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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Al-Tahouna Al-Ahliyah General Trading & Contracting Company W.L.L.

File: B-411505

Date: August 11, 2015

Meshal Al-Otaibi, for the protester.

Robin E. Walters, Esq., Defense Logistics Agency, for the agency.

Evan D. Wesser, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's awards of contracts for the sale of scrap metal to two offerors who bid lower rates per pound than the protester is denied where the record does not demonstrate that the agency received the protester's higher-priced bid before the submission deadline.

DECISION

Al-Tahouna Al-Ahliyah General Trading & Contracting Company W.L.L. (Al-Tahouna), of Hawally, Kuwait, protests the awards to Al-Baz 2000 General Trading & Contracting Company W.L.L. (Al-Baz), of Hawally, Kuwait, and Class Worldwide General Trading LLC (CWGT), of Dubai, United Arab Emirates (UAE), under invitation for bids (IFB) No. 39-4604, which was issued by the Defense Logistics Agency (DLA), for the sale of metallic scrap located in Bahrain.¹ Al-Tahouna alleges that DLA unreasonably made award to Al-Baz and CWGT, who bid lower rates per pound for the scrap metal than proposed by the protester,

¹ As a general matter, sales by a federal agency, such as scrap sales, are not procurements of property or services, and are therefore not within our Office's bid protest jurisdiction. See 31 U.S.C. § 3551(1)(a). We will, however, consider protests concerning sales by a federal agency if that agency has agreed in writing to have such protests decided by our Office. Bid Protest Regulations, 4 C.F.R. § 21.13(a). DLA, by letter dated January 13, 1987, has expressly agreed to have protests concerning scrap sales decided by our Office. See Agency Report (AR) at 1 n.1.

because the agency failed to consider the protester's timely submitted, higher-priced bid. DLA responds that it did not receive a bid from Al-Tahouna prior to the bid submission deadline.

We deny the protest.

BACKGROUND

On November 19, 2014, DLA issued the IFB seeking bids for the purchase of mixed metallic and electronic scrap in Bahrain. Relevant to the issues in the protest, the IFB contemplated the award of one or more awards for metallic scrap with a 1-year base period and up to two 1-year options. IFB at 6, 9. The IFB contemplated that each awardee would be guaranteed the right to purchase a minimum quantity of 20,000 pounds of metallic scrap, with a maximum potential quantity of 20,000,000 pounds. Id. at 9. Awards were to be made to the highest-priced, responsive, responsible bidder(s). Id. at 8.

The IFB stated that bids would be accepted until the specified date and time set for bid opening, and warned that “[b]ids and all required documentation received after the bid opening date may be determined late and not considered.” Id. at 2. The IFB further provided that “[b]ids must be in the possession of the Sales Contracting Officer by the hour (exact time) specified for the bid opening.” Id. at 17. Bidders were permitted to submit their bids by email. Id. The IFB, however, specifically advised offerors that “[i]t is the bidder’s responsibility to confirm receipt of email bids (via phone or email).” Id.

DLA extended the original bid submission deadline from December 4 at 3 p.m. Bahrain Standard Time (BST) until December 18 at 3 p.m. BST. Contracting Officer’s Statement of Facts (COSF) (June 8, 2015) ¶ 2. The agency received 19 responsive bids and 4 non-responsive bids for the metallic scrap portion of the IFB by the revised bid submission deadline. AR, Tab 2, Bid Abstract, at 1-2. DLA represents that it did not receive a bid from Al-Tahouna prior to the bid submission deadline, and no bidder communicated any transmission difficulties to DLA. COSF (June 8, 2015) ¶ 5. Of the timely bids received by DLA, Al-Baz proposed the highest price of \$0.32/pound, and CWGT proposed the next highest price of \$0.30/pound. AR, Tab 2, Bid Abstract, at 1. On March 13, the agency made awards to Al-Baz and CWGT. COSF (June 8, 2015) ¶ 5.

Contemporaneously with the issuance of the IFB for the Bahrain sale, the same DLA contracting officer (CO) also issued IFBs for similar metallic and electronic scrap sales for Kuwait and UAE. Id. ¶ 3. The CO consolidated the email lists used to communicate with bidders for all three IFBs. Id. The list of successful offerors for the Bahrain IFB was sent to the consolidated bidders’ email list on March 16. Id. ¶ 7; Protest (May 7, 2015), attach. No. 5, List of Successful Bidders (Mar. 16, 2015).

