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**Comptroller General
of the United States**

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

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Decision

Matter of: The Sandi Group, Inc.

File: B-401218

Date: June 5, 2009

Anand V. Ramana, Esq., McGuire Woods LLP, for the protester.
Charmaine A. Howson, Esq., and Jeffrey Galan, Esq., Department of Energy, for the agency.
Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is denied where agency reasonably did not accept protester's late proposal submission because protester was not the "otherwise successful offeror."
 2. Agency's rejection of protester's initial proposal as unacceptable was reasonable where protester advised agency that the individual it proposed to be responsible for the project was no longer available and the protester's proposed substitution was received late.
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DECISION

The Sandi Group, Inc. (TSG) of Washington, D.C. protests the rejection of its proposal under request for proposals (RFP) No. DE-RP30-08CC60025, issued by the Department of Energy (DOE) Environmental Management Consolidated Business Center for security services at the DOE Savannah River Site (SRS) in South Carolina. TSG contends that the agency improperly rejected its proposal modification as late.

We deny the protest.

The SRS is a key DOE complex that--through safe stabilization, treatment, and disposition of legacy nuclear materials, spent nuclear fuel, and waste--supports DOE national security and non-proliferation programs and reduces risks as required by the Office of Environmental Management program. Agency Report (AR) at 1. The DOE sought proposals to meet the security requirements for the DOE Savannah River Operations Office and the National Nuclear Security Administration programs. The RFP provides for a cost-plus award-fee contract with a base performance period of 5 years with two options extending the contract for up to five more years.

The RFP advised offerors that award would be made without discussions to the offeror whose proposal was determined to represent the best value, based upon two evaluation factors: technical and cost/price. RFP at M-1--M-3. The technical evaluation factor consisted of the following subfactors: key personnel, relevant experience, technical approach, business approach and past performance. RFP at M-3. The key personnel technical evaluation subfactor was more important than the other subfactors. The technical evaluation factor was significantly more important than the cost/price evaluation factor.

With respect to the key personnel evaluation subfactor, the RFP required offerors to identify and propose the key positions and individuals considered essential for successful performance. RFP at L-12. While the number and exact function of key personnel was left to each individual offeror, the RFP provided that key personnel positions should include, at a minimum, the individual responsible for the overall contract. Offerors were to submit a resume for each proposed key person to demonstrate the extent of the individual's relevant experience and qualifications. Offerors were also required to demonstrate the availability of their proposed key personnel by submitting letters of commitment. The RFP further advised that the agency would conduct an oral presentation session limited to the proposed key personnel. RFP at L-13. The RFP emphasized that the oral presentation would not constitute discussions and would not constitute a part of the offeror's technical proposal.

Several offerors submitted proposals by the amended closing date, including TSG. In its proposal, TSG identified two key positions, project manager and deputy project manager, and provided resumes and letters of commitment for the individuals proposed for those positions. On February 20, offerors were notified of the date for oral presentations. AR, Tab C1, Oral Presentation Email. TSG's oral presentation was scheduled for March 17, 2009.

One week before its oral presentation, on March 10, TSG informed the contracting officer that the person identified as its project manager was no longer available, and requested permission to substitute another individual for that position. TSG provided a resume for its new project manager and at the same time also provided a resume for a position not previously identified as key in TSG's initial proposal, director of operations. Additionally, TSG stated that its oral presentation team would consist of its new project manager, its deputy project manager and the individual TSG proposed as the director of operations. AR, Tab C4, Mar. 10 Email Request for Changes.

On March 12, the contracting officer notified TSG that its request to substitute a new project manager and add another key personnel position would constitute a late revision to its proposal, and the request was denied. AR, Tab C6, Mar. 12 Email to TSG. The contracting officer advised TSG that allowing the proposed substitution

would constitute negotiations which would unduly delay the procurement, and prejudice other offerors. The contracting officer further advised TSG that since its key personnel team was no longer available, TSG's oral presentation was cancelled and its proposal would be eliminated from further consideration. AR, Tab C6, Mar. 12 Email to TSG.

On March 13, TSG requested a debriefing, which the contracting officer provided, in writing, on March 20. TSG was advised that its submission of a new project manager and identification of a new key position was an untimely material modification and/or revision of the TSG proposal that would not be accepted because it would unduly delay the acquisition and unfairly prejudice the other offerors. AR, Tab C8, Mar. 20, Debriefing Letter. The contracting officer further stated that since the TSG proposal effectively included only one key position (a deputy project manager) and no longer identified an individual responsible for the overall contract, as required by the RFP, the TSG proposal had no reasonable chance of receiving award. On March 25, TSG filed this protest with our Office.

