



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Cyber Digital, Inc.

File: B-270107

Date: January 24, 1996

J. C. Chatpar for the protester.

Michael W. Clancy, Esq., for GTE Government Systems Corporation, an interested party.

Michael Briskin, Esq., Defense Logistics Agency, for the agency.

Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, participated in the preparation of the decision.

DIGEST

1. Agency properly rejected facsimile best and final offer as late where offeror failed to allow a reasonable time for timely receipt by the agency.
 2. Where entire best and final offer (BAFO) was not received until after announced deadline, agency was not required to consider that portion of the BAFO received before the deadline (8 of 19 total pages) since it did not constitute the entire offer and did not convey protester's full commitment to the solicitation's requirements.
 3. Where agency properly eliminated protester from further consideration due to negative past performance record, protester is not an interested party to challenge agency's evaluation of its initial price proposal.
 4. Protest that awardee's prices are materially unbalanced is dismissed where even if this protest ground were sustained, another offeror would be in line for award instead of the protester.
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DECISION

Cyber Digital, Inc. protests the award of a contract to GTE Government Systems Corporation under request for proposals (RFP) No. SP4700-95-R-0006, issued by the Defense Logistics Agency (DLA) for the installation and maintenance of a telephone system to serve four Defense Contract Management Offices located in the states of Florida, Georgia, and Alabama. Cyber Digital contends that DLA improperly rejected its best and final offer (BAFO) as late, and that the agency miscalculated its initial price proposal. Cyber Digital also contends that GTE's proposed pricing is materially unbalanced.

We deny the protest in part and dismiss it in part.

The RFP was issued on March 27, 1995, and contemplated the award of a 9-year, fixed-price, indefinite quantity/indefinite delivery contract to the offeror whose technically acceptable offer represented the "best value" to the government, using the evaluation factors of past performance and price. In addition to technical proposals, offerors were required to submit the RFP's fixed pricing schedule as well as the RFP's "Pricing Questionnaire," which required "simple" or "compounded" escalation rates for each of the required services associated with this contract. Offerors were also required to submit a "Performance Proposal" providing references for all contracts awarded within the last 5 years, and detailing similar past experience, which the agency would use in evaluating each offeror's past performance. The RFP also provided that a life-cycle evaluation of each offeror's proposed prices would be performed.

By the May 11 closing date, three offers were received, from The American Telephone Company, Cyber Digital, and GTE. For the next several months, numerous technical and pricing clarification requests were issued by the agency to each offeror. On September 11, based on the offerors' responses to the clarification requests, the contracting officer established a competitive range which included all three offers.

On September 14, oral discussions were conducted with each offeror. Of significance to this protest, during discussions with the protester, DLA advised Cyber Digital that the three references listed in its performance proposal had advised the contracting officer that because of problems with Cyber Digital's performance, none would award another contract to the firm. The agency gave a written summary of the references' remarks to Cyber Digital and advised the firm that it should address these negative remarks in its BAFO.

By amendment dated September 18, the agency requested that each offeror submit its BAFO by 4 p.m. on September 21. The RFP authorized the submission of facsimile BAFOs.

On September 21, at 3:30 p.m., Cyber Digital contacted the contracting officer and requested a BAFO extension, which was denied. The Cyber Digital representative advised the contracting officer that it "would try" to meet the 4 p.m. deadline. At 3:50 p.m., DLA's facsimile machine began receiving Cyber Digital's BAFO; during this process, a Cyber Digital representative telephoned a contract specialist who was monitoring the agency's facsimile machine site to verify that Cyber Digital's facsimile was being received. The contract specialist advised Cyber Digital that the transmission was proceeding, but warned Cyber Digital that it did not appear that the entire document would be received by the 4 p.m. deadline.

By 4 p.m., DLA had received the first eight pages of Cyber Digital's facsimile transmission which consisted solely of pricing schedule pages; the contract specialist and five other agency officials signed the cover page of the facsimile BAFO transmission in witness of the partial, 8-page receipt. The remaining 11 pages of Cyber Digital's BAFO—including 6 pricing schedule pages, and a 4-page response to DLA's past performance questions—were received late. The last facsimile page of Cyber Digital's BAFO was received at 4:12 p.m.

Because the entire BAFO was not timely received by the 4 p.m. deadline, the contracting officer rejected the BAFO as late, in accordance with Federal Acquisition Regulation § 15.412(c). By letter dated September 25, the contracting officer notified Cyber Digital that its BAFO was being rejected as late and that only Cyber Digital's initial proposal would be considered in the award evaluation process; on September 30, the contracting officer awarded the contract to GTE as the best value offer. On October 6, Cyber Digital filed this protest at our Office.

Rejection of Cyber Digital's BAFO

Under FAR §§ 15.412 and 52.215-10 (which was incorporated in the RFP), a BAFO received at the designated agency location after the exact specified closing time may not be considered unless the late receipt is due solely to mishandling by the government after receipt at the government installation.¹ In this case, Cyber Digital argues that government mishandling prevented its facsimile from arriving by the 4 p.m. deadline; alternatively, Cyber Digital maintains that the agency was required to accept and consider the eight BAFO pricing schedule pages which were timely submitted by the 4 p.m. closing deadline.

