has expired, we have recognized that an offeror may extend its acceptance period and revive its proposal if doing so would not compromise the integrity of the competitive bidding system.

Western Star Hosp. Auth., Inc., supra, at 10. Where we have found that revival should have been allowed, we have found that a bidder or offeror has promptly taken action to rectify the expiration or where all offerors were treated equally. For example, we have found that revival is appropriate where a bid or proposal expires on a weekend, and the bidder or offeror promptly revives its proposal on the next business day. Ocean Servs., LLC, B-404690, Apr. 6, 2011, 2011 CPD ¶ 73 at 2-3; Trojan Indus., Inc., B-220620, Feb. 10, 1986, 86-1 CPD ¶ 143 at 5. We have also found revival appropriate where all offerors were granted the opportunity to extend their proposals on an equal basis via an amendment to the solicitation. BioGenesis Pac., Inc., B-283738, Dec. 14, 1999, 99-2 CPD ¶ 109 at 6.

In contrast, we have found that allowing revival would compromise the integrity of the competitive bidding system where the offeror or bidder offered an acceptance period shorter than other bidders, or where the offeror or bidder expressly or impliedly refused a request to extend its bid and later granted an extension as its own interests dictated. Western Hosp. Auth., Inc., supra, at 10. Similar to the circumstances here, we have rejected arguments that revival should have been allowed where there is evidence that the government attempted to contact the offeror or bidder in order to secure an extension, but the offeror or bidder either did not receive or timely respond to the request, and subsequently sought to revive its bid or proposal more than a week after the bid or proposal expired. See, e.g., Discount Machinery & Equip., Inc., supra (denying protest that an agency should have allowed bid revival weeks after other offerors had granted extensions where the agency never received the protester's alleged extension); Pegasus Alarm Assocs., Inc., supra, at 3-4 (also denying protest where the protester claimed that it never received the agency's second extension request, and sought to revive the bid after award had been made).

Here, Emagine failed to respond to the agency's request for an extension and took no other steps to address the expiration of its proposal for more than a week. On this record, we find that allowing revival would compromise the integrity of the competitive bidding system where: Emagine took no affirmative steps to maintain the viability of its proposal; and the other offerors have already been subjected to responding to discussions and submitting revised proposals, and the agency has already evaluated those revised proposals. To allow revision under these circumstances would reward Emagine's lack of reasonable diligence, and would be contrary to its affirmative

(...continued)

such as submitting a best and final offer or other bid or proposal related information. M.J.S., Inc., supra. Here, no such similar proposal submission was made by Emagine.

obligation to have promptly and effectively communicated its intent to remain in the competition.

The protest is denied.

Thomas H. Armstrong
General Counsel