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**Comptroller General
of the United States**

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

Decision

Matter of: Seven Seas Engineering & Land Surveying

File: B-294424.2

Date: November 19, 2004

Jamie P. Clare, Esq., Cole, Schotz, Meisel, Forman, & Leonard; and Frederick Coles III, Esq., for the protester.

Jeffrey I. Kessler, Esq., and Kim Sawicki, Esq., Department of the Army, for the agency.

Katherine I. Riback, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's rejection of the protester's late proposal revision is denied, where the lateness of the submission was not caused by the agency and the protester's initial proposal was not technically acceptable.

DECISION

Seven Seas Engineering & Land Surveying protests the rejection of its proposal under request for proposals (RFP) No. W15P7T-04-R-L204, issued by the U.S. Army Communications Electronics Command (CECOM) for construction and related services at facilities located in states from North Carolina to Maine.

We deny the protest.

On May 30, 2003, CECOM issued a written notice to eligible small disadvantaged offerors under the Small Business Administration's section 8(a) contracting program, inviting them to a presolicitation conference and alerting them that the agency intended "to award a multiple award, best value construction services task order contract." This notice informed firms that all future information for this acquisition would be posted on the agency's Interactive Business Opportunities (IBOP) website. Agency Report (AR), Tab L.2, Presolicitation Conference Notice (May 30, 2003). Potential offerors visiting this website were informed that registration was necessary to review or respond to this, or other procurements. See <abop.monmouth.army.mil/ibophome.nsf/homepage3?open>.

On February 12, 2004, the RFP was issued on the IBOP website, as a section 8(a) competitive set-aside, and provided for the award of multiple fixed-price contracts on the basis of a cost/technical tradeoff. Offerors were informed that proposals would be evaluated under three factors, technical,¹ performance risk, and price, and that the technical and performance risk factors were equally important and each significantly more important than price. The RFP cautioned offerors that to receive consideration for award, proposals must receive “a rating of no less than ‘Acceptable’” under the technical evaluation factor and its subfactors. RFP § M.A, at 48.

Detailed proposal preparation instruction were provided, describing the information that offerors were required to provide for each evaluation factor and subfactor. RFP amend 1, at 5-9. In addition, offerors were instructed that they must be “registered users in the IBOP in order to submit proposals” and that proposals were required to be submitted electronically to the IBOP website.² RFP § L.D., at 42-43; amend. 1 at 3.

Seven Seas timely submitted its electronic proposal, including an acknowledgment of amendment 1, to CECOM on March 16. In its initial evaluation, the agency found that Seven Seas’ proposal was susceptible of being made acceptable and included the proposal in the competitive range along with five other proposals. CECOM prepared eight “items for negotiation” (IFN) for Seven Seas, which among other things, identified three deficiencies and two weaknesses in the protester’s proposal under the technical factor. AR, Tab M.2. On June 29, an e-mail notification was sent to Seven Seas, informing it that “[t]here are items for negotiation pertaining to your proposal for the Solicitation information below” and directing the firm to “click on the link” in the e-mail to access the IFNs on the IBOP website.³ Seven Seas was informed that its response to the IFNs was due July 14. AR, Tab M.1. Also, on June 29, CECOM issued amendment 2 to the RFP, which extended the proposal validity date from 120 to 210 days and deleted the requirement to submit, and for the evaluation of, past performance information for major subcontractors. The amendment was posted to the IBOP website and requested acknowledgment by July 14. AR, Tab J, RFP amend. 2.

¹ Three subfactors were identified for the technical factor: key management, subcontracting, and sample task. RFP § M.A, at 48.

² In addition to the electronic proposal, offerors were also directed to deliver a hard copy of each proposal to CECOM.

³ Although e-mail notices were generated to inform registered offerors that information was available on the IBOP website concerning their proposals or the solicitation, the website in several places cautioned offerors that “[e]-mail notifications are NOT guaranteed. Best Practice is frequent visits to the site.” See IBOP Proposal Submission Guidelines, <abop.Monmouth.army.mil/home.nsf/Proposal+Alert?readform>.

