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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Lani Eko & Company, CPAs, PLLC

File: B-404863

Date: June 6, 2011

Terry L. Elling, Esq., Holland & Knight LLP, for the protester.
Wilbert T. Jones, Esq., Department of Homeland Security, for the agency.
Paula A. Williams, Esq., and Edward Goldstein, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably rejected protester's hand-carried proposal as late where a preponderance of the evidence does not establish that the protester delivered the proposal to the designated location prior to the time set for closing and where the protester significantly contributed to the late delivery by failing to allow sufficient time for delivery.

DECISION

Lani Eko & Company, CPAs, PLLC (Lani Eko) of Alexandria, Virginia, protests the rejection of its proposal as late under request for proposals (RFP) No. HSCG23-11-R-TABS00, issued by the Department of Homeland Security, United States Coast Guard, for technical, acquisition, and business support services.

We deny the protest.

As amended, the solicitation informed potential offerors that hand delivery of initial proposals was permitted and indicated that they were to be submitted to the Jemal Building, 1900 Half Street SW, Washington, DC, 3 p.m. eastern standard time (EST), March 2, 2011. RFP amend. 7, at 1-2. The solicitation further instructed that offerors should

use the loading dock on the T Street Southwest (SW) side of the Jemal Building. Upon arrival at the loading dock area, offerors should go through the brown gate and climb the stairs to enter the building at the loading dock guard desk.

Id. at 1.

The amendment reiterated that proposals were due by 3 p.m. on March 2, and cautioned offerors planning to hand deliver proposals on that day “to plan accordingly” because of an expected high volume of proposal delivery and “limited parking at the Jemal Building.” Id. at 2. The RFP added, in relevant part, that

[a]ny offeror who has not received a confirmation receipt or is not in line at the loading dock of the Jemal building by 3 PM EST will have their proposal considered late.

Id.

The solicitation included the standard late proposal clause for commercial items, Federal Acquisition Regulation (FAR) § 52.212-1(f), which generally states that any offer received at the place designated in the solicitation after the exact time specified for receipt will not be considered. RFP at 65.

On March 2, the day proposals were due, Lani Eko asserts that its representative left the firm’s offices in Virginia to deliver the firm’s proposal package to the Jemal Building in Washington, DC at “about 2:30 p.m.” Protester’s Response to Dismissal Request, exh. 1, Decl. of Protester’s Representative, Mar. 23, 2011, at 1. The representative indicates that she arrived at the gate closest to the loading dock’s guard desk shortly before 3 p.m. More specifically, she indicates that she exited her vehicle, and noticed that the time was then 2:58 p.m. The representative states that it “only required a few seconds to enter the gate and walk up a few steps” to arrive at the guard’s desk—based on her “cell phone,” the time was 2:59 p.m. Id. The agency official, who was waiting at the desk, refused to accept the proposal package because Lani Eko’s representative “had missed the 3:00 p.m. deadline.” Id. The agency official then referred Lani Eko’s representative to the security guard desk telephone, which reflected a time of “3:02 p.m.” Id. Despite her requests, the agency official refused to time stamp, or otherwise accept, the protester’s proposal package. This protest followed.

Lani Eko contends that its representative arrived at the Jemal Building with its proposal package prior to the closing time on March 2, and that the agency improperly refused to accept its proposal. In support of its position, the protester relies on its representative’s timing of events, and maintains that consistent with the language of the solicitation, the firm’s representative was “in line” at the loading dock prior to 3 p.m. As such, the agency improperly determined that its proposal was late. Protester’s Comments at 1-2. We disagree.

It is an offeror’s responsibility to deliver its proposal to the place designated in the solicitation by the time specified, and late receipt generally requires rejection of the proposal. Federal Acquisition Regulation (FAR) § 15.208(a); O.S. Sys., Inc., B-292827, Nov. 17, 2003, 2003 CPD ¶ 211 at 3; Integrated Support Sys. Inc., B-283137.2, Sept. 10, 1999, 99-2 CPD ¶ 51 at 2. Unless a preponderance of the

evidence demonstrates that the proposal was at the designated location for receipt prior to the time set for closing, the proposal may not be considered for award. See Med-National, Inc., B-277430, Sep. 8, 1997, 97-2 CPD ¶ 67 at 3. A late hand-carried proposal may be considered for award, however, if improper government action was the paramount cause of the late delivery and consideration of the proposal would not compromise the integrity of the competitive procurement process. Caddell Constr. Co., Inc., B-280405, Aug. 24, 1998, 98-2 CPD ¶ 50 at 6. Improper government action in this context is affirmative action that makes it impossible for the offeror to deliver the proposal on time. Id. Even in cases where the late receipt may have been caused, in part, by erroneous government action, a late proposal should not be considered if the offeror significantly contributed to the late receipt by not doing all it could or should have done to fulfill its responsibility to deliver a hand-carried proposal to the specified place by the specified time. ALJUCAR, LLC, B-401148, June 8, 2009, 2009 CPD ¶ 124 at 3; O.S. Sys., Inc., supra. We find no basis to conclude that Lani Eko timely delivered its proposal or that improper government action was the paramount cause for the late submission of its proposal.

