



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: B&S Transport, Inc.

File: B-404648.3

Date: April 8, 2011

Ronald K. Henry, Esq., and Jeremy M. White, Esq., Kaye Scholer LLP, for the protester.

Marc A. Shepler, Esq., Defense Logistics Agency, for the agency.

Jonathan L. Kang, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected protester's hand-delivered proposals as late where the protester, rather than the agency, was the paramount cause for the late receipt.

DECISION

B&S Transport, Inc., of North Canton, Ohio, challenges the rejection of its proposals as late under request for proposal (RFP) Nos. SPM7LX-10-R-0041, SPM7LX-10-R-0042, and SPM7LX-10-R-0067, issued by the Defense Logistics Agency (DLA) for various types of tires.¹ The protester contends that its proposals were improperly rejected because the agency's actions were the paramount cause of the late delivery.

We deny the protest.

BACKGROUND

The solicitations as amended required proposals to be submitted to the the DLA Land and Marine Activity in the lobby of Building 20 at the Defense Supply Center Columbus (DSCC) installation. RFP at 2. The due date for proposals, as amended, was 1 p.m., Eastern Time, on January 10, 2011. Id.

¹ The relevant portions of these solicitations are identical; for the sake of convenience and brevity, citations to the solicitations will be to RFP No. SPM7LX-10-R-0041.

As relevant here, the solicitations included an enclosure detailing the requirements for access to the DSCC. Offerors were informed that visitors to the DSCC facility, such as couriers, were required to be sponsored by an agency official and entered into the DSCC Visitor Notification System (VNS). RFP, encl. 6, at 1. Further, visitors would be required to register at the Visitor Processing Center (VPC) for identification verification, a background check, and issuance of a temporary vehicle registration. Id. at 3. Additionally, a solicitation question and answer (Q&A) advised offerors that they were required to advise the agency via email a day in advance of the due date of the offeror's intent to use a courier for hand delivery, so that the courier could be entered into the VNS. RFP, Q&A No. 8. The Q&A also advised that "[a]ny delays encountered at the [VPC] shall not constitute a basis for solicitation re-opening and therefore, an offeror who chooses to hand deliver proposals shall plan accordingly." Id.

On the due date of January 10, B&S attempted to have its proposal delivered by a courier. A videotape provided by the agency in its report on the protest shows that B&S's courier arrived at the VPC at 12:50:12 p.m.—less than 10 minutes before the time set for receipt of proposals. Agency Report (AR), exh. 14, VPC Videotape. Upon arrival, a DLA security officer checked the VNS and determined that the courier was not entered into that system. The security officer advised the courier that he needed a sponsor in order to be entered into the VNS and to have access to the DSCC facilities, and asked the courier if he had a point of contact in order to obtain a sponsor. The courier advised that he did not have a point of contact. At 12:54 p.m., the security officer suggested that the courier call the DLA Small Business Office, who advised the courier, and then the security officer, that they were not involved with the procurement and could not assist the courier. Decl. of Security Officer at 2.

During this time, the courier called the protester's in-house counsel for assistance. Decl. of Security Officer at 2; Protester's Comments at 2. At 12:58 p.m., a DLA acquisition specialist received a call from B&S's in-house counsel, asking that the courier be entered into the VNS and allowed to deliver the proposal. AR at 3. The acquisition specialist entered the courier into the VNS, and erroneously directed him to deliver the proposal to Building 21. Id. The courier departed the VPC at 1:03:57 p.m. AR, exh. 14, VPC Videotape. Subsequent to the courier's departure from the VPC, the acquisition specialist discovered that he had incorrectly directed the courier to Building 21, rather than Building 20, as specified in the RFPs. AR at 3. The acquisition specialist called B&S's counsel and advised him of the error, and then corrected the VNS entry to allow the courier to access Building 20. Id. The courier delivered the proposals to DLA personnel in Building 20 at 1:20 p.m., and the proposals were stamped as received at 1:21 p.m. Contracting Officer's (CO's) Memorandum Re: Late Bids, Jan. 24, 2011, at 3.

DLA advised B&S on February 1, 2011, that its proposals had been rejected as late. This protest followed.

DISCUSSION

B&S contends that DLA should accept its proposals because the agency was the primary cause of the late filing, and because the courier was under the control of the agency at the time he arrived at the VPC. We find no merit to these arguments.