Upon receipt of the Bahrain IFB successful offerors list, Al-Tahouna promptly emailed the CO to inquire why its higher-priced proposal of \$0.398 per pound for metallic scrap was not selected for award. Protest (May 7, 2015), attach. No. 3, Email from Al-Tahouna (Mar. 16, 2015), at 1. The protester forwarded a copy of an email with proposal attachments purportedly sent from Al-Tahouna to the designated email address in the IFB, which was dated December 18, 2014 at 2:54 p.m. BST. Id., Email from Al-Tahouna (Mar. 17, 2015).

In response to Al-Tahouna's inquiry, the CO commenced an investigation. First, the CO requested a search of the DLA disposition sales bid box to confirm whether any bid for the Bahrain IFB was received from Al-Tahouna; no such bid was identified. COSF (June 8, 2015) ¶ 7. Next, the CO engaged DLA's enterprise help desk to conduct further research. Id. ¶¶ 9, 11-12. The help desk personnel searched the DLA disposition services server and other DLA sites, in the event that the email had been routed to another server. Id. ¶¶ 11, 13; AR at 4. The help desk did not find any evidence that the bid had entered the agency's computing infrastructure. COSF (June 8, 2015) ¶ 13. The CO, however, explained that the help desk had also indicated that the agency's various sites only retain emails and the associated server logs for a period of 30-90 days. Id. ¶ 11. The agency therefore acknowledges, as a result of the agency's automatic purging of emails and server logs, it could not "definitively" conclude that Al-Tahouna's December 18 email had never entered DLA's computing environment. Id. ¶ 13; AR at 4.

On May 6, the CO notified Al-Tahouna that DLA's investigation failed to locate any emails or bids submitted by the protester in response to the Bahrain IFB prior to the bid submission deadline. Protest (May 7, 2015), attach. No. 4, Memo. to Al-Tahouna (May 6, 2015), at 1. This timely protest followed.

DISCUSSION

Al-Tahouna argues that its highest-priced bid was timely submitted to DLA, and that the agency unreasonably excluded the protester from the competition. The protester's argument relies on two documents: (1) a copy of the email it asserts was submitted to the email address set forth in the IFB approximately 6 minutes before the bid closing time; and (2) a document logging the various servers the email message passed through after being transmitted, including the successful receipt at another contractor-controlled email account that was copied on the transmission to the agency. For the reasons set forth below, we find no basis to sustain the protest.

Neither the Competition in Contracting Act of 1984 (CICA) nor the Federal Acquisition Regulation (FAR) apply to sales of government property. Where, as here, CICA and the FAR do not apply to procurements that are otherwise within our jurisdiction, we review the record to determine if the agency's actions were reasonable and consistent with any statutes or regulations that do apply. See, e.g.,

Open Spirit, LLC, B-410428, B-410428.2, Dec. 15, 2014, 2014 CPD ¶ 373 at 6; Great S. Bay Marina, Inc., B-293649, May 3, 2004, 2004 CPD ¶ 108 at 2-3.

In protests involving IFBs subject to FAR part 14, we have found that bidders are responsible for delivering their bids to the proper place at the proper time, and late delivery of a bid generally requires rejection even if it is the lowest (or, in this case, the highest) bid. See Aquaterra Contracting, Inc., B-400065, July 14, 2008, 2008 CPD ¶ 138 at 3; Amigo-JT Joint Venture, B-292830, Dec. 9, 2003, 2003 CPD ¶ 224 at 4. We have also found that it is an offeror's responsibility, when transmitting its bid or proposal electronically, to ensure the bid's or proposal's timely delivery by transmitting the bid or proposal sufficiently in advance of the time set for receipt of bids or proposals to allow for timely receipt by the agency. C2G Ltd. Co., B-411131, May 12, 2015, 2015 CPD ¶ 157 at 4.