In support of its contention that government mishandling caused its late BAFO submission, Cyber Digital argues that DLA improperly failed to advise it that there were four facsimile machines available for transmission of BAFO documents. We find this argument without merit.

The RFP listed two of the four available facsimile machine numbers. According to an affidavit provided by a DLA cost analyst who was monitoring the four facsimile machines, Cyber Digital submitted its BAFO on a third facsimile machine whose telephone number was provided by the agency to all three offerors during clarifications. The cost analyst also reports that to the best of her recollection, "neither of [the two] machines [identified in the RFP was] in use" when Cyber Digital was submitting its BAFO on the third facsimile machine. Thus, the record

¹This exception only applies if the late BAFO is received prior to contract award. FAR § 52.215-10(c).

shows that Cyber Digital had access to three of the four facsimile machines located at the closing site.

The agency was under no obligation to provide all four facsimile machine numbers to the protester. The FAR requires agencies to have adequate procedures in place to ensure the timely receipt and delivery of all proposal documents—including facsimile submissions when such submissions are authorized. FAR §§ 15.411(a) and 14.202-7(a)(5); Butt Constr. Co., Inc., B-258507, Jan. 30, 1995, 74 Comp. Gen. ____, 95-1 CPD ¶ 45. At the same time, however, FAR § 15.412(b) places the burden on offerors to see that offers and any modifications to them reach the designated office on time. As noted above, the agency provided the offerors with three facsimile numbers (two listed in the RFP and one provided during clarifications) for transmitting proposal documents; since nothing requires an agency to have more than one facsimile machine and since the offeror generally bears the risk of non-receipt of facsimile transmissions, we have no basis for finding any inadequacy in the agency's process for receiving facsimile documents.

We also have no basis to otherwise find government mishandling. Where an offeror delayed transmitting a lengthy facsimile BAFO until 10 minutes prior to the BAFO closing deadline, and the agency otherwise had reasonable facsimile submission procedures in place, we held that receipt by the agency after the BAFO closing time was solely the fault of the contractor. See Brookfield Dev., Inc., Fuller and Co., and Colorado Nat'l Bank, B-255944, Apr. 21, 1994, 94-1 CPD ¶ 273. Similarly here, the late receipt of Cyber Digital's BAFO was simply the result of the protester's failure to allow a reasonable time for the facsimile transmission of its BAFO, not government mishandling. See Phoenix Research Group, Inc., B-240840, Dec. 21, 1990, 90-2 CPD ¶ 514.

While Cyber Digital argues that the agency should have considered the eight pages that were received prior to the 4 p.m. deadline, we see no basis to conclude that the agency was required to do so. On the contrary, even if the timely received pages had been substituted for the corresponding pages in Cyber Digital's initial proposal, the agency still would have been left with an incomplete offer; we do not think the agency could reasonably assume that Cyber Digital's BAFO committed it to every CLIN in the RFP's pricing schedule—or that Cyber Digital had addressed the agency's concerns about the protester's negative past performance record—without receiving a complete BAFO by the designated 4 p.m. deadline. See Inland Serv. Corp., Inc., B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266; Phoenix Research Group, Inc., supra.

Price Evaluation Challenges

Cyber Digital also contends that the agency performed an improper life-cycle evaluation of its initial proposal pricing and that the awardee's pricing is materially

unbalanced. Because the record shows that Cyber Digital would not be in line for award even if these challenges were sustained, we will not consider these contentions further.

As noted above, the RFP provided that past performance was an important factor in the award selection process. In its proposal, Cyber Digital listed three contract references for past performance--which the agency determined to be unacceptable based upon each reference's negative assessment of Cyber Digital's performance, as well as each reference's recommendation that DLA exclude Cyber Digital from further consideration for award. Although Cyber Digital was given the opportunity to address this aspect of its proposal, because its BAFO was received late, the agency had no basis to change its negative evaluation of Cyber Digital's past performance.

Under these circumstances, even if the agency did perform an improper life-cycle price analysis of Cyber Digital's proposed pricing, because Cyber Digital's negative past performance rating rendered it ineligible for award, the record establishes that the protester was not prejudiced by any alleged agency price evaluation error. Consequently, we will not consider this contention further.

Nor is Cyber Digital an interested party to maintain its challenge that the awardee's pricing is materially unbalanced. The record shows that in the event we were to sustain this protest ground, another offeror--The American Telephone Company--would receive contract award. Under our Bid Protest Regulations, a protester is not an interested party to maintain an award challenge where it would not be in line for contract award were its protest to be sustained. Section 21.0(a), 60 Fed. Reg. 40,737, 40,739 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.0(a)); RC 27th Ave. Corp.--Recon., B-246727.2, May 20, 1992, 92-1 CPD ¶ 455.

The protest is denied in part and dismissed in part.

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of the United States