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Decision

Matter of: Optimo Information Technology, LLC

File: B-419956.258

Date: June 21, 2023

Eden Brown Gaines, Esq., Brown Gaines, LLC, for the protester.
Karyne C. Akhtar, Esq., Department of Health and Human Services, for the agency.
Lucas Della Ventura, Raymond Richards, Esq., and Glenn G. Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Comments filed via email to GAO's protest inbox during normal business hours, and subsequently submitted to GAO's electronic protest docketing system (EPDS) after normal business hours, are dismissed as untimely where protester failed to timely file the comments using EPDS, which was functioning and available during normal business hours.

DECISION

Optimo Information Technology, LLC. (Optimo), a small business of Bloomsburg, Pennsylvania, protests the exclusion of its proposal from the competition conducted by the Department of Health and Human Services, National Institutes of Health (NIH), under request for proposals (RFP) No. 75N98121R00001, which was issued for the award of multiple indefinite-delivery, indefinite-quantity governmentwide acquisition contracts for information technology (IT) services, known as Chief Information Officer-Solutions and Partners (CIO-SP4). The protester argues that the agency's evaluation of its proposal under phase one of the competition unreasonably failed to consider price or technical merit.

We dismiss the protest.

BACKGROUND

NIH issued the solicitation on May 25, 2021, seeking proposals to provide IT solutions and services in the areas of health, biomedical, scientific, administrative, operational,

managerial, and information systems requirements. Memorandum of Law (MOL) at 3.¹ The RFP provided for a three-phase evaluation of proposals. Agency Report (AR), Tab Q.4, RFP amend.16 at 173. Relevant here, phase one of the competition required offerors to submit a self-score based on representations concerning experience and other capabilities. *Id.* at 157. The solicitation advised that “[o]nly the highest rated offerors [would] advance to phase two of the evaluation.” *Id.* at 174.

On August 6, 2021, Optimo timely submitted a proposal in response to the RFP. NIH advised Optimo on March 20, 2023, that its proposal was not among the most highly rated and therefore was not selected to advance to phase two of the competition. Protest, exh. 1, Notification of Unsuccessful Offer at 1. On March 28, the agency provided Optimo with a requested debriefing. Protest, exh. 2, Debriefing at 1. Optimo timely filed this protest on April 7.

On May 3--prior to the deadline to file its agency report--NIH produced its agency report exhibits. On May 12, the agency filed its MOL and contracting officer’s statement of facts (COS), fulfilling its obligation to file a report on the protest.² See Bid Protest Regulations, 4 C.F.R. §§ 21.3(c),(d). Accordingly, the due date to submit comments on the agency report was established as May 22. See *id.* § 21.3(i)(1); Dkt. No. 11 (“Comments must be filed within 10 days from receiving the MOL [and] COS”).

On May 22, shortly before 5:30 p.m.,³ protester’s counsel sent an email to protests@gao.gov, which included Optimo’s comments on the agency report. See GAO Req. for Briefing. Later on May 22, at 5:40 p.m., the protester’s comments were filed in EPDS.

On May 23, GAO requested briefing from the protester regarding its comments on the agency report. GAO Req. for Briefing. We asked the protester to explain why its comments were not filed in EPDS by 5:30 p.m. on May 22, and also requested any supporting documentation available. *Id.*

In response, protester’s counsel explains that she attempted to access EPDS at 5:20 p.m. on May 22. Resp. to GAO Req. for Briefing at 1. Counsel states that after entering the appropriate username and password, the dashboard interface appeared to be loading for an extended period of time. *Id.* Counsel explains that “because the time

¹ Citations to the record and the parties’ briefings are to the Adobe PDF pages for those documents.

² The agency failed to file its MOL and COS by the established deadline of May 8. Acknowledgement Package with Protective Order at 1 (agency’s filing deadline). Our Office instructed the agency to file its MOL and COS no later than May 11. Electronic Protest Docketing System (EPDS or Dkt.) No. 11. The agency filed its MOL and COS on May 12.

