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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: WareOnEarth Communications, Inc.

File: B-298408

Date: July 11, 2006

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DIGEST

Protest challenging agency's issuance of amendments changing basis of price evaluation is dismissed as untimely where protest was not filed before the time set for receipt of revised proposals.

DECISION

WareOnEarth Communications, Inc. (WCI) protests the terms of request for proposals (RFP) No. HC1019-04-R-0008, issued by the Defense Information Systems Agency, Defense Information Technology Contracting Organization -- Pacific (DITCO). Specifically, WCI challenges the agency's issuance of amendments altering the basis for the agency's price evaluation.

We dismiss the protest as untimely.

The agency issued the RFP on June 9, 2005, for various telecommunications services for military installations throughout the state of Hawaii, referred to as the "Joint Hawaii Information Transfer System (JHITS)," which encompasses "switched voice and data services, Integrated Services Digital Network (ISDN) services, dedicated transmission (point-to-point and multi-point) as well as optional services for the maintenance of Customer Premise Equipment (CPE) and intra-base Outside Plant (OSP) cable including fiber optic cable." Agency's Comments on Timeliness at 2. The RFP contemplates the award of a contract with a period of performance up to 10 years in length (6-year base period with a 3-year option period, plus an additional 1-year option period).

As it relates to the protest, the RFP required offerors to submit prices for approximately 7,600 contract line item numbers and sub-line item numbers (CLIN/SLIN) covering all required services over the 10 years of potential contract performance. Each offeror's price was to be evaluated based on a "Discounted Life Cycle Cost (DLCC)" calculated for the life of the contract. As explained by the parties, the DLCC was to be based on the sum of all nonrecurring and recurring costs for all CLINs/SLINs with future year costs discounted to present value based on a table of discount factors provided by the agency. The agency also provided offerors with a software application which automatically calculated their total prices based on each offeror's price data. Final proposals were due on April 20, 2006.

After receiving final proposals, the agency issued two additional amendments to the solicitation on Thursday, June 1, amendments 14 and 15, which are the subject of this protest. Principally, these amendments changed the basis for determining the offerors' DLCCs by deleting various CLINs/SLINs from the calculation.¹ While indicating that the revised DLCC pricing scheme "should not result in changes to the offerors' proposed pricing," the agency requested offerors to provide their new proposed total DLCCs by 4 p.m. on Monday, June 5. RFP amend. 0014, at 2. WCI timely submitted its revised DLCC, which consisted of 2 pages, to the agency both electronically and via mail. Subsequently, on June 12, WCI filed the subject protest challenging the revised basis for calculating offerors' DLCCs as set forth in amendments 14 and 15. (June 12 was the first business day following the tenth day after WCI received notice of the amendments (June 11), which fell on a Sunday.) In its protest WCI argues that the agency lacked a legitimate reason or rational basis for reducing the scope of the cost evaluation and that even if such reasons existed, there was no compelling reason to revise the solicitation after receipt and evaluation of final proposals.²

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. Challenges to alleged solicitation improprieties that did not exist in the initial solicitation but which are subsequently incorporated into the solicitation, such as WCI's challenges to amendments 14 and 15, must be filed prior to the next closing time for receipt of proposals. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2006). Applying this rule, WCI's protest is untimely since it was not filed before the June 5 closing time following the issuance of amendments 14 and 15.

¹ The amendments explained, however, that all CLIN/SLIN prices, including those not utilized for calculating the DLCC, would be evaluated for completeness and reasonableness. RFP amend. 0014, at 2.

² For the purpose of establishing competitive prejudice, WCI posits that the amended price evaluation scheme appears to favor the incumbent, citing three CLINs/SLINs which were not removed from the revised calculation.

WCI argues, however, that our Office has recognized an exception to the above rule where a protester does not have a reasonable opportunity to file its protest before the due date for proposals. In such cases our Office has required that the protester challenge the impropriety no later than 10 days from the time it knew or should have known of its basis for protest—in this case, when WCI learned of amendments 14 and 15. Applying this exception, WCI's protest would be timely.

According to WCI, the exception should apply in this case because WCI did not have a reasonable opportunity to file a protest with our Office prior to the June 5 closing date due to the numerous steps required to file the protest, including: (1) analyzing “the likely differential impact of the evaluation changes on the WCI proposal relative to the competition”; (2) the need for WCI, a small business concern without in-house counsel, to identify and obtain outside counsel; (3) researching and clearing any potential conflicts of interest by outside counsel; (4) researching and analyzing the bases of protest; and (5) drafting and filing the protest, as well as the complex nature of the procurement and protest issues. Protester's Letter on Timeliness at 3. WCI further argues that if we do not apply the exception in this instance, agencies will have “a strong incentive to game the system and avoid review of dubious procurement actions” by imposing short closing times for the receipt of revised proposals requiring offerors to file “precipitous protests” to protect their rights. *Id.* at 6.