Seven Seas submitted its reply to CECOM's IFNs on July 27, after the required date for its reply; Seven Seas also acknowledged amendment 2 at the same time.⁴ The record shows that the protester's IFN responses would have revised the firm's proposal in a number of regards. Comments, attach. H. CECOM did not consider the protester's late response to the IFNs or its late acknowledgment of amendment 2. In the absence of a timely response to the IFNs, CECOM concluded that Seven Seas' proposal was technically unacceptable based upon deficiencies and weaknesses identified in all three technical subfactors, and based upon the missing past performance information. AR, Tab K, Letter from CECOM to Seven Seas (Aug. 2, 2004). CECOM rejected Seven Seas' proposal, and this protest followed.

Seven Seas acknowledges that its reply to the agency's IFNs was late,⁵ but protests that the contracting officer should have considered the protester's late response.⁶ Seven Seas argues, citing Federal Acquisition Regulation (FAR) § 15.307, that the contracting officer is required to establish a common cut-off date for only the receipt of final proposal revisions, and that, because the IFNs did not request the firm's final proposal revisions, the contracting officer had latitude to relax time constraints for the submission of proposal revisions before the final revision. Comments at 4-6. On this basis, Seven Seas contends that the contracting officer could waive the late submission of the firm's proposal revisions as a minor informality under

⁴ On July 21, one of the protester's intended subcontractors called the agency's contract specialist for this procurement and informed her that the subcontractor had found the IFNs on the IBOP website and inquired as to whether it was too late for Seven Seas to submit a response. The contract specialist informed the potential subcontractor that the time for replies had passed. AR, Tab N, Contracting Officer's Memorandum for Record (July 26, 2004).

⁵ The record shows that Seven Seas was having "computer difficulties" during the time that the e-mail notice of the IFNs was generated to Seven Seas and was unable to access the Internet. See Contracting Officer's Statement at 4.

⁶ Seven Seas also protests that its failure to timely acknowledge amendment 2 was not fatal to its proposal because this amendment was not material. We need not address this protest allegation because, as explained below, we find that Seven Seas' proposal was otherwise unacceptable.

FAR § 14.405.⁷ Seven Seas does not contend that its late response to the IFNs was due to any action or inaction by the agency.⁸

We disagree with Seven Seas' apparent belief that the contracting officer was required to consider the protester's late IFN responses or was required to waive the protester's late proposal revisions. Although it is true that FAR § 15.307(b) provides for a common cut-off date only for receipt of final proposal revisions, this does not mean that an offeror is permitted to submit other proposal revisions (not the final proposal revision) after the time specified by an agency. FAR § 15.208 provides in this regard that offerors are responsible for submitting proposals, revisions, and modifications to the proper place at the proper time and that late submissions of proposals, revisions, and modifications may not be considered, except, as is pertinent here, where the late submission is received before award, and is a late modification of an otherwise successful proposal that makes its terms more favorable to the government. An "otherwise successful proposal" is one that would result in the award of the contract to the offeror regardless of the late modification. RMS Indus., B-245539, Dec. 9, 1991, 91-2 CPD ¶ 528 at 3. Here, Seven Seas' initial proposal was not technically acceptable and therefore could not be considered "an otherwise successful proposal." In the absence of any action by the agency causing the protester's late response to the IFNs, we conclude that the contracting officer did not act unreasonably in rejecting Seven Seas' late IFNs responses.

Seven Seas has not challenged the agency's determination that, in the absence of the firm's late proposal revisions, the protester's proposal was technically unacceptable. Accordingly, given our decision above that the agency was not required to consider the protester's late discussion responses, we have no basis to question the agency's rejection of Seven Seas' proposal.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁷ FAR § 14.405 applies by its terms to sealed bid procurements. For a negotiated procurement, such as this one, Seven Seas might be arguing that the agency should have treated the late submission as a matter (such as an ambiguity or a mistake) that could be addressed outside the framework of discussions. See FAR § 15.306(b)(3).

⁸ Seven Seas initially protested that CECOM did not reasonably notify the protester of the issuance of the IFNs and amendment 2. The agency addressed Seven Seas' arguments in its report, and the protester withdrew this ground of protest. Comments at 2.