³ All times referenced in this decision are shown in Eastern Time.

to upload the filing before 5:30 [p.m.] was short,” she emailed Optimo’s comments to protests@gao.gov. *Id.*

DISCUSSION

For the reasons discussed below, Optimo’s email sent to protests@gao.gov did not constitute a filing as defined by our regulations and Optimo’s 5:40 p.m. filing in EPDS was not filed on time. As Optimo did not file comments on the agency report by the established deadline, we dismiss the protest. 4 C.F.R. § 21.3(i)(2).

Our regulations state that a document is *filed* on a particular day when it is received in EPDS by 5:30 p.m. 4 C.F.R. 21.0(g). Delivery of a document by means other than those set forth in the online EPDS instructions does not constitute a filing.⁴ *Id.* GAO allows for an alternative filing method in the event EPDS is unavailable. Specifically, when EPDS is unavailable during normal business hours protesters are instructed to contact GAO to ascertain EPDS’s operating status, and then file a submission to protests@gao.gov, with courtesy copies to the other parties, and file the document in EPDS when it is operational. EPDS Instructions, Section VII.22(b); *see also Erimax Inc.*, B-421141 *et al.*, Dec. 21, 2022, 2023 CPD ¶ 6 at 3.

Optimo’s May 22 email to protests@gao.gov submitted prior to 5:30 p.m. did not constitute a filing. In this regard, Optimo has not established that EPDS experienced a technical failure or was otherwise not available during normal system operating hours when it attempted to file its comments on the agency report. While Optimo’s counsel describes difficulties she encountered in attempting to file Optimo’s comments, counsel has not established that those difficulties were due to a technical failure of EPDS. Rather, protester’s counsel describes an issue associated with her own EPDS session.

GAO has confirmed that EPDS was available and not experiencing any technical failures or difficulties on May 22 at the time protester’s counsel was attempting to file comments. Since EPDS was operating normally on May 22, the alternative option to file comments via email was not available. Therefore the May 22 email sent to protests@gao.gov does not constitute a filing. 4 C.F.R. § 21.0(g); *Erimax Inc.*, B-421141 *et al.*, *supra* at 4.

As Optimo’s May 22 email to protests@gao.gov was not a filing, we next address Optimo’s filing via EPDS at 5:40 p.m. that day. As discussed below, Optimo failed to file its comments by the established deadline.

The filing deadlines in our Regulations are prescribed under the authority of the Competition in Contracting Act of 1984; their purpose is to enable us to comply with the statute’s mandate that we resolve protests expeditiously. See 31 U.S.C. § 3554(a); *Keymiaee Aero-Tech, Inc.*, B-274803.2, Dec. 20, 1996, 97-1 CPD ¶ 153. To avoid

⁴ The EPDS Protester/Intervenor User Manual and the Instructions are located on GAO’s website at <https://www.gao.gov/legal/bid-protests/file-a-bid-protest>.

delay in the resolution of protests, section 21.3(i) of our Regulations provides that a protester's failure to file comments within 10 calendar days "shall" result in dismissal of the protest except where GAO has granted an extension or has established a shorter period. 4 C.F.R. § 21.3(i); *California Env'tl. Eng'g*, B-274807, B-274807.2, Jan. 3, 1997, 97-1 CPD ¶ 99 at 5-6.

Here, the deadline to file comments was 5:30 p.m. on May 22. The protester filed its comments at 5:40 p.m. on May 22. Thus, the protester did not file its comments by the deadline. Optimo argues that we should nevertheless consider its comments on the agency report because the agency did not file its agency report by the established deadline and because accepting Optimo's comments would not prejudice either party. Resp. to GAO Req. for Briefing at 1. As noted above, our rules provide that a protest shall be dismissed where comments are not filed on time. Our Regulations do not provide exceptions to the requirement to file comments on time. *California Env'tl. Eng'g, supra* at 5-6; see also *Aspen Consulting, LLC*, B-405778.2, Mar. 19, 2012, 2012 CPD ¶ 117 at 1 (protest dismissed where comments were not filed by due date); *Andros Contracting, Inc.*, B-403117, Sept. 16, 2010, 2010 CPD ¶ 219 at 3 (protest dismissed where comments were sent to incorrect e-mail addresses and thus were not filed by due date). Accordingly, we dismiss the protest. 4 C.F.R. § 21.3(i)(2).

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel