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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Athena Construction Group, Inc.

**File:** B-413406; B-413406.2

**Date:** October 21, 2016

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Carol L. O’Riordan, Esq., Anthony J. Marchese, Esq., and Taimur Rabbani, Esq., O’Riordan Bethel Law Firm, LLP, for the protester.

Benjamin M. Diliberto, Esq., Department of Veterans Affairs, for the agency.

Matthew T. Crosby, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest challenging agency’s acceptance of a bid received in the bid opening room after the time set for bid opening is denied where the record shows the bid was received at the government installation’s mailroom and was under the government’s control before the time set for the receipt of bids.

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### DECISION

Athena Construction Group, Inc., of Triangle, Virginia, protests the award of a contract to R&R Construction Services, Inc., of Moon Township, Pennsylvania, by the Department of Veterans Affairs (VA), National Cemetery Administration, under invitation for bids (IFB) No. VA786A-16-B-0046 for road repair services at the Baton Rouge National Cemetery in Baton Rouge, Louisiana. Athena alleges that the agency should have rejected R&R’s bid as late.

We deny the protest.

### BACKGROUND

The agency issued the solicitation on May 18, 2016 as a service-disabled veteran-owned small business set-aside. IFB at 1. The solicitation called for various road repair services, including milling, paving, and replacing gravel and concrete in certain areas with pavement. See IFB, amend. No. A00001, at 2. The solicitation provided that award would be made “to the responsible bidder whose bid, conforming to the invitation, will be most advantageous to the Government, considering only price and price-rated factors.” IFB at 1.

Bid opening was scheduled for June 17 at 2:00 p.m., Eastern Daylight Time (EDT), in Room 4E.425A at the agency's office at 425 I Street, NW, Washington, DC. IFB at 1. Regarding the submission of bids, the solicitation provided as follows:

Bids received after 2:00 PM EDT, June 17, 2016 WILL NOT BE ACCEPTED

Electronic submission of bids will not be accepted; only sealed bids will be accepted. Please place the solicitation number on the outside of the sealed envelope. It is not recommended to send the bid submission via the U.S. Postal Service as the mail is erratic, which sometimes delays delivery. It's HIGHLY recommended to send the bids via overnight courier/hand courier to the address listed in Block 8. Facsimile and electronically submitted bids will not be accepted.

Id. (emphasis in original). The address shown in block 8 was as follows: Department of Veterans Affairs, National Cemetery Administration, Contracting Services (43C2), 425 I Street NW, 5th Floor, Washington, DC, 20001. Id. The solicitation also instructed that "[s]ealed envelopes containing offers shall be marked to show the offeror's name and address, the solicitation number, and the date and time that offers are due." Id.

In conjunction with the provision set forth above, the solicitation also incorporated by reference the provision at Federal Acquisition Regulation (FAR) § 52.214-7, Late Submissions, Modifications, and Withdrawals of Bids (Nov. 1999). IFB at 48. As relevant here, this provision states:

(a) Bidders are responsible for submitting bids, and any modifications or withdrawals, so as to reach the Government office designated in the [IFB] by the time specified in the IFB. . . .

(b)(1) Any bid, modification, or withdrawal received at the Government office designated in the IFB after the exact time specified for receipt of bids is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late bid would not unduly delay the acquisition; and

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(ii) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids and was under the Government's control prior to the time set for receipt of bids.

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(c) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the bid wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

FAR § 52.214-7.

On the afternoon of June 16--one day before the scheduled bid opening--the mailroom staff of the VA office at 425 I Street, NW, delivered a bid from TKTMJ, Inc., to the contracting officer. Contracting Officer's Statement ¶ 2. The next day, shortly before 2:00 p.m., a representative of Athena hand delivered Athena's bid to the contracting officer in the bid opening room. Id. ¶ 3. Thus, by the designated bid opening time of 2:00 p.m., June 17, the contracting officer had received two bids--one from Athena and one from TKTMJ.

At 2:00 p.m. that day, the contracting officer opened the two bids. Contracting Officer's Statement ¶ 4. TKTMJ's bid was \$399,000, while Athena's was \$306,107. Id. ¶ 7. Minutes later, around 2:02 p.m., VA mailroom staff delivered three additional bids to the bid opening room. Id. ¶ 6. Shortly after, these bids were opened and recorded as follows: Pontchartrain Partners, LLC, \$238,900; Hernandez Consulting, LLC, \$262,380; and R&R, \$168,700. See id. ¶¶ 6-7. The table below shows all five bids, from lowest to highest.

