

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD**

PROTEST OF:

PHOENIX CAPITAL PARTNERS, LLC	)	
	)	CAB No. P-0938
	)	
Solicitation No. CFOPD-13-RFQ-025	)	

For the Protester, Phoenix Capital Partners, LLC: Edward J. Tolchin, Ira E. Hoffman; Offit Kurman, P.A. For the District of Columbia, Office of the Chief Financial Officer: Robert Schildkraut, Jody Harrington; Office of the Attorney General.

Opinion by Administrative Judge Monica C. Parchment with Administrative Judge Maxine E. McBean concurring.

**OPINION**

*Filing ID 54008345*

This protest arises from the District of Columbia Office of the Chief Financial Officer (“OCFO”) contracting officer’s refusal to consider a Statement of Qualifications (“SOQ”) submitted 24 minutes after the submission deadline by the Phoenix Capital Partners, LLC (“Phoenix”) in response to Request for Qualifications No. CFOPD-13-RFQ-025 (the “RFQ”). The protester contends that the OCFO should have considered its SOQ despite its late submission. The OCFO maintains that the contracting officer properly rejected Phoenix’s SOQ as late. For the reasons set forth herein, we deny the protest.

**FACTUAL BACKGROUND**

The Office of Contracts of the OCFO issued Request for Qualifications No. CFOPD-13-RFQ-025 on April 25, 2013, in an effort to prequalify prospective contractors for future procurements of financial advisory services on behalf of the Office of Finance and Treasury. (Agency Report (“AR”) Ex. 2, at 1-3.) The RFQ sought to prequalify prospective contractors in four different categories of financial advisory services.<sup>1</sup> (*Id.* ¶¶ B.1.1, C.1, C.2.) Along these lines, the RFQ provided detailed requirements that any prequalified vendor would be expected to meet for each of the four categories of services. (*See generally id.* ¶¶ C.3.1-C.3.4.) The RFQ made clear, however, that prequalification alone would not commit the OCFO to purchase any quantity of services from a vendor. (*Id.* ¶¶ B.2.3, B.2.5.) Rather, the OCFO would acquire services through subsequent procurements, participation in which would be limited to prequalified vendors. (*Id.* ¶¶ B.2.2, B.2.4.)

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<sup>1</sup> The four categories listed in the RFQ were: (1) Debt Obligations; (2) Economic Development Financings; (3) Management of Real Property, Economic Development and Other Financing Programs; and (4) General Advisory Services. (AR Ex. 2 ¶ C.1.2.)

The RFQ directed vendors to submit technical proposals in response to the RFQ that identified the categories of services for which the vendor was seeking prequalification. (*Id.* ¶¶ L.3.2, L.3.3.1.) The RFQ also specified that offerors that submitted technical proposals were required to meet the specific technical criteria set forth in Section M of the RFQ. (*Id.* ¶¶ L.3.3.2, M.3.1.) The initial cover page to the RFQ stated that responses would be received by the District until 2:00 p.m. on May 16, 2013. (*Id.* at 1.) The delivery instructions for proposals in response to the RFQ further stated that responses were due “not later than proposal due date as specified on page 1 of this solicitation or as amended.” (*Id.* ¶ L.12.2.C (emphasis in original).) Additionally, under the express terms of the RFQ, the District would not consider a late proposal unless one of three exceptions applied. (*Id.* ¶¶ L.8.1, L.8.3.)<sup>2</sup> The OCFO amended the RFQ twice; however, neither of those amendments modified the May 16, 2013, submission deadline. (*See generally* AR Ex. 3.)

Phoenix submitted its SOQ in response to the RFQ at 2:24 p.m. on May 16, 2013 -- 24 minutes after the submission deadline. (AR Ex. 5.) On May 23, 2013, the OCFO contracting officer informed Phoenix that the District would not consider its SOQ because it was submitted after the submission deadline. (AR Ex. 4 ¶ 9.) Phoenix timely protested the OCFO’s refusal to consider its submission by filing the present protest with the Board on May 31, 2013.