The agency reports that on March 2, three contract specialists were present at various times throughout the day at the loading dock in the Jemal Building to receive proposal packages. At approximately 2:58 p.m., one of the contract specialists declares that she began processing a hand-carried proposal package from another vendor which she completed just after 3 p.m. Agency Report (AR) exh. 28, Decl. of Contract Specialist A, Apr. 19, 2011; see also, exh. 29, Decl. of Contract Specialist B, Apr. 19, 2011 at 2. According to this individual, at 3:01 p.m., after acknowledging that the closing time had passed, a third contract specialist stepped out of the door to the loading dock. The second contract specialist declares that no offerors were waiting at the security desk at 3 p.m. AR, exh. 29, Decl. of Contract Specialist B, Apr. 19, 2011, at 1. When the security desk phone registered 3:01 p.m., the contract specialists concluded that the submission deadline had passed, and the third contract specialist went to the top of the loading dock stairs to inform all offerors that the submission deadline had expired. Id. The third contract specialist, who in fact engaged Lani Eko's representative outside the loading dock, declares that no offerors were waiting inside or outside of the loading dock at 3:01 p.m. (he verified the time via his wristwatch, cell phone and security guard desk phone), and that approximately six offerors, including Lani Eko's representative, approached the loading dock door with their proposals as he was standing there. AR, exh. 27, Decl. of Contract Specialist C, Apr. 19, 2011, at 2. After approximately a minute of conversation, the offerors asked which clock he was using and the third contract specialist indicated "the guard desk clock," which verified the time as 3:02 p.m. Id. Because the offerors arrived after the closing time and were considered late, the contracting specialist refused to accept their proposals. Id.

We conclude that the protester has failed to demonstrate by a preponderance of evidence that it arrived at the place designated for delivery of proposals by the 3 p.m. deadline established by the RFP. In this regard, the protester offers no evidence, other than the declaration of its own representative, to support its assertion that it

had arrived at the Jemal loading dock area by 3 p.m. Moreover, the protester's assertion of timely delivery is based solely on the time that its representative observed on her personal cell phone. This is not the relevant time, however, since the official time maintained by the agency is controlling absent a showing that it was unreasonable. See U.S. Aerospace, Inc., B-403464, B-403464.2, Oct. 6, 2010, 2010 CPD ¶ 225 at 9. With regard to the official time, the protester's representative reports having observed a time of 3:02 p.m. after being informed that its proposal was late. This is consistent with the declarations submitted by the agency, which represent that an agency representative was waiting at the loading dock door at 3:01, the protester arrived just after 3:01 p.m., and that, after a conversation of approximately 1 minute, he showed her the official time, which then was 3:02.¹ On this record, we find nothing unreasonable in the agency's determination that Lani Eko's proposal was delivered late.²

The protester also contends that its delivery was frustrated by the agency's use of a security guard phone clock to determine the closing time. Protest at 2. Lani Eko argues that use of this device was unreasonable since there was a "1-2 minute discrepancy maintained on that device versus on various cell phones." Id. at 2. This argument is without merit. As noted above, we have held that the time maintained

¹ Lani Eko's representative maintains that the conversation lasted several minutes. In this regard she declared that it lasted "some three or four minutes" and in an prior e-mail message to the contracting officer indicated that the conversation had lasted at least 2 minutes. Protester's Response to Dismissal Request, exh. 1, Decl. of Protester's Representative, Mar. 23, 2011, at 1; exh. 2, E-mail to Agency, Mar. 2, 2011. Other than her own impressions as to the length of the conversation, Lani Eko's statements indicating that the conversation in fact lasted several minutes are not supported by any evidence. The declarations submitted by the agency on the other hand support a finding that the conversation lasted approximately one minute where the time was specifically noted as 3:01 p.m. before the conversation began and again as being 3:02 p.m. when the conversation concluded.

² Even assuming, as the protester maintains, that the solicitation merely required an offeror to be "in line at the loading dock" by 3 p.m. to effectuate timely delivery, the record does not establish by a preponderance of the evidence that Lani Eko's representative was actually waiting in line at the loading dock by 3 p.m. Rather, Lani Eko's representative indicates that when she arrived at the stairs leading up to the loading dock area, the agency representative was waiting and informed her that she had arrived after closing time. See Protester's Response to Dismissal Request, exh. 1, Decl. of Protester's Representative, Mar. 23, 2011, at 1. This representation is consistent with the declaration of the agency representative, who indicates that he was waiting at the loading dock door when he determined that it was 3:01 p.m. and that Lani Eko's representative approached after this time. AR, exh. 27, Declaration of Agency Representative C, Apr. 19, 2011, at 2.

by the agency official responsible for receiving bids or proposals is determinative, unless it is shown to be unreasonable under the circumstances. U.S. Aerospace, Inc., B-403464, B-403464.2, supra. Here, there was nothing inherently unreasonable with the agency's use of a security guard desk phone clock to determine the solicitation's closing time. Notwithstanding the protester's suggestion to the contrary, there simply is no requirement for the time maintained by the agency to be synchronized with the protester's personal cell phone, or any other cell phone. Moreover, it is apparent that the paramount cause of Lani Eko's late delivery of its proposal stemmed from the fact that Lani Eko's representative arrived at the Jemal Building, according to her own version of events, with approximately 1 minute to spare. By allowing herself so narrow a margin of time, Lani Eko's representative assumed the risk that any number of events might intervene to prevent the timely submission of the proposal. See Pat Mathis Constr. Co., Inc., B-248979, Oct. 9, 1992, 92-2 CPD ¶ 236 at 4. Accordingly, we have no basis on which to object to the agency's actions.³

The protest is denied.

Lynn H. Gibson
General Counsel

³ The protester also argues that even if its proposal was late, according to FAR §15.208(g), the agency was nonetheless required to hold its proposal unopened until after award. To the extent the agency failed to take custody of Lani Eko's late proposal as contemplated by the FAR, Lani Eko did not suffer any prejudice associated with this error since its proposal was properly rejected as late and was therefore ineligible for award.