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Decision

Matter of: NCI Information Systems, Inc.

File: B-405745

Date: December 14, 2011

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William W. Thompson Jr., Esq., and Lori Ann Lange, Esq., Peckar & Abramson, PC, for the intervenor.
Marvin Kent Gibbs, Esq., Department of the Air Force, for the agency.
Cherie J. Owen, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Final proposal revision is late where deadline was set as “close of business,” but no particular time was specified, and offeror submitted proposal after 4:30 p.m., the time designated by the Federal Acquisition Regulation as the time for submission if no time is specified in the solicitation.

DECISION

NCI Information Systems, Inc., of Reston, Virginia protests the issuance of a task order to Harris IT Services by the Department of the Air Force under request for proposals (RFP) No. HTC711-11-R-D002 for information technology (IT) support services pursuant to the agency’s “Information Technology Enterprise Solutions 2” indefinite delivery/indefinite quantity contract. NCI contends that the proposal submitted by Harris was ineligible for award because the final proposal revision was submitted late.

We sustain the protest.

BACKGROUND

The RFP, issued on March 25, 2011, sought IT administrative and management support services for the United States Transportation Command’s (USTRANSCOM)

Corporate Services Support, Service Delivery requirement at Scott Air Force Base in Illinois. The RFP provided for the award of a fixed price and labor hour contract for a one-year base period and three option years. RFP at 37; AR, Tab 4a, RFP amend. 1, at 2.

The solicitation stated that initial proposals were due by 1:00 p.m. central time. RFP at 1. The RFP also incorporated Federal Acquisition Regulation (FAR) § 52.215-1(c)(3)(i), which states that if no time is specified in the solicitation, the time for receipt is 4:30 p.m., local time, for the designated government office on the date that the proposal or revision is due. RFP at 34-35.

After three rounds of discussions, the agency requested final proposal revisions (FPRs). Agency Report (AR), Tab 12, Source Selection Decision Document, at 3. In a memorandum sent to each of the offerors, the agency stated that “by close of business on 31 August 2011” offerors should submit either their FPRs or a statement indicating that no change would be made. Protester’s Comments, attach. 2 at 1.

On August 31 at 4:21 p.m., Harris sent an e-mail to the contracting officer asking, “Can the Government extend COB until after 4:30 PM CST?” AR, Tab 17, E-Mail Communications, at 257. The contracting officer responded to Harris stating “Until 5:00 PM Central Time is acceptable as meeting the close of business deadline.” Id. The agency’s computer logs show that the proposal submitted by Harris reached the agency’s central server at 4:57 p.m. and arrived at the contracting officer’s computer at 4:59 p.m. on August 31. First Supp. AR at 4.

After evaluating all FPRs, the agency determined that the proposals of NCI, Harris, and one other offeror remained eligible for award. The contracting officer concluded that the proposal submitted by Harris offered the best value to the government, and selected Harris for award. This protest followed.

DISCUSSION

NCI contends that Harris was ineligible for award because Harris’s FPR was not submitted by the date and time set for receipt of FPRs.¹ Comments at 9-13.

¹ The agency contends that NCI is not an interested party to challenge the award to Harris because NCI is not next in line for award. Specifically, the agency argues that even if the Harris proposal were eliminated from the competition, and NCI received the additional credit it claims it deserves in the evaluation of its proposal, NCI still would not be eligible for award because another offeror had a higher technical score and a slightly lower price. First Supp. AR at 2. While the other offeror had a higher technical rating and lower price, the protester had a higher past performance score. We note that the agency did not rank offerors’ proposals and that the source selection decision contained a comparison of the awardee’s proposal to NCI’s proposal and to the other offeror’s proposal, but it did not contain any comparison of
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Specifically, NCI argues that the agency set the due date for FPRs as the close of business on August 31, and because the contracting officer's notice did not provide a specific time for "close of business," the language of FAR § 52.215-1(c)(3) and the solicitation dictate that the time for receipt of FPRs was 4:30 p.m.² Protester's Comments at 9.

The agency contends that a specific time--close of business--was provided in the contracting officer's memorandum, and therefore the FAR clause (which provides that 4:30 p.m. is the closing time if no time is specified) does not apply here. Citing a decision by the General Services Board of Contract Appeals (GSBCA) from 1987, the agency argues that "close of business" means that proposals would be received on the specified date at "any time prior to when the office closed for the day . . . so long as an employee remained in the office during that employee's regularly scheduled duty hours." Federal Sys. Group, Inc., GSBCA No. 9240-P, 88-1 BCA ¶ 20334. The agency argues that since the contracting officer's flextime hours are from 7:00 a.m. to 5:00 p.m. on Wednesdays (the day FPRs were due), close of business that day was 5:00 p.m.³ The agency also argues that GAO implicitly adopted the Federal Systems Group rule in 120 Church Street Assoc.--Recon., B-232139.4, May 23, 1989, 89-1 CPD ¶ 490, in which GAO distinguished the facts of that case from the facts of Federal Systems Group, holding that where agency employees do not work flextime schedules and there is an agency order establishing an agency-wide closing time, the time specified in the order controls.

Under negotiated procurements, the FAR provides generally that a proposal or revision received after the time set for receipt shall not be considered. FAR § 15.208(b)(1). Our Office has long held that the late proposal rule alleviates confusion, ensures equal treatment of offerors, and prevents one offeror from obtaining a competitive advantage as a result of being permitted to submit a proposal

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the other offeror's proposal to NCI's proposal. Determining which offeror is next in line for award would require a trade-off decision between technical/price and past performance. Therefore, we cannot conclude that NCI is not an interested party to pursue this protest.

² The protester also raised several challenges to the evaluation of its own proposal. We have reviewed the evaluation record and find these challenges have no merit. Because we are sustaining the protest on other grounds, we need not discuss these issues in detail.

³ The agency submitted the contracting officer's approved flextime schedule, which includes departure times of 5:00 p.m. for most days, 4:30 p.m. for one day, and one day off every two weeks. Therefore, under the agency's proposed interpretation, the time for "close of business" would vary from day to day.

later than the deadline set for all competitors. Sunrise Medical HHG, Inc., B-310230, Dec. 12, 2007, 2008 CPD ¶ 7 at 8; Tishman Constr. Corp., B-292097, May 29, 2003, 2003 CPD ¶ 94 at 3. FAR § 52.215-1(c)(3)(i) states that if no time for submission is specified in the solicitation, the time for receipt is 4:30 p.m., local time. In 120 Church Street Assoc.–Recon., *supra*, our Office stated that this FAR provision establishes 4:30 p.m. local time “as the close of business where the solicitation does not state a specific time for receipt of proposals.” *Id.* at 3.

Here, we find that the agency’s reference (in its request for FPRs) to the “close of business” did not state a specific time for receipt of proposals. We decline to adopt the Federal Systems Group rule that where an agency has no established time for the close of business and allows its employees to work flextime schedules, close of business means any time so long as an employee remains in the office during his or her duty hours.⁴ Adoption of such a rule would result in confusion and a lack of uniformity, where, as here, employees work different schedules on different days.⁵

Where, as in 120 Church Street, the agency has established official working hours, then “close of business” means the end of the official day. Where, as here, an agency does not have official working hours, then pursuant to FAR § 52.215-1(c)(3)(i), 4:30 p.m. local time is considered to be the close of business where the solicitation does not state a specific time for receipt of proposals. In this way, the exact date and time for submission of proposals will be easily ascertainable to all potential offerors.

The contracting officer’s e-mail, which was sent only to Harris, cannot be considered an amendment to the solicitation’s due date, and we have held that an offeror acts unreasonably when it relies on the informal advice of a contracting officer rather than following the solicitation’s instructions. See Noble Supply & Logistics, B-404731, Mar. 4, 2011, 2011 CPD ¶ 67 at 3 (offeror acted unreasonably where it relied on contracting officer’s oral permission to submit proposal after stated closing time); Radva Corp., B-219595, July 26, 1985, 85-2 CPD ¶ 101 at 2 (“even if the contracting officer had told [the offeror] that its late proposal would be accepted, the contracting officer in fact lacked the authority to accept the late proposal”); see also Diamond Aircraft Industries, Inc., B-289309, Feb. 4, 2002, 2002 CPD ¶ 35 (holding that informal advice sent via e-mail to only one offeror could not amend the solicitation, and offerors who rely on such informal advice do so at their own risk).

⁴ While GSBICA and other board decisions may be instructive, they are not binding on GAO. Pitney Bowes, Inc.–Recon., B-233100.2, June 22, 1989, 89-1 CPD ¶ 587 at 3.

⁵ Indeed, even the awardee appears to have believed that “close of business” meant 4:30 p.m., as evidenced by its e-mail asking whether the due date could be extended past 4:30 p.m..

While application of the late proposal rules may sometimes seem harsh, the rules are aimed at ensuring equal treatment of all offerors, and promoting confidence in the competitive system, thereby protecting the integrity of the procurement process--goals that are of greater importance than the possible advantage gained by considering a late proposal in a single procurement. U.S. Aerospace, Inc., B-403464, B-403464.2, Oct. 6, 2010, 2010 CPD ¶ 225 at 10 n.16. The rationale underlying strict application of the late proposal rules is to prevent even the slightest possibility of any offeror gaining an unfair competitive advantage by being able to make material changes in its offer after the cutoff date and time. Computer Sciences Corp., B-190632, Aug. 4, 1978, 78-2 CPD ¶ 85.

The awardee here submitted its FPR after the time set for receipt, and the agency should have rejected it as late. We therefore sustain the protest

RECOMMENDATION

Based on the foregoing, we recommend that the agency cancel its award to Harris and conduct a new source selection. In making the new source selection decision, the agency may consider all of the materials submitted by offerors prior to the deadline at 4:30 p.m. on August 31, or take such other actions as it deems appropriate. We further recommend that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2011). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be filed to the agency within 60 days after receiving this decision.

The protest is sustained.

Lynn H. Gibson
General Counsel