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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Optelec U.S., Inc.

File: B-400349; B-400349.2

Date: October 16, 2008

Robert E. Korroch, Esq., and Francis E. Purcell, Esq., Williams Mullen, for the protester.

Maura C. Brown, Esq., Department of Veterans Affairs, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that failure to submit timely response to solicitation resulted from agency's failure to provide timely notice of solicitation is denied where agency advised protester that solicitation would be posted on FedBizOpps website, and protester then failed to avail itself of all reasonable means to view solicitation when it was posted.

DECISION

Optelec U.S., Inc. protests the rejection of its proposal as late under request for proposals (RFP) No. VA-797-08-RP-0002, issued by the Department of Veterans Affairs (VA) for closed-circuit electronic magnification devices (CCTV). Optelec asserts that its offer was late solely because VA improperly failed to provide it with timely notice of the solicitation.

We deny the protest.

The solicitation was posted on the FedBizOpps website on May 29, 2008, with a closing time of 4:00 p.m. on June 30. Offerors were required to submit technical and price proposals, and product samples. Agency Report (AR) at 4, 5. Optelec submitted its proposal via e-mail at 4:39 p.m. on June 30, followed by product

samples on July 1 and the required technical volumes on July 15. Id. The agency rejected the proposal as late because it was submitted after the stated closing time.¹

Optelec states that it first contacted VA in late 2006 when it learned that the agency planned to issue a solicitation for CCTV's, and that VA instructed the firm to register on the FedBizOpps website to receive information on the procurement. Protest at 3. Optelec states that it did so and also continued to speak with the agency during 2007 and in February and March of 2008; it was told that the solicitation was being reviewed. Id. Optelec next contacted VA on June 30, upon learning that the solicitation had been issued and that responses were due that day. Id. at 4. It proceeded to submit its proposal, but, as noted, the proposal was received after the stated closing time.

Optelec states that, in investigating why it did not receive the solicitation, it learned that FedBizOpps discontinued its e-mail notification function in April, so that Optelec did not receive notice that the solicitation had been issued. Id. According to Optelec, since the agency knew that Optelec was interested in the procurement, and since Optelec registered with FedBizOpps as instructed, the lateness of its proposal is attributable to VA's actions, and its proposal therefore should be considered.

The Competition in Contracting Act of 1984 generally requires contracting agencies to obtain full and open competition through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A) (2000), both to ensure that a procurement is open to all responsible sources and to provide the government with the opportunity to receive fair and reasonable prices. Kendall Healthcare Prods. Co., B-289381, Feb. 19, 2002, 2002 CPD ¶ 42 at 6. In pursuit of these goals, a contracting agency has the affirmative obligation to use reasonable methods to publicize its procurement needs and to timely disseminate solicitation documents to those entitled to receive them. However, concurrent with the agency's obligations in this regard, prospective contractors must avail themselves of every reasonable opportunity to obtain the solicitation documents. Laboratory Sys. Servs., Inc., B-258883, Feb. 15, 1995, 95-1 CPD ¶ 90 at 2. Where a prospective contractor fails in this duty, we will not sustain its protest challenging the agency's failure to meet its solicitation dissemination obligations. Wind Gap Knitwear, Inc., B-276669, July 10, 1997, 97-2 CPD ¶ 14 at 3. In considering such situations, we consider whether the agency or the protester had the last clear opportunity to avoid the protester's being precluded from competing. Id.

The procurement here was conducted electronically pursuant to Federal Acquisition Regulation (FAR) subpart 4.5. VA met its obligation to publicize the procurement by posting the solicitation on the FedBizOpps website and by advising Optelec to

¹The agency notes that, aside from the lateness of the proposal, offerors were not permitted to submit proposals by e-mail.

register with the website in order to receive information about the procurement. See FAR § 5.102(a)(1). Optelec, however, failed to avail itself of every reasonable opportunity to obtain the solicitation. In this regard, Optelec's responsibility did not end with its registering with FedBizOpps. Rather, once the agency advised the firm that the solicitation would be posted on the website, it became solely Optelec's responsibility to take whatever steps were necessary to obtain the solicitation. This means that Optelec alone was responsible for monitoring the website for the posting of the solicitation; while Optelec could choose to await e-mail notification from FedBizOpps, the change in the website's policy to eliminate e-mail notification did not operate to shift responsibility for obtaining the solicitation away from Optelec to VA. Since Optelec took no steps to obtain the solicitation from the end of March until the end of June, when it again contacted the agency, its failure to timely receive the solicitation, and its resultant inability to submit a timely offer, was the result of its failure to avail itself of every reasonable opportunity to obtain the solicitation. The agency therefore properly rejected Optelec's proposal as late.

The protest is denied.

Gary L. Kepplinger
General Counsel