Here, we find that Al-Tahouna has failed to establish that its bid was received by DLA prior to the closing time for the receipt of bids. As stated above, it is an offeror's responsibility to ensure that an electronically submitted bid is received by--not just submitted to--an agency prior to the time set for closing. See also IFB at 17 (stating that it was the offeror's responsibility to confirm receipt of an emailed bid). Al-Tahouna does not argue, and the record contains no other evidence showing, that the protester attempted to confirm receipt of its emailed bid. The only evidence provided by the protester to demonstrate that the agency received Al-Tahouna's bid is a copy of the email sent by the protester 6 minutes before the closing time, and a copy of the server route for the message reflecting that another Al-Tahouna controlled email address that was copied on the message successfully received the email. See Protest (May 7, 2015), attach. No. 2, Email from Al-Tahouna (Dec. 18, 2014); attach. No. 3, Gmail Server Information (May 6, 2015). Neither of these documents, however, demonstrates that DLA in fact received the bid prior to the closing time.

DLA conducted an internal investigation and found no evidence demonstrating that the agency received the protester's bid prior to the IFB's closing time. See COSF ¶ 13. Furthermore, with regard to the server data submitted by the contractor, DLA submitted a declaration by the Microsoft Windows server team lead and senior Microsoft Exchange email administrator for the agency's email support contractor (the DLA email administrator). See DLA Email Administrator Statement (June 5, 2015). The DLA email administrator states that he reviewed the server data submitted by the protester, but that none of the internet protocol addresses referenced in the document reflect a received message at a DLA internet protocol. Id. ¶ 5. Rather, the DLA email administrator explains that the internet protocol addresses in the document only reflect that the document was successfully transmitted within the same email environment utilized by the protester. Id. ¶¶ 6-7. Al-Tahouna does not specifically dispute the DLA email administrator's explanation

of the server data.² On this record, we find that the protester has failed to demonstrate that DLA timely received the bid prior to the IFB's closing time.

Al-Tahouna also argues that our Office should draw a negative inference from DLA's destruction of electronic files, in the ordinary course of the agency's business, from the email inbox used for the receipt of bids. The protester argues that the agency's 30-90 day email retention periods are inconsistent with the requirements of FAR § 4.805. Comments (June 18, 2015) at 1. That provision of the FAR provides, in relevant part, that unsuccessful offers, quotations, bids, and proposals relating to contracts above the simplified acquisition threshold must be retained at least until the contract is completed. FAR § 4.805(b)(5)(i). Although the FAR is not applicable to this scrap sale procurement, we find that DLA was nonetheless required to retain copies of any unsuccessful bids for a reasonable period of time. Under the circumstances here, it is questionable whether DLA's policy of purging the email inbox used to receive bids after as little as 30 days was reasonable. Had Al-Tahouna provided any evidence indicating the timely receipt of its bid by the government, DLA would have borne the risk that it would be unable to rebut the evidence when the burden would have shifted to the agency. Cf. Southwest Marine, Inc.; Am. Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10 (finding that, in a negotiated procurement, where an agency fails to retain evaluation materials it bears the risk that there is inadequate supporting rationale in the record for the source selection decision), recon. denied, B-265865.5, B-265865.6, June 3, 1996, 96-1 CPD ¶ 261; Hydraudyne Sys. & Eng'g B.V., B-241236, B-241236.2, Jan. 30, 1991, 91-1 CPD ¶ 88 at 5 n.4 (finding that, in a negotiated procurement, the destruction of evaluation documentation in violation of the FAR's requirements was "inappropriate"). In the absence of any such evidence from the protester showing that its bid was timely received by the agency, however, we need not resolve this evidentiary matter.

The protest is denied.

Susan A. Poling
General Counsel

² Al-Tahouna requested that our Office contact Google to seek additional information regarding the email system utilized by the protester. Comments (June 18, 2015) at 2. Our Bid Protest Regulations, however, require that a protester "[s]et forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents." 4 C.F.R. § 21.1(c)(4). We do not conduct investigations as part of our bid protest function. Coast to Coast Computer Prods., Inc., B-409528.33, Dec. 3, 2014, 2014 CPD ¶ 346 at 6 n.8; Information Ventures, Inc., B-407478.4, July 17, 2013, 2013 CPD ¶ 176 at 9.