It is an offeror's responsibility to deliver its proposal to the proper place at the proper time; proposals that are received after the exact time specified are "late" and must generally be rejected. Federal Acquisition Regulation (FAR) § 52.212-1(f);² O.S. Sys., Inc., B-292827, Nov. 17, 2003, 2003 CPD ¶ 211 at 3; Integrated Support Sys. Inc., B-283137.2, Sept. 10, 1999, 99-2 CPD ¶ 51 at 2. The late proposal rules include limited exceptions under which late proposals may be considered. Our Office has held that a late hand-carried offer may be considered for award if the government's misdirection or improper action was the paramount cause of the late delivery and consideration of the offer would not compromise the integrity of the competitive process. See U.S. Aerospace, Inc., B-403464, B-403464.2, Oct. 6, 2010, 2010 CPD ¶ 225 at 11; ALJUCAR, LLC, B-401148, June 8, 2009, 2009 CPD ¶ 124 at 3. A late proposal may also be accepted if it is found to have been received at the designated government installation and was under the agency's control at the time set for receipt of proposals. FAR § 52.212-1(f)(1)(B); U.S. Aerospace, Inc., *supra*, at 12. Nonetheless, even in cases where the late receipt may have been caused, in part, by erroneous government action, a late proposal should not be considered if the offeror significantly contributed to the late receipt by not doing all it could or should have done to fulfill its responsibility. See U.S. Aerospace, Inc., *supra*; ALJUCAR, LLC, *supra*.

Here, we conclude that the protester's actions were the paramount cause for the late delivery. As discussed above, the RFPs stated that if an offeror intended to hand deliver its proposal, the offeror must provide notice to DLA a day in advance of delivery in order to be sponsored and be entered into the VNS. RFP, encl. 6, at 3; RFP, Q&A No. 8. The RFPs further advised offerors that visitors would be required to check in at the VPC, and that any delays encountered at the VPC would not be a basis for accepting a late proposal. RFP, Q&A No. 8.

Despite the instructions and warnings in the RFPs, the record shows that B&S's courier was not entered into the VNS system prior to his arrival, nor did the courier have the appropriate contact information to obtain a sponsor for entry into the VNS. Moreover, the courier arrived at the VPC less than 10 minutes before the proposal receipt deadline. On this record, we conclude that the protester's actions, rather than the agency's actions, were the paramount cause of the late receipt. See

² FAR § 52.212-1, Instructions to Offerors—Commercial Items, was incorporated into the RFPs.

ALJUCAR, LLC, supra, at 4 (a protester contributes significantly to a delay where it fails to provide sufficient time for delivery at a secure government facility).

To the extent that B&S contends that DLA's actions were the paramount cause of the late delivery, we disagree. First, the protester argues that the agency was responsible for the late filing because the acquisition specialist directed the protester's courier to the wrong building. As discussed above, the agency does not dispute that the courier was initially directed to Building 21, instead of Building 20. See AR at 3. However, the videotape shows that the courier did not leave the VPC until 1:03 p.m. On this record, we think it is clear that the courier would not have made a timely delivery of the proposals, even if he had been directed to the correct building.

Next, B&S contends that personnel at the VPC directed the courier to call "a person who had nothing to do with the matter," thus resulting in delay in the courier's departure from the VPC. Protester's Comments at 3. As discussed above, however, the call to the DLA Small Business Office was suggested by the security officer because the courier was unable to provide the appropriate contact information. Moreover, as discussed above, the RFPs instructed offerors to contact DLA the day before an attempted delivery in order to enter couriers into the VNS, and warned that any delays encountered at the VPC were the responsibility of the offeror. We do not think that the security officer's suggestion to call the Small Business Office was the paramount cause of the delay.

Finally, the protester argues that the courier was under the control of the government as of the time the courier arrived at the VPC, and thus the proposals should have been deemed as timely received. In determining whether a late-submitted proposal was "under the Government's control" prior to the time set for receipt of proposals, our Office has held that an offeror must, at a minimum, have relinquished physical custody of the proposal. See U.S. Aerospace, Inc., supra; ALJUCAR, LLC, supra. This requirement is an obvious necessity in order to preclude any potential that an offeror could alter, revise, or otherwise modify its proposal after other offerors' competing proposals have been submitted. B&S's argument misapprehends the legal standard: the issue is not whether the courier was under the control of the government personnel, but instead whether the proposal had been accepted by government personnel, thereby putting it under government control. The record here shows that the courier did not relinquish control of the proposals until his arrival at Building 20 at 1:20 p.m. CO's Memorandum Re: Late Bids, Jan. 24, 2011, at 3. For this reason, as well as those stated above, we find no merit the protester's arguments.

The protest is denied.

Lynn H. Gibson
General Counsel