



Decision

Matter of: Labatt Food Service, Inc.

File: B-310939.6

Date: August 18, 2008

Johnathan M. Bailey, Esq., Bailey & Bailey, PC, for the protester.
Dmitry Pilipis, Esq., Defense Logistics Agency, for the agency.
Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency improperly rejected the protester's proposal due to the late acknowledgement of an amendment is denied where the solicitation stated that the deadline in the solicitation would be used to assess whether submissions were late, and the record establishes that the proposal did not meet the deadline in the solicitation.
 2. Notwithstanding that each of the offerors submitted its proposal by a method not permitted by the solicitation, protest that agency was required to reject all offerors' proposals as late is denied; the protester has failed to show how it was prejudiced by the agency's failure to enforce the method of submission requirement.
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DECISION

Labatt Food Service, Inc. protests the rejection of its proposal as late by the Defense Logistics Agency (DLA), Defense Supply Center Philadelphia (DSCP) under request for proposals (RFP) No. SPM300-06-R-0063 for food distribution services. The protester argues that its proposal was not received late by the agency, and that even if it was late, the agency should have rejected all of the proposals and cancelled the solicitation.

We deny the protest.

The protester is one of three offerors whose proposals were included in the most recent competitive range created by the agency.¹ At issue is the mode of transmission permitted by the RFP. As a general matter, offerors may use any transmission method authorized by the solicitation. Federal Acquisition Regulation (FAR) § 15.208(a). The solicitation nowhere authorized the use of electronic methods of submission for the original proposal and contemplated the use of facsimile submissions only for revisions of offers. RFP at 2. The RFP did clearly contemplate submission in paper form. See id. (listing the mailing address for offers and instructions for hand delivery, including delivery by courier).

The record shows that throughout this competition the agency has made no objection to the submission by e-mail of proposal revisions by the protester and at least one other offeror. On May 13, 2008, DSCP transmitted amendment 7 to Labatt as an attachment to an e-mail that instructed Labatt to “review, sign, and return this amendment along with your proposal no later than 20 May 2008.” Protest, Exh. 9. The attached amendment specified a deadline of 2:00 p.m. Eastern Standard Time (EST), May 20. Amendment 7 increased the guaranteed minimum and maximum order quantities by over 20 percent and made several changes to the solicitation which directly addressed Labatt’s previous protest. The other two offerors submitted proposals by the 2:00 p.m. deadline; Labatt transmitted its proposal at 4:27 p.m. On May 22, the agency informed the protester that its proposal was transmitted by e-mail, which was not an authorized transmission method, and that it was submitted late. This protest followed.

Labatt does not contest that it failed to meet the 2:00 p.m. solicitation deadline. Rather, Labatt argues that, because the e-mail transmitting the amendment was created after the amendment and did not bear the 2:00 p.m. deadline, Labatt reasonably understood the deadline to be 4:30 p.m. In support of its position, Labatt relies on FAR § 52.212-1(f)(1) (incorporated into the RFP here), which provides that “[i]f no time is specified in the solicitation, the time for receipt is 4:30 p.m., local time, . . . on the date that offers or revisions are due.” The protester met that deadline, and thus its proposal was not late, Labatt argues. We disagree. The FAR clause quoted above also stated that “[o]fferors are responsible for submitting offers, and any modifications, revisions, or withdrawals, so as to reach the Government office designated in the solicitation by the time specified in the solicitation.” Solicitation at 75. The “time specified in the solicitation,” specifically, amendment 7, was 2:00 p.m., irrespective of what the transmittal e-mail said, and the protester failed to meet that deadline.

The protester argues that, assuming all of the offerors made submissions via e-mail, which, as noted above, was not a transmission method permitted by the solicitation,

¹ This solicitation has been the subject of previous protests, the resolutions of which are not germane to this protest.

the agency was required to reject all of the proposals. We disagree. Even where an agency clearly should have amended a solicitation or otherwise apprised offerors that it had effectively waived a requirement, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. 4-D Neuroimaging, B-286155.2; B-286155.3, Oct. 10, 2001, 2001 CPD ¶ 183 at 9-10. Here, the agency allowed each of the offerors to submit proposals by e-mail, which was not a method permitted by the solicitation; the protester, in fact, benefited from the agency's decision to relax the transmission method. The protester has not shown how it was harmed by the agency's acceptance of the offerors' submissions by e-mail.

The protest is denied.

Gary L. Kepplinger
General Counsel