### ***Contentions of the Parties***

Phoenix does not dispute that it submitted its SOQ after the submission deadline, nor does Phoenix argue that the late submission was caused by some act on the part of the OCFO. (*See* Protest 2 (“Phoenix was inadvertently delayed in delivering its SOQ.”).) Instead, Phoenix maintains that the OCFO should have considered its SOQ despite its late submission. Phoenix argues that the RFQ late proposal provisions as well as the District’s procurement regulations governing the rejection of late bids and proposals are inapplicable to this case because an SOQ is neither a bid nor a proposal for a contract award. (Protester Comments 1-7; Protest 3.) Phoenix further argues that the OCFO is not bound by the late proposal regulations, promulgated by the District’s Chief Procurement Officer (“CPO”), because the OCFO is not subject to the CPO’s authority. (*Id.*) Phoenix also contends that principles of law and equity require that the OCFO consider its SOQ to satisfy the mandate for full and open competition. (*Id.* at 4.)<sup>3</sup>

The District, on the other hand, asserts that even though the OCFO is exempt from the CPO’s authority, the OCFO is not exempt from the CPO’s procurement regulations, including those concerning late proposals. (AR 3-4.) The District further argues that the late proposal provisions in the RFQ apply to preclude acceptance of Phoenix’s late SOQ. (*Id.* at 4-5.) The

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<sup>2</sup> The exceptions for accepting a late proposal included: 1) the proposal was sent by registered or certified mail not later than the 5<sup>th</sup> calendar day before the date specified for receipt of proposals; 2) the proposal was sent by mail and it is determined by the contracting officer that the late receipt at the location specified in the solicitation was caused by mishandling by the District; or 3) the proposal was the only proposal received. (*Id.*) None of the foregoing exceptions have been cited by the protester, or recognized by the Board, as applying to the underlying facts in the present case.

<sup>3</sup> Phoenix also argues that the RFQ did not provide a firm closing date for receipt of responses. (Protester Comments 1-2.)

District also contends that principles of law and equity mandate rejection of Phoenix's late SOQ in order to protect the integrity of the procurement process. (*Id.* at 5-6.)

## DISCUSSION

The Board exercises jurisdiction over the present protest matter pursuant to D.C. CODE § 2-360.03(a)(1) (2011).

The central issue in this protest primarily concerns whether the District violated procurement law or regulation by improperly refusing to accept the protester's SOQ, which was submitted late, since the SOQ is not a formal proposal for a contract award.<sup>4</sup> In this regard, and as noted above, the protester principally argues that there was no requirement in the RFQ, or any applicable law, that precluded the District from accepting its SOQ even though it was delivered after the submission deadline.

In addressing the protester's contentions, we first look to the terms of the RFQ to determine whether any express submission deadline provisions are contained therein. We have recognized in our earlier decisions that where the protester and the contracting agency disagree as to the meaning of solicitation provisions, the Board will interpret the solicitation as a whole and in a manner so as to give effect to all of its provisions. *See Koba Assocs., Inc.*, CAB No. P-350, 41 D.C. Reg. 3446, 3470 (June 16, 1993); *NCS Techs., Inc.*, B-406306.3, 2012 CPD ¶ 259 at 3 (Sept. 17, 2012); *Colt Def., LLC*, B-406696, 2012 CPD ¶ 302 at 7 (July 24, 2012). Accordingly, the same contract interpretation principle must apply in analyzing the parties' disagreement over the existence of any applicable submission deadline provisions that may be present in the RFQ given that its terms and conditions for offerors are very comparable to those of a solicitation for a contract award.

Here, the cover page (page 1) to the RFQ unequivocally states that responses to the RFQ would be received by the District until 2:00 p.m. on May 16, 2013. (AR Ex. 2, at 1.) Similarly, the supplemental delivery instructions for proposals in response to the RFQ further stated that responses were due "not later than proposal due date as specified on page 1 of this solicitation or as amended." (*Id.* ¶ L.12.2.C (emphasis in original).) The RFQ further stated that it would not consider proposals submitted after the submission deadline unless a specific exception applied. (*Id.* ¶¶ L.8.1, L.8.3.)

