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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Hawker Beechcraft Defense Company, LLC

File: B-406170

Date: December 22, 2011

James J. McCullough, Esq., Michael J. Anstett, Esq., Karen M. Soares, Esq., Aaron T. Tucker, Esq., Brian M. Stanford, Esq., and Sujata M. Jhaveri, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP; and Deneen J. Melander, Esq., Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, for the protester.
W. Michael Rose, Esq., Department of the Air Force, for the agency.
Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's decision to exclude protester's proposal from the competitive range is dismissed as untimely where: (1) the protest was filed more than 10 days after receipt of a written notice provided via certified mail, return receipt requested; (2) the notice was accurately addressed and delivered to the government business address set out multiple times in the protester's proposal; (3) the notice accurately indicated the precise name of the protester's designated contracts manager; and (4) an employee of the protester signed for receipt of the certified notice.

DECISION

Hawker Beechcraft Defense Company (HBDC), LLC, protests its exclusion from the competitive range by the Department of the Air Force under request for proposals (RFP) No. FA8637-10-R-6000, for light air support aircraft.

We dismiss the protest.

BACKGROUND

The Air Force issued the RFP on October 29, 2010, for the purpose of procuring light air support aircraft for current and future Building Partnership Capacity nations. HBDC submitted a proposal in response to the RFP on December 28. On the basis of initial proposals, the agency established a competitive range that included HBDC.

The agency then conducted discussions with those offerors in the competitive range from April 8 until September 23, 2011. After reviewing HBDC's responses to issues raised during discussions, the Air Force concluded that HBDC had not adequately corrected deficiencies in its proposal. In this regard, the agency concluded that "multiple deficiencies and significant weaknesses found in HBDC's proposal make it technically unacceptable and results in unacceptable mission capability risk." Protest, Tab 1, at 1.

On November 1, the Air Force sent HBDC notice of its exclusion from the competition via certified letter addressed to HBDC's designated point of contact--the HBDC contracts manager with whom the Air Force had corresponded throughout discussions--at the "government business" address set forth in HBDC's proposal, with return receipt and restricted delivery requested. The certified return receipt, a part of the record here, reflects the signature of the HBDC employee that received the notice, and demonstrates that the notice was received by HBDC on November 4.

Despite delivery of the notice on November 4, on November 15, HBDC contacted the contracting officer to request a preaward debriefing, and stated that "Notice of Exclusion from the Competitive Range was received . . . late this afternoon today, November 15." Agency Motion (AM), Tab 5, at 3. The next day, November 16, the contracting officer refused the debriefing request as untimely, in accordance with Federal Acquisition Regulation (FAR) § 15.505(a), which provides that an offeror may request a preaward debriefing by making such a request within 3 days after receiving notice of exclusion from a competition. HBDC requested reconsideration of its request for a debriefing, which the contracting officer also refused. HBDC then filed this protest on November 21.

DISCUSSION

The Air Force argues that HBDC's protest should be dismissed because the certified return receipt demonstrates that HBDC received notice of its exclusion from the competition on November 4, and because HBDC did not timely request a debriefing or file a timely protest. HBDC maintains that the timeliness of its debriefing request and protest should be measured from November 15, as opposed to November 4, since the Air Force sent the notice of exclusion to an allegedly "incorrect address."

More specifically, HBDC asserts that the Air Force erred in sending the notice to HBDC's physical government business address, rather than to HBDC's designated mailing address, and due to this error the notice cannot be considered received by HBDC until the time the notice reached HBDC's contracts manager on November 15. HBDC argues that its separate mailing address was identified on Standard Form (SF) 33 of its most recent proposal revision of September 14, and is accurately listed in HBDC's Central Contracting Registry (CCR) Database profile, along with its physical government business address.

HBDC also argues that the Defense FAR Supplement (DFARS) and its associated Procedure, Guidance, and Information (PGI), require defense agencies to "use the CCR database as the primary source of contractor information for contract award and administration," and "shall use the CCR database as the authoritative source" for certain information, including a contractor's mailing address. DFARS PGI 204.1103. Finally, HBDC notes that the Air Force sent correspondence to HBDC's "correct" mailing address earlier in the competition.

We fundamentally disagree with HBDC's premise that the Air Force directed the notice of exclusion to an "incorrect" address. The Air Force notice correctly indicated--i.e., there were no typographical errors--an address HBDC provided to the Air Force throughout the competition--i.e., in its initial proposal, in its revised proposal, on the cover letter of its revised proposal signed by its contracts manager, and in the signature line of email correspondence sent by its contracts manager. AM, Tab 1, at 2; Tab 2, at 1, 2; Tab 5 at 2, 3. It is this address which HBDC now claims to be "incorrect" for the purpose of receiving the agency's exclusion letter.