We conclude that application of the exception is not appropriate in this instance. Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.—Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129 at 2. In order to prevent these rules from becoming meaningless, exceptions are strictly construed and rarely used. *Id.* The cases where we have concluded that an offeror did not have a reasonable opportunity to protest solicitation terms, and thus applied the exception advocated by WCI, are those where the protester faced an extremely limited timeframe within which to challenge the solicitation provisions at issue. See, e.g., Dube Travel Agency & Tours, Inc.; Garber Travel, B-270438, B-270438.2, Mar. 6, 1996, 96-1 CPD ¶ 141 at 6 n.7 (amendment not received until 1 day before proposals due); Skyline Indus., Inc., B-257340, Sept. 22, 1994, 94-2 CPD ¶ 111 at 3 (time for receipt of proposals was “practically simultaneous with solicitation itself”); Ling Dynamic Sys., Inc., B-252091, May 24, 1993, 93-1 CPD ¶ 407 at 3 (protester learned basis for challenging solicitation only 2 hours before bid opening); G. Davidson Co., Inc., B-249331, July 14, 1992, 92-2 CPD ¶ 21 at 2 n.1 (concluding that 2 hours and 45 minutes was not a reasonable period of time within which to file a protest); Bardes Servs., Inc., B-242581, Apr. 29, 1991, 91-1 CPD ¶ 419 at 3 (protest not feasible since protester was informed of basis of protest only 1 day before proposals due); ImageMatrix, Inc., B-243170, Mar. 11, 1991, 91-1 CPD ¶ 270 at 1 (protester did not receive amendment until 1 day before proposals were due); The Big Picture Co., B-210535, Feb. 17, 1983, 83-1 CPD ¶ 166 at 2 (solicitation amendment not received until 1 day before proposals due);

Culligan, Inc., 58 Comp. Gen. 307 (1979) (protester received solicitation amendment less than 3 hours before bid opening); Ampex Corp., B-190529, Mar. 16, 1978, 78-1 CPD ¶ 212 at 3 (“the time for receipt of proposals was practically simultaneous with the solicitation, the entire process apparently taking only 10 minutes”).

Here, the protester received the amendments 4 days--or, as the protester describes them, 2 working days--before revised proposals were due and was able to prepare and timely submit the revised pricing information required by the agency. In other cases we have found that a similar period of time--2 or 3 days--prior to a bid or proposal closing date afforded an offeror a reasonable opportunity to file a protest challenging the terms of a solicitation. See, e.g., Concepts to Operations, Inc., B-248606, Sept. 10, 1992, 92-2 CPD ¶ 164 at 2 (dismissing protest as untimely where 3 calendar days, 1 business day, was sufficient time to file protest); Mobile/Modular Express, B-246183, Nov. 13, 1991, 91-2 CPD ¶ 459 at 2-3 (2 days reasonable period of time to file protest); Pacific Instruments, Inc., B-228274, Oct. 21, 1987, 87-2 CPD ¶ 380 (“only 2 working days” as argued by protester was reasonable opportunity to file protest); R&B Equip. Co., B-219560.2, Sept. 5, 1985, 85-2 CPD ¶ 272 at 2 (afforded “only 2 working days”); Reliance Steel Prods. Co., B-206754, Jan. 23, 1983, 83-1 CPD ¶ 77 at 2 (2 days reasonable); Cybermedic, B-200628, May 19, 1981, 81-1 CPD ¶ 380 at 3 (2 days reasonable opportunity to file protest); Clarke & Lewis, Inc., B-196954, Jan. 8, 1980, 80-1 CPD ¶ 24 at 2 (2 days sufficient period of time to file protest); Irvin Indus., Inc., B-187849, Mar. 28, 1977, 77-1 CPD ¶ 217 at 2 (2 days reasonable period of time to file protest).³

As factors in favor of waiving our timeliness rule, WCI points to the purported complexity of the protest issues in this case--a factor which appears overstated given the limited nature and detail of the arguments raised in WCI's protest--as well as its status as a small business concern without the aid of in-house counsel. In our view, it is not appropriate to take such factors into account as part of our determination. Giving weight to such considerations would undermine the bright-line nature of our timeliness rules, which serve as a predictable guide to the procurement community and, as noted above, strike an appropriate balance between two principal goals of our bid protest forum, giving parties a fair opportunity to present their cases and

³ In support of its position that our Office should apply the exception to the general rule regarding timely filing of challenges to solicitation improprieties, the protester relies on Morrison Knudsen Corp., B-247160, Jan. 7, 1992, 92-1 CPD ¶ 35 at 2, holding that a period of 5 days, or 3 working days, did not afford the protester a reasonable opportunity to file its protest before proposals were due and therefore applying the 10-day rule. This decision appears to be a departure from our case law and will no longer be followed in this respect.

resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Recon., supra.

The protest is dismissed.

Gary L. Kepplinger
General Counsel