TSG argues that the agency did not have any reasonable grounds to eliminate TSG from the competition prior to evaluation of offers. TSG asserts that the agency was required to consider its late modification pursuant to the RFP provision stating that "a late modification of an otherwise successful proposal that makes its terms more favorable to the government will be considered at any time it is received and may be accepted." RFP at L-2. TSG also contends that at the time it was eliminated from the competition, the agency had not selected an awardee and that TSG, like all other offerors at that point in the procurement, was "in line for award" when it submitted its modification to the agency.

TSG's argument is without merit. Under negotiated procurements, the FAR provides generally that a proposal 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 result of being permitted to submit a proposal later than the deadline set for all competitors. Tishman Constr. Corp., B-292097, May 29, 2003, 2003 CPD ¶ 94 at 3. The FAR provides a limited exception for receipt of late proposals that are submitted by the "otherwise successful offeror" and which provide more favorable terms. This exception to the general "late is late" rule is intended to allow the government to receive the benefit of a more advantageous proposal from the offeror who has been selected for award, without offending the general rule that offerors must be treated equally.

As an initial matter, we disagree with TSG's assertion that the limited exception for receipt of late proposals applies here. An "otherwise successful proposal" is one that would result in the award of the contract to the offeror regardless of the late modification; generally, this means that the government may accept a favorable late modification only from the offeror already in line for award. Seven Seas Eng'g &

Land Surveying, B-294424.2, Nov. 19, 2004, 2004 CPD ¶ 236 at 4. This exception is not available for every proposal submitted.

Furthermore, an offeror cannot make itself the “otherwise successful offeror” by submitting a late proposal modification; instead the offeror must already be the offeror in line for award prior to the time the late proposal modification is submitted. Phyllis M. Chestang, B-298394.3, Nov. 20, 2006, 2006 CPD ¶ 176 at 5 n.3. In this regard, an offeror cannot avail itself of the late proposal submission provision where the agency has not already identified an “otherwise successful offeror.” Global Analytic Info. Tech. Servs., Inc., B-298840.2, Feb. 6, 2007, 2007 CPD ¶ 57 5-6.

Here, the agency had only begun its evaluation of proposals when it was advised by TSG that its project manager was no longer available to perform the contract, or to attend the scheduled oral presentation. Without this individual TSG’s proposal was deficient, and TSG can not be viewed as, the “otherwise successful offeror.” On this record, we conclude that the agency’s determination not to accept TSG’s late proposal modification was entirely consistent with the RFP and reasonable under these circumstances.

TSG also argues that the agency’s cancellation of its oral presentation and elimination of its proposal from the competition were unreasonable. Where a protester challenges an agency’s evaluation of a proposal’s technical acceptability, our review is limited to considering whether the evaluation is reasonable and consistent with the terms of the RFP and applicable procurement statutes and regulations. National Shower Express, Inc.; Rickaby Fire Support, B-293970, B-292970.2, Jul. 15, 2004, 2004 CPD ¶ 140 at 4-5.

TSG’s argument that the agency’s decision to reject its proposal was unreasonable is primarily based on its contention that the agency improperly refused to accept its late modification. TSG does not argue that the agency should have evaluated its proposal as originally submitted. In any event, the record shows that once TSG advised the contracting officer that the individual it proposed as its project manager was no longer available, TSG’s proposal did not meet the RFP requirement that the proposal identify at a minimum, the key individual responsible for the overall contract, and a letter of commitment for that key person. Under these circumstances, we cannot say that the rejection of TSG’s proposal was unreasonable or violated the terms of the RFP. ¹

¹ TSG makes a number of other arguments related to the agency’s decision to eliminate the firm’s proposal from the competition without considering its offer to substitute a new project manager, and to propose an entirely new key position, director of operations. We also find them without merit. For example, TSG contends that the contracting officer had no authority to eliminate TSG’s proposal prior to evaluation by the evaluation team. On this record, we do not find that the

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As a final matter, we recognize that the protester and the agency disagree about whether TSG was attempting to identify for the first time a new key position, director of operations, when TSG advised the agency that it needed to substitute a new project manager. Compare Initial Protest at 5 n.1 (TSG says it was not identifying this individual as one of its key personnel) with Agency Memorandum of Law at 7 n.8 (the agency concluded that by submitting a new resume, a letter of commitment and a request that its director of operations attend the oral presentation, which was only to be attended by key personnel, TSG was identifying a new key position). While TSG may not have intended to identify its new director of operations as a key employee, its actions, at a minimum, created an ambiguity about the extent to which TSG was seeking to modify its proposal weeks after the proposal submission date. We see nothing unreasonable about the agency's decision not to allow either of these modifications.

The protest is denied.

Daniel I. Gordon
Acting General Counsel

(...continued)
contracting officer abused his discretion in deciding to eliminate TSG from the competition instead of delaying the procurement and accepting TSG's late modification.