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Decision

Matter of: The Morganti Group, Inc.

File: B-420750.2

Date: December 19, 2022

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DIGEST

1. Protest that agency improperly failed to evaluate protester's proposal is denied where the protester failed to submit its proposal in accordance with the terms of the solicitation, and its proposal was automatically and irretrievably deleted by the agency's system.
 2. Protest that agency engaged in disparate treatment is denied where agency treated similarly situated offerors in an equal manner.
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DECISION

The Morganti Group, Inc., of Danbury Connecticut, protests the award of a contract to American International Contractors, Inc. (AICI), of McLean, Virginia, under request for proposals (RFP) No. W912ER-22-R-0007, issued by the Department of the Army, Corps of Engineers, for the construction of a munitions storage area in Jordan. The protester contends that the agency improperly failed to evaluate its proposal. It also contends the agency engaged in disparate treatment.

We deny the protest.

BACKGROUND

The agency issued the solicitation on October 22, 2021, in accordance with Federal Acquisition Regulation (FAR) part 15. Agency Report (AR), Tab 6, RFP at 2, 12. The RFP contemplated the award of a fixed-price contract for a period of 870 days. *Id.* at 60. The due date for proposals, as amended, was March 8, 2022.¹ COS at 1.

The solicitation provided for the submission of proposals in three volumes: technical, price, and responsibility determination. RFP at 13. Offerors were required to submit their proposals electronically through the Department of Defense's Secure Access File Exchange (SAFE) site.² RFP at 17. To submit a proposal through SAFE, an offeror first needed to email the contracting officer and contract specialist at least four days before the due date for proposals to request a SAFE code. *Id.* The agency explains that it would then send the offeror an email with a link that contained a unique twelve-character code that directed them to the SAFE site. MOL at 3. Once on the SAFE site, the offeror would enter the code provided by the agency; SAFE would then open a drop-off form wherein the offeror would upload its file, and enter the names and emails of the intended agency recipients.³ *Id.* After the submission, SAFE would notify the listed agency recipients, that a file had been dropped off and provide them a link, claim ID, and passcode that granted them access to view and download the electronic file with the proposal. *Id.* at 3-4. The agency explains that SAFE, by default, would notify the offeror when the agency had opened and downloaded its proposal. *Id.* After seven days, regardless of whether the agency had opened and downloaded the firm's proposal, the agency represents that SAFE would automatically and irretrievably delete the file. *Id.* at 3.

The agency received sixteen emails requesting SAFE codes, including one from Morganti. COS at 2; see AR, Tab 74, Morganti Email Evidencing Request for SAFE Code at 7. The agency responded to Morganti's request and provided it with the necessary link and code to upload the firm's proposal to the SAFE site. AR, Tab 74, Morganti Email Evidencing Request for SAFE Code at 22. According to Morganti, it then submitted its proposal in accordance with the solicitation instructions, and received an automated confirmation notice from SAFE that its "[d]rop-off . . . [had been]

¹ The agency amended the solicitation eight times. *Id.* None of these amendments changed the submission instructions, which are at issue here. Contracting Officer's Statement (COS) at 1.

² SAFE is a virtual application with "the capability to securely send and receive large files, including files that are too large to be transmitted via email." Memorandum of Law (MOL) at 3.

³ As relevant here, the RFP provided that "[s]ubmissions will be made to" the contracting officer and the contract specialist at their respective email addresses. RFP at 17.

successfully sent to the recipient.”⁴ Protest, exh. C-4, SAFE Drop-Off Confirmation at 2. The recipient’s email address listed in this automated notice, however, was misspelled.⁵ See *id.*; RFP at 17. By March 8, 2022, the agency received ten automated emails from SAFE that confirmed nine proposals had been submitted.⁶ COS at 2.

