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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: GROH GmbH

File: B-291980

Date: March 26, 2003

Henry Salisbury for the protester.

Capt. Robert L. Stolzman, Department of the Air Force, for the agency.

Tania Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting agency improperly rejected proposal sent by facsimile as late is denied where the record does not establish that the agency timely received the protester's proposal and where, in any event, the solicitation did not include the clause authorizing submission of proposals by facsimile; notwithstanding the e-mail advice sent to the protester by the agency's point of contact, authorization for submission of facsimile proposals concerns the preparation of proposals and must be furnished to all offerors.

DECISION

GROH GmbH protests as improper the rejection of its proposal as late under request for proposals (RFP) No. F61815-03-R-0002, issued by the Department of the Air Force for the repair of a military family housing playground at Morón Air Force Base, Spain.

We deny the protest.

The closing time and date for receipt of proposals under this solicitation was 4 p.m. on February 3, 2003. RFP amend. No. 0001 at 2. The solicitation's standard form (SF) 1442, "Solicitation, Offer, and Award," stated that proposals were to be delivered to "the place" listed in block 8 of the form. RFP at 1. The information in block 8 simply referred offerors to block 7, which contained the street address, telephone number, and facsimile number of the agency's issuing office. Id.

The solicitation incorporated Federal Acquisition Regulation (FAR) § 52.215-1, "Instructions to Offerors-Competitive Acquisition." Among other things, this clause

instructs offerors that, “[u]nless other methods (*e.g.*, electronic commerce or facsimile) are permitted in the solicitation, proposals and modifications to proposals shall be submitted in paper media” FAR § 52.215-1(c)(1). Despite the presence of a facsimile number in block 7 of the solicitation’s SF 1442, the solicitation did not include the clause at FAR § 52.215-5, “Facsimile Proposals,” which authorizes the submission of proposals by facsimile. See FAR § 15.209(e).

GROH asserts that it successfully transmitted its proposal by facsimile to the number identified in the solicitation on January 31, 2003, and supports its position with a copy of the log from its facsimile machine showing a successful transmission to the agency on that date. The Air Force denies that it received any transmission from GROH on January 31, and supports its position with a copy of the log from its facsimile machine showing no transmission from GROH on that date. Both parties agree that GROH successfully transmitted its proposal by facsimile to the agency on February 4, 1 day after the closing date, and that GROH’s commercial courier hand-delivered a copy of its proposal to the agency on February 5, 2 days after the closing date. On February 6, the contracting officer informed GROH that its proposal was delivered late and could not be considered for award.

GROH argues that its proposal was not late because the log from its facsimile machine shows that it was successfully faxed to the agency before the closing date. GROH also argues that the solicitation’s inclusion of a facsimile number in box 7 of the solicitation’s SF 1442 constituted the requisite authorization to submit proposals by facsimile, and that the agency’s point of contact authorized GROH to submit its proposal by facsimile via e-mail advice.

It is an offeror’s responsibility to deliver its proposal to the proper place at the proper time, and late delivery generally requires rejection of the proposal. Med-National, Inc., B-277430, Sept. 8, 1997, 97-2 CPD ¶ 67 at 2. Even if we were to accept GROH’s interpretation of the solicitation as permitting the submission of proposals by facsimile, the firm’s facsimile log, by itself, does not establish that the Air Force timely received the firm’s proposal. Where, as here, a transmission record is in the protester’s control, it can be created or altered to support a protester’s contentions. As a result, we do not consider such a transmission record to be definitive evidence of transmission. Southern CAD/CAM, B-244745, Nov. 13, 1991, 91-2 CPD ¶ 453 at 3. Moreover, evidence of a facsimile transmission does not establish receipt where, as here, contracting officials deny receipt and there is no other conclusive, contemporaneous evidence of receipt. The Microscope Co., Inc. B-257015, Aug. 8, 1994, 94-2 CPD ¶ 157 at 2; Southern CAD/CAM, supra.

In any event, a proposal sent by facsimile must be rejected where, as here, a solicitation permits the submission of proposals by facsimile machine only if authorized and does not elsewhere provide authorization. G.D. Searle & Co., B-247077, Apr. 30, 1992, 92-1 CPD ¶ 406 at 3. As noted above, FAR § 52.215-1, which was incorporated in this solicitation, states that, “unless other methods (*e.g.*,

electronic commerce or facsimile) are permitted in the solicitation, proposals and modifications to proposals **shall be submitted in paper media**”

FAR § 52.215-1(c)(1) (emphasis added). Since the solicitation did not permit the use of other methods for the submission of proposals, GROH and the other offerors were required to submit their proposals in paper media. Given the language of FAR § 52.215-1(c)(1), we cannot agree with GROH that the mere presence of a facsimile number in box 7 of the SF 1442 constituted the requisite authorization to submit proposals by facsimile.¹

The underlying basis for this holding is our view that agencies are required to provide all offerors the same information in order to ensure that the acquisition is conducted on an equal basis for all competing firms. G.D. Searle & Co., supra. In this regard, the FAR provides that, when specific information about an acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to all potential offerors in order to avoid creating an unfair competitive advantage. See FAR § 15.201(f). Authorization for the submission of facsimile proposals, such as that provided to GROH via an e-mail from the agency’s point of contact, was information that was necessary for the preparation of proposals and which, since it was furnished to only one offeror, could have conferred a potential competitive advantage—that is, more time in which to prepare its proposal. In the absence of notice to all offerors, if there had been sufficient evidence to establish that GROH successfully faxed the agency its proposal prior to the closing date, it would have been unfair and improper for the agency to consider it because the other offerors were not on notice of such an opportunity. G.D. Searle & Co., supra.

The protest is denied.

Anthony H. Gamboa
General Counsel

¹ GROH is correct that offerors were permitted to submit their past performance questionnaires via mail or facsimile, but the solicitation’s language in this regard was expressly limited to these questionnaires.