To the extent HBDC listed a different address on the SF 33 of its September 14 revised proposal submission, this address was not identified as a "mailing address" or HBDC's "correct" address, and the record reflects that in various other places in this submission, HBDC identified its address as the address used by the agency to provide this notice.[1] HBDC Response, Tab 3, at 1. We also note that the DFAS PGI provisions that HBDC relies on for establishing its "correct" mailing address do not apply to agency communications during the course of a procurement--by their terms they apply to contract award and contract administration matters. The use of a firm's CCR information has never been established as a requirement when providing adverse action notices.

More importantly, our timeliness rules do not turn on whether an agency has sent information to a particular designated address; rather, we look to whether the relevant information was in fact received by the offeror. In this regard, our Office has previously held that actual notification to a company's designated point of contact is not required to constitute notice under our Bid Protest Regulations, where notice is otherwise received by the firm. For example, in Jarrell-Ash Div., Fisher Scientific Co.--Reconsideration, we held that notice of rejection of a proposal was effective on the date it was received at the company's sales office address, even where the sales office address was not designated in the firm's proposal, and was not the address of the individuals who prepared the proposal. Jarrell-Ash Div., Fisher Scientific Co.--Reconsideration, B-209236.3, Dec. 21, 1982, 82-2 CPD ¶ 562 at 3.

[1] Moreover, notwithstanding the fact that HBDC submitted numerous iterations of its proposal during this competition, HBDC has provided only one citation to a page in its proposal where it used an address other than the one used by the agency.

Here, it is beyond dispute that the Air Force sent the notice of exclusion, via certified mail, to HBDC's designated contracts manager at an address set forth on numerous proposal documents submitted by HBDC--including a revised proposal cover letter signed by the contracts manager--and that receipt of the notice on November 4 is confirmed by an HBDC employee's signature on the certified mail return receipt. Accordingly, there is no basis for HBDC to claim that the Air Force caused the delay here. That it took HBDC 11 days to route the notice of exclusion to the appropriate person does not toll the filing deadline imposed by our regulations, or the statutory deadline to request a required debriefing. [2]

In this regard, Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on alleged improprieties in a solicitation must be filed prior to bid opening or the time established for receipt of proposals, 4 C.F.R. § 21.2(a)(1) (2010), and all other protests must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Where a protester timely requests a required debriefing, a protest filed within 10 days of the debriefing will be considered timely with respect to bases known before or as a result of the debriefing. Id. An offeror excluded from further consideration prior to contract award may request a preaward debriefing, but must submit a written request to the contracting officer within three days after receipt of the agency's notice of exclusion. Federal Acquisition Regulation (FAR) § 15.505(a)(1). An offeror that fails to submit its request to the contracting officer within three days after receiving notice of exclusion is not entitled to either a preaward, or post-award, debriefing. [3] FAR § 15.505(a)(3).

Accordingly, HBDC was required to request a debriefing within three days of its receipt of the Air Force notice on November 4, or, absent a debriefing, was required to file its protest no later than 10 days after that date. [4] Where HBDC did not timely

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[2] For the record, based on HBDC's CCR profile, it appears that the HBDC contracts manager who first reviewed the contents of the notice on November 15, is located at the same address where the agency's exclusion letter was in fact received.

[3] Although the Air Force is not required to provide HBDC with a preaward debriefing due to HBDC's untimely debriefing request, we note that the Air Force is not prohibited from providing HBDC with such a debriefing, so that HBDC can have a full understanding of the basis for its exclusion from the competition.

[4] HBDC also requests that we consider its protest under the "significant issue" exception to our timeliness rules, 4 C.F.R. § 21.2(c), which provides that we may consider the merits of an untimely protest where good cause is shown or where the protest raises a significant issue to the procurement system. In order to prevent our timeliness rules from becoming meaningless, exceptions are strictly construed and rarely used. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. The

(continued...)

request a debriefing, and failed to file its protest until 17 days after it was notified that its proposal had been excluded from the competitive range, the protest is untimely and must be dismissed.

The protest is dismissed.

Lynn H. Gibson
General Counsel

(...continued)
significant issue exception to our timeliness rules is limited to untimely protests that raise issues of widespread interest to the procurement community which we previously have not considered on the merits. While we recognize that its exclusion from the competitive range is of paramount importance to the protester here, we fail to see an issue of such widespread interest to the procurement community as to warrant its resolution in the context of an otherwise untimely protest. HBDC also argues that the agency improperly deviated from the consistent means of communication used throughout the procurement--e-mail transmission--in sending the notice of exclusion by certified mail. However, the protester has cited no authority for the proposition that an agency is required to utilize a single mode of communication throughout the course of a procurement, and we are aware of none.