R&R	\$168,700
Hernandez	\$262,380
Pontchartrain	\$238,900
Athena	\$306,107
TKTMJ	\$399,000

Since the contracting officer received the three lowest bids in the bidding room a few minutes past the bid opening time, she requested information from the mailroom staff regarding when those bids were received at the VA office. Contracting Officer's Statement ¶ 9. In response, the mailroom staff provided screen shots from the agency's package-intake software showing that the Pontchartrain, Hernandez, and R&R bids were received in the 425 I Street NW mailroom at 1:32 p.m. on June 17, 2016. Id.; Agency Report (AR), Tab 12, Hernandez Bid Receipt Verification, at 1; Tab 17, Pontchartrain Bid Receipt Verification, at 1; Tab 21, R&R Bid Receipt Verification, at 1. Based on this information, the contracting officer concluded that the three bids were received at the agency "installation" and were under agency control before the 2:00 p.m. deadline. Contracting Officer's Statement ¶ 10. The contracting officer also concluded that accepting the bids would not unduly delay the acquisition. Id. Accordingly, the contracting officer invoked the late bid exception in the provision at

FAR § 52.214-7 and accepted R&R's bid as the lowest bid received. See Contracting Officer's Statement ¶ 10.

Award was made to R&R on July 8. AR, Tab 23, Award Ltr. One week later, Athena filed a protest with our Office.

## DISCUSSION

Athena argues that the agency should have rejected the three lowest bids, including the bid submitted by R&R, as late for various reasons. We have considered all of the firm's arguments, and we conclude, based on the record, that none furnishes a basis on which to sustain the protest. Below we discuss the firm's principal contentions.

Athena's leading argument is that because the solicitation included a statement that bids received after 2:00 p.m. would not be accepted, and because R&R's bid (and those of the next two low bidders) was received in the bid opening room after 2:00 p.m., the agency simply should have rejected R&R's bid as late. See Protest at 2, 9-12; Comments at 1-4; Supp. Comments at 2, 4-5. Athena explains its position as follows:

Here, where the Solicitation expressly stated that bids received after 2:00 p.m. would "NOT BE ACCEPTED," the Agency cannot rescue itself by relying on the provisions [in the provision at FAR § 52.214-7] regarding consideration of late bids . . . . The express language of the Solicitation overrode the more liberal FAR provisions and divested the Contracting Officer of the discretion she may have had, under other circumstances, to consider a late bid, regardless of the time it arrived at the installation.

Comments at 4 (quoting IFB at 1). In other words, Athena contends that the procedures in the provision at FAR § 52.214-7 regarding the acceptance of late bids were essentially inapplicable to this procurement. For the reasons discussed below, we see no merit in this argument.

Where a dispute exists as to the meaning of an IFB's terms, our Office resolves the matter by reading the IFB as a whole and in a manner that gives effect to all the IFB's provisions. See Nat'l Servs., Inc., B-400836.2, Mar. 11, 2009, 2009 CPD ¶ 58 at 2; BAE Sys. San Diego Ship Repair, B-400350, Sept. 22, 2008, 2008 CPD ¶ 174 at 3. To be reasonable, an interpretation of the IFB language must be consistent with the IFB when read as a whole. See Nat'l Servs., Inc., supra; BAE Sys. San Diego Ship Repair, supra.

Here, the solicitation provided that bid opening would occur in a given room at 2:00 p.m. and that bids received after 2:00 p.m. would not be accepted. IFB at 1.

However, the solicitation also incorporated by reference the provision at FAR § 52.214-7, which establishes procedures through which an agency may accept a late bid, including procedures for instances where, as here, a bid was received at the government installation and was under government control before the time set for receipt of bids. IFB at 48. While Athena argues that the first provision “overrides” the second, we see no basis for that conclusion.

Instead, we find the two provisions to be harmonious, with the first provision establishing the deadline for the receipt of bids in the bid opening room, and the second one establishing a limited set of circumstances under which a late bid could be accepted. We further find that the record includes acceptable evidence--screen shots from the agency’s package-intake software--to show that R&R’s bid was received at the agency installation and was under agency control before the time set for the receipt of bids. See AR, Tab 21, R&R Bid Receipt Verification, at 1. Additionally, we see no basis to question the contracting officer’s determination that acceptance of R&R’s bid would not unduly delay the procurement. Accordingly, we see the agency’s acceptance of R&R’s bid as reasonable. In sum, we deny Athena’s claim that the agency was somehow required to ignore the solicitation’s inclusion of the provision at FAR § 52.214-7 and simply reject R&R’s bid as late.<sup>1</sup>

Next, Athena argues that the agency should have rejected R&R’s bid because the envelope containing the bid was not marked with certain information. Comments at 1, 5-6. As discussed above, the solicitation listed the address to which bids were to be sent as Department of Veterans Affairs, National Cemetery Administration, Contracting Services (43C2), 425 I Street NW, 5th Floor, Washington, DC, 20001, and it instructed that bid envelopes show, among other things, the solicitation number and the date and time that offers were due. IFB at 1. Athena points out that R&R’s bid envelope omitted the “Contracting Services (43C2)” line from the address<sup>2</sup> and that it was not marked with the solicitation number or the date and time that offers were due. Comments at 5-6. Athena apparently takes the position that because R&R’s bid envelope lacked this information, the agency should have rejected the bid. See id. at 6. We need not reach the issue of whether, under the circumstances here, the contracting officer was compelled to reject R&R’s bid as

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<sup>1</sup> Even if the two provisions at issue are interpreted as being in conflict with each other, the ambiguity created by that conflict would be patent (*i.e.*, an obvious, gross, or glaring error). A patent ambiguity in a solicitation must be challenged before the opening of bids; any subsequent challenge is untimely. 4 C.F.R. § 21.2(a)(1). Thus, to the extent Athena argues the two provisions are in conflict and the provision regarding the 2:00 p.m. deadline must control, such an argument concerns a patent ambiguity in a solicitation and is untimely at this juncture.

<sup>2</sup> Instead of including the “Contracting Services (43C2)” line, R&R’s bid envelope provided the name of the contracting officer. AR, Tab 19, R&R Bid Envelope, at 1.

Athena claims because, as discussed below, the record shows that Athena is not an interested party to raise this issue.

Our Bid Protest Regulations provide that only an interested party may protest a federal procurement. 4 C.F.R. § 21.1(a). Our Regulations define an interested party as an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Id. § 21.0(a). Generally, a party is not deemed to have the necessary economic interest where there are other intervening offerors that would be in line for award if the awardee were eliminated from competition. See Community Asphalt Corp., B-249475, B-249475.2, Sept. 14, 1992, 92-2 CPD ¶ 178 at 5; Do-Less Mowing Servs., B-235425 et al., Aug. 29, 1989, 89-2 CPD ¶ 185 at 2.

Here, the record reflects that at least one of the bidders--Pontchartrain--submitted a bid that was lower than Athena's and that was submitted in an envelope marked with all of the information at issue in Athena's allegation. AR, Tab 15, Pontchartrain Bid Envelope, at 1; Tab 18, Pontchartrain Bid, at 4. Since Pontchartrain, and not Athena, would be in line for award if R&R's bid was rejected on the basis that its bid envelope was not marked with certain information, Athena is not an interested party to challenge this aspect of the procurement.

The protest is denied.<sup>3</sup>

Susan A. Poling  
General Counsel

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<sup>3</sup> We note that Athena also argues that the agency should have rejected R&R's bid as late because "there is no evidence of government mishandling of the bid." Comments at 4-5. Athena's allegation apparently stems from language in a superseded version of the provision at FAR § 52.214-7, which required that before an agency may accept a late bid, the agency must determine that "the late receipt of the bid was due primarily to Government mishandling after receipt at the Government installation." See FAR § 52.214-7 (May 1997). The current version of the provision at FAR § 52.214-7 (Nov. 1999) does not include this requirement. Further, as shown above, the record reflects that here, the requirements for the acceptance of a late bid under the current version of the provision at FAR § 52.214-7 were met. For these reasons, we see no merit in Athena's argument.