



Decision

Matter of: PennaGroup, LLC

File: B-414840.2; B-414841.2

Date: August 25, 2017

Michael Evangelista-Ysasaga, for the protester.
Andrew K. Lieberman, Esq., and Jodi L. Silcox, Esq., Department of Homeland Security, for the agency.
Todd C. Culliton, Esq., Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests that the agency unreasonably evaluated proposals are dismissed where the protester failed to timely file comments on the agency reports.

DECISION

PennaGroup, LLC, of Fort Worth, Texas, protests the exclusion of its proposals from phase II of the competitions conducted under request for proposals (RFP) Nos. HSBP1017R0022 and HSBP1017R0023, which were issued by the Department of Homeland Security (DHS), U.S. Customs and Border Protection, for border wall prototypes. PennaGroup argues that DHS unreasonably evaluated its proposals as non-compliant with the solicitations.

We dismiss the protests because PennaGroup failed to file its comments on the agency reports by the date established by our Office, as required by our Bid Protest Regulations.

On March 17, 2017, DHS issued RFP No. HSBP1017R0022 for the design and construction of solid concrete border wall prototypes, and RFP No. HSBP1017R0023 for the design and construction of other than solid concrete border wall prototypes. The RFPs were issued under the two-phase design-build provisions of Federal Acquisition Regulation (FAR) subpart 36.3. The solicitations here concerned phase I of the competition, and proposals submitted in response to the RFP were to be evaluated to determine whether an offeror would be permitted to participate in phase II of the procurement.

The RFPs instructed offerors to acknowledge any issued amendment by signing the accompanying Standard Form 30 (SF-30), and to submit the SF-30 with each offeror's proposal. Agency Report, Exh. B, RFP, at 35; Exh. I, RFP amend. 7, at 35.¹ The RFPs stated "[f]ailure to acknowledge all Amendments issued by the Government may result in the proposal submitted in response to the solicitation being found non-responsive by the Government." RFP at 35. The agency issued seven amendments to the solicitations.

PennaGroup submitted timely proposals in response to each of the solicitations, but for each proposal it included an SF-30 acknowledging only the seventh amendment. PennaGroup did not include SF-30s for amendments one through six with either proposal. As a result, the agency determined that PennaGroup's proposals were non-compliant with the solicitations and eliminated them from further competition. Following a protest with the agency, PennaGroup filed the instant protests with our Office.

Upon receipt of PennaGroup's protests, our Office prepared and distributed development letters to the parties. The development letters stated that the due date for the agency to file its reports in response to the protests was July 26, and further advised that PennaGroup was "required to submit written comments in response to the report." Development Letter from GAO to Protester, June 29, 2017. The development letter further expressly stated "[w]ritten comments must be received in our Office within 10 calendar days of your receipt of the report--otherwise, we will dismiss your protest." *Id.* (emphasis in original).

DHS filed its agency reports on July 26, and PennaGroup specifically acknowledged its receipt of the reports on that day. E-mail from Protester to Agency, July 26, 2017 (3:44 p.m.); E-mail from Protester to Agency, July 26, 2017 (3:45 p.m.). PennaGroup's comments were therefore due by the close of business on August 7; however, the firm did not file comments or request an extension of time to file comments by close of business that day. On August 8, our Office asked PennaGroup to confirm whether it had filed comments; in response, the protester stated that "[o]ur legal team has reviewed the [agency's] response and finds no new legal or factual arguments not fully set forth in length in our original Bid Protest." E-mail from Protester to GAO, Aug. 8, 2017 (10:43 a.m.); E-mail from Protester to GAO, Aug. 8, 2017 (10:46 a.m.).

On August 9, the agency filed requests for dismissal of the protests citing PennaGroup's failure to file comments. In response, PennaGroup acknowledged that its comments were not timely filed, but stated that it would have filed its comments by the deadline but for technical difficulties (*i.e.*, internet service disruption) resulting from inclement weather. E-mail from Protester to GAO, Aug. 9, 2017 (2:10 p.m.); E-mail from Protester

¹ The agency submitted an agency report in response to each protest, one containing RFP No. HSBP1017R0022 and the other containing RFP No. HSBP1017R0023; citations herein are to identical provisions in each RFP.

to GAO, Aug. 9, 2017 (2:11 p.m.). The protester also states that it attempted to reach the GAO attorneys assigned to the protests regarding the late filing of comments.² Id.

Bid protests are serious matters which require effective and equitable procedural standards to assure both that parties will have a fair opportunity to present their cases, and that protests can be resolved in a reasonably speedy manner. Reynolds Bros. Lumber and Logging Co.--Recon., B-234740.2, May 16, 1989, 89-1 CPD ¶ 468 at 2-3. The filing deadlines in our Regulations are prescribed under the authority of the Competition in Contracting Act of 1984; their purpose is to enable our Office to comply with the statute's mandate that we resolve protests expeditiously. See 31 U.S.C. § 3554(a); Keymiaee Aero-Tech, Inc., B-274803.2, Dec. 20, 1996, 97-1 CPD ¶ 153 at 1. A protester is required to file comments on an agency's report responding to the protest. 4 C.F.R. § 21.3(i). To avoid delay in the resolution of protests, our Bid Protest Regulations provide that a protester's failure to file comments within 10 calendar days "shall" result in dismissal of the protest except where GAO has granted an extension or has established a shorter period. Id. § 21.3(i). But for this provision, a protester could idly await receipt of the report for an indefinite time, to the detriment of the protest system and our ability to resolve the protest expeditiously. Prio-Leau Culinary Servs., Inc.--Recon., B-236373.6, Jan. 23, 1990, 90-1 CPD ¶ 90 at 2. Accordingly, we dismiss PennaGroup's protests because it failed to file comments by August 7, the due date for its comments on the agency report.

To the extent PennaGroup now requests that this Office provide an extension of time for it to file comments, we note that our Bid Protest Regulations do not allow for post-deadline extensions. As noted above, a protest will be dismissed unless our Office granted an extension prior to the deadline. 4 C.F.R. § 21.3(i). In this case, our Office did not grant an extension prior to the close of business on August 7, and therefore, we cannot provide PennaGroup with more time to file its comments, even if it experienced technical difficulties. Since PennaGroup had an opportunity to file its comments, as well as an opportunity to request an extension of time to file its comments, allowing PennaGroup to file its comments late would be inconsistent with our purpose of providing a fair opportunity for protesters to have their protests considered without unduly disrupting the procurement process.

The protests are dismissed.

Susan A. Poling
General Counsel

² GAO's phone records indicate that the protester called two GAO attorneys on August 8--the day after comments were due--but did not leave messages.