On March 10, an offeror (other than Morganti) emailed the contracting officer and the contract specialist because it had not received a notification from SAFE that the agency opened and downloaded its proposal. AR, Tab 55, Email Requesting Acknowledgment of Offeror SAFE Drop-Off at 1. In its email, the offeror attached a screenshot of the confirmation email generated by SAFE following the offeror’s submission of its proposal. *Id.* at 2. On March 11, the agency informed the offeror that the email address provided in the recipient field was incorrect “as it was missing a letter,” and that the agency would not evaluate the offeror’s proposal. AR, Tab 56, Email Response to Request for Acknowledgment of Offeror SAFE Drop-Off at 2. The offeror then requested reconsideration of the agency’s decision, arguing that it was the agency’s fault that the email address was incorrect. AR, Tab 58, Offeror Request for Proposal Reconsideration at 7. On March 15, the agency granted the request and stated that it would evaluate the offeror’s proposal. AR, Tab 59, Offeror Response to Agency’s Acceptance of Late Proposal at 1.

In light of this correspondence, the agency learned that some of the SAFE drop-off forms auto-populated the recipient field with only one agency representative, and that the email address for this representative was incorrect. COS at 3. Nevertheless, the agency did not contact any of the offerors potentially affected by this issue and “did not undertake any examination or necessary remediation regarding the issues.” AR, Tab 88, Statement of the Contracting Officer at 8. Instead, the agency proceeded with the evaluation, and on May 6, awarded the contract to AICI. COS at 3.

Post-Award Developments

On May 9, Morganti emailed the agency a screenshot from SAM.gov of the award to AICI, and asked whether the agency intended to provide Morganti with formal notification of the award.⁷ AR, Tab 74, Morganti Email Demonstrating Use of SAFE

⁴ Although this notice provided that the “[d]rop-off” had been sent to the agency recipient, the contracting officer explains that SAFE in fact sends only an email to the agency recipient advising that a proposal had been uploaded to SAFE. See COS at 2.

⁵ The recipient here was the contract specialist. See Protest at 7.

⁶ One offeror submitted its proposal to the contracting officer and the contract specialist through two separate SAFE links, resulting in two submission notifications. See COS at 2.

⁷ The System for Award Management (SAM) website is the official United States government system for contract opportunities. See <https://sam.gov/content/home> (last visited on December 9, 2022).

Link at 3. On May 10, the agency replied that it had “no record of receiving a proposal from [Morganti],” and that it appeared Morganti used an incorrect email address when submitting its proposal through SAFE. *Id.* at 2. Morganti then requested that the agency “re-evaluate the situation,” arguing that Morganti used the SAFE link provided by the agency and even received a confirmation receipt of the drop-off from SAFE. *Id.* at 1. On May 12, the agency denied the request. AR, Tab 72, Response to Morganti’s Pre-Protest Resolution at 1. According to the agency, Morganti failed to comply with the terms of the solicitation when it submitted its proposal to an incorrect email address through SAFE. *Id.* As a result, neither the contracting officer nor the contract specialist received the protester’s proposal. *Id.*

On May 13, Morganti filed a protest with our Office, arguing that the agency improperly excluded its proposal from the competition. AR, Tab 77, May 13 Protest at 200. In response, the agency requested dismissal of the protest on the basis that it intended to take corrective action. AR, Tab 82, Notice of Corrective Action at 1. Specifically, the agency represented that it would evaluate Morganti’s proposal and make a new award decision. *Id.* We dismissed the protest as academic on June 8. *The Morganti Group, B-420750, June 8, 2022* (unpublished decision).

On June 17, AICI filed a complaint with the U.S. Court of Federal Claims (COFC), challenging the agency’s proposed corrective action and its decision to evaluate Morganti’s proposal. COS at 4. The government subsequently requested that the court remand the case to the agency so the agency could reconsider its proposed corrective action.⁸ AR, Tab 87, Motion to Stay and Voluntary Remand at 1. After a hearing, the court granted in part the request for remand.

The government subsequently requested dismissal of the case before COFC on the basis that the Corps of Engineers intended to lift the stay of performance on the contract awarded to AICI. AR, Tab 94, COFC Notice of Corrective Action at 1. AICI then sought dismissal of the case before COFC on September 14. AR, Tab 96, Notice of Voluntary Dismissal at 1. COFC dismissed the case the same day. COS at 5.

In a letter to Morganti, the agency explained it was revoking the corrective action proposed in response to Morganti’s protest to our Office because the administrative record before COFC was “insufficient to demonstrate the Government’s rationale for the proposed corrective action.” AR, Tab 95, Notice of Revocation of Corrective Action at 1. The agency noted that it had chosen to revoke the corrective action and lift the stay of performance to avoid the “significant litigation risk” it would encounter if it continued to defend its corrective action before COFC. *Id.*

Morganti filed this protest with our Office on September 9, challenging the agency’s decision to reject its proposal. Protest at 1.

⁸ The Department of Justice represented the agency before COFC. See AR, Tab 87, Motion to Stay and Voluntary Remand at 4.

DISCUSSION

Morganti argues that it submitted its proposal in accordance with the terms of the solicitation, and that the agency erred in rejecting its proposal. Protest at 2-7. It also argues that the agency engaged in disparate treatment by evaluating proposals from other firms that failed to comply with the requirements of the solicitation. Protest at 11-12; Comments at 19-20. For the reasons discussed below, we deny the protest.⁹

As a general matter, it is an offeror's responsibility to deliver its proposal to the proper place at the proper time. *Onsite OHS*, B-406449, May 30, 2012, 2012 CPD ¶ 178 at 4. The protester has the burden of showing that it timely delivered its proposal to the agency at the specified address. *SigNet Techs., Inc.*, B-417435, July 3, 2019, 2019 CPD ¶ 247 at 4.

Here, although the solicitation required offerors to submit their proposals through SAFE, it further directed that "[s]ubmissions will be made to" the contracting officer and the contract specialist. RFP at 17. The solicitation provided that the words "will," "shall," and "must" indicated a "mandatory requirement," and that failure to comply with that requirement could result in disqualification from the competition. *Id.* at 13. In other words, the RFP required offerors to submit their proposals to the contracting officer and the contract specialist via SAFE. Here, the record reflects that SAFE auto-populated an incorrect email address for the contract specialist and Morganti failed to add the email address for the contracting officer. See Protest, exh. C-4, SAFE Drop-Off Confirmation at 2. Consequently, neither the contracting officer nor the contract specialist received the protester's proposal.

While we agree with the protester that the agency was at fault for the SAFE system auto-populating an incorrect email address for the contract specialist, we still have no basis to sustain this protest. First, the paramount cause of the agency's failure to receive notice of the submission of Morganti's proposal was Morganti's failure to follow the solicitation instructions. As noted above, the solicitation required offerors to designate both the contracting officer and the contract specialist as recipients for proposals. Had Morganti followed the solicitation's instruction in this regard, the agency would have received notice of Morganti's proposal at one of the two email addresses, notwithstanding the agency's auto-population error. The agency's requirement for multiple email addresses by its nature provided a failsafe against the misdirection of a single email. By failing to follow the solicitation instructions, Morganti frustrated this failsafe and the agency's ability to receive Morganti's proposal in the manner established by the solicitation.

Second, although agencies have a fundamental obligation to have procedures in place not only to receive proposals, but to reasonably safeguard the proposals received, an agency still may lose or misplace a proposal. *Gunter Constr., Inc.*, B-412039, Nov. 30,

⁹ Although we do not address every argument raised by the protester, we have considered them and find none to be meritorious.

2015, 2015 CPD ¶ 375 at 5. In these instances, we have explained that such an occasional loss generally does not entitle the protester to relief, even if the loss arose due to negligence of the agency. See *Project Resources, Inc.*, B-297968, Mar. 31, 2006, 2006 CPD ¶ 58 at 2 (denying protest where agency signed for, but then lost, proposal).¹⁰

As explained above, SAFE did not notify anyone at the agency that Morganti's proposal had been submitted because the only email address for an agency recipient on Morganti's SAFE drop-off form was the contract specialist's, and that email address was misspelled. As a result, the agency was unaware that the proposal had been submitted. MOL at 14. When the agency learned of Morganti's submission on May 9, SAFE had already irretrievably deleted the proposal, meaning that the only means available to establish the content of Morganti's now-deleted proposal would be for Morganti to reconstruct it. Allowing an offeror to establish the content of its lost or deleted proposal after the closing date has passed would be inconsistent with maintaining a fair and competitive system. *Gunter Constr., Inc.*, *supra*, at 6. Therefore, because the agency was unaware of Morganti's submission, and SAFE had permanently deleted the submission prior to the agency's knowledge thereof, we have no basis to object to the agency's decision to exclude Morganti's proposal from the competition.

Morganti also argues that the agency engaged in disparate treatment in rejecting its proposal because only one offeror (which was not the awardee) submitted its proposal in strict compliance with the solicitation requirements, meaning the agency evaluated several offers from firms that failed to submit their proposals in accordance with the terms of the RFP. Protest at 11-13; Comments at 19-20. The agency concedes this point. MOL at 12-15. Nevertheless, the agency argues that not every offeror who failed to comply with the terms of the solicitation was similarly situated to Morganti, and that it uniformly rejected the proposals of the offerors who were similarly situated to Morganti. *Id.* at 13. Based on the record, we have no basis to object to the agency's action here.

In conducting procurements, agencies may not generally engage in conduct that amounts to unfair or disparate treatment of competing offerors. *Morgan Bus Consulting, LLC*, B-418165.6, B-418165.9, Apr. 15, 2021, 2021 CPD ¶ 171 at 11. It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their offers evenhandedly against the solicitation's requirements. *Id.* Differences in treatment are relevant in a disparate treatment analysis, however, only to the extent the offerors were similarly situated. *Cf. INDUS Tech., Inc.*, B-411919 et al., Nov. 20, 2015, 2015 CPD ¶ 359 at 6 (finding no disparate

¹⁰ Our Office has recognized an exception to this rule when the loss was not an isolated incident, but was the result of a "systemic failure." *Project Resources, Inc.*, *supra*, at 2. Although, due to the email address misspelling, Morganti and two other firms had their proposals irretrievably deleted by SAFE without the intended recipients having accessed them, we do not view these circumstances, which resulted in three (of 14) proposals not being evaluated, as a "systemic failure" by the agency.

treatment where offerors were not similarly situated with respect to the magnitude and reason for cost overruns).

Here, the agency outlined five categories of offerors. MOL at 12-15. In category one, one offeror submitted its proposal through SAFE, and to the contracting officer and the contract specialist at the correct email addresses, as required by the solicitation. *Id.* at 12. In category two, eight offerors, including the awardee, submitted proposals through SAFE with the correct email address for either the contracting officer or the contract specialist, but not both. *Id.* at 13. In category three, one offeror submitted its proposal to the contracting officer and the contract specialist, but failed to submit it through SAFE. *Id.* In category four, which includes Morganti and two other firms, the offerors submitted their proposals through SAFE, but neither the contracting officer nor the contract specialist received notification of the submissions because the offerors used a single misspelled email address for the contract specialist that had been automatically generated by SAFE. *Id.* at 14. In category five, similar to category four, one offeror submitted its proposal through SAFE using only the incorrectly automatically generated email address for the contract specialist. *Id.* This offeror, however, contacted the agency two days after the due date for proposals, and the agency was thus able to retrieve the proposal from SAFE prior to its deletion. *Id.* In each of these categories, except for category four, the agency evaluated the proposals. *Id.* at 12-15.

The record does not support the claim that the agency engaged in disparate treatment here because, as demonstrated above, not every offeror failed to follow the requirements of the solicitation in the same way. These differences are meaningful because they affected whether the agency knew of the submission prior to deletion by SAFE. For instance, in categories one and two, the agency was notified of the submissions prior to award and prior to SAFE deleting the files. MOL at 12-13. In category three, the offeror, despite failing to use SAFE, still delivered its proposal to the contracting officer and contract specialist. *Id.* at 13. In category five, the offeror informed the agency of its proposal submission on SAFE before the system deleted it. *Id.* at 14. In these four categories, the agency confirmed that it had received, and was able to retain, these proposals as they had been submitted before SAFE deleted them. See MOL at 12-15. In category four, however, the agency had not retained the proposals because it did not learn of the existence of the proposals until after SAFE had deleted them and after award had been made. *Id.* at 14. Every offeror in this category had its proposal rejected by the agency. *Id.* at 14. In light of the foregoing, the only group of offerors similarly situated to Morganti were those offerors in category four, and the agency treated each offeror in that group equally.

The protest is denied.

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