Thus, it is fairly evident that all of the foregoing provisions, read together as a whole, *consistently* reiterate to vendors that there was a firm deadline for technical submissions to be received and, further, that late submissions in response to the RFQ would not be accepted by the OCFO, with very limited exceptions. In other words, it was clearly the intention of the OCFO to impose a deadline on submissions in response to the RFQ by repeatedly requiring that offerors submit proposals by 2:00 p.m. on May 16, 2013. This established deadline in the RFQ is consistent with governing procurement law which requires contracting agencies to establish deadlines for submissions in response to an RFQ. D.C. CODE § 2-354.03(f)(2); D.C. Mun. Regs. tit. 27, § 1615.4(e) (2013).

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<sup>4</sup> See D.C. Mun. Regs. tit. 27, §§ 1524.1, 1524.3 (2012); D.C. Mun. Regs. tit. 27, §§ 1627.1, 1627.3 (2013). These provisions generally provide that bids and proposals received after the time and date designated in the solicitation are late and cannot be considered by the contracting agency absent limited exceptions.

The protester's attempt to disregard the unambiguous language in the RFQ imposing a submission deadline because these submissions are not, in fact, proposals for an actual contract award is unpersuasive. The RFQ, interpreted as a whole, notified offerors of the District's clear intent to impose a firm deadline on its acceptance of technical qualification submissions. Consequently, based upon a strict reading of the terms of the RFQ alone, the District properly rejected the protester's SOQ when it was delivered after the submission deadline.

Moreover, in further addressing the protester's general contention that the SOQ should not be treated the same as a late proposal for a contract award requiring rejection, we also look to our federal bid protest tribunal counterpart, the Government Accountability Office ("GAO"), for guidance. In analogous situations, GAO case law has applied the well-established rule generally requiring rejection of late proposals to contract related submissions other than bids and proposals for a contract award. *See, e.g., Nw. Heritage Consultants*, B-299547, 2007 CPD ¶ 93 at 4 (May 10, 2007) (applying the late proposal rule in finding that agency properly declined to accept Architect-Engineer ("A-E") Qualification Statements submitted after deadline)<sup>5</sup>; *Zebra Techs. Int'l, LLC*, B-296158, 2005 CPD ¶ 122 at 3 (June 24, 2005) (applying the late proposal rule to past performance submissions in holding that protester's late submission was properly rejected by the agency given the solicitation's mandatory requirement for an earlier submission date). In the foregoing cases, GAO opined as to the necessity of applying the late proposal rule to other material procurement related submissions, that are not proposals, primarily to alleviate confusion, ensure equal treatment of all competitors, and prevent any unfair competitive advantage that might accrue where only one firm is allowed additional time to prepare its submission. *Id.* We are persuaded by GAO's reasoning in this regard, as applied to the instant case, and find that it would also be unfair to the other offerors in this disputed procurement to allow the protester additional time to prepare and submit its response to the RFQ where all offerors responding to the RFQ were equally notified in advance of the submission deadline and all but the protester complied with this requirement.

Thus, while the protester argues that public policy considerations require that the OCFO accept its late SOQ submission, we find the opposite to be the case. Specifically, our case law has long held that a prospective contractor bears the responsibility for ensuring timely delivery of its bid or proposal. *See, e.g., Tri Gas & Oil Co.*, CAB No. P-867, 2010 WL 5776583 at \*2 (Dec. 10, 2010); *Ctr. on Juvenile & Criminal Justice*, CAB No. P-488, 44 D.C. Reg. 6834, 6836 (June 16, 1997). Indeed, the Board has recognized that a contrary rule, which would allow a prospective contractor to file a late bid or proposal by even a few minutes, would inevitably lead to unequal treatment and subvert the procurement process. *Denville Line Painting, Inc.*, CAB No. P-292, 40 D.C. Reg. 4640, 4643 (Oct. 22, 1992); *Prison Health Servs., Inc.*, CAB No. P-610, 48 D.C. Reg. 1540, 1544 (May 24, 2000) (quoting *Unitron Eng'g Co.*, 58 Comp. Gen. 748, 749 (1979)). Accordingly, we have stated that although the government may lose the benefit of a more advantageous proposal under this late submission rule, maintaining the integrity of the procurement process is of more importance than any advantageous terms the government may receive by considering a late proposal in any single procurement. *Denville Line Painting, Inc.*,

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<sup>5</sup> Similar to the present protester, the protester in *Northwest Heritage Consultants* unsuccessfully argued that since its submissions were not proposals for a contract award, but merely A-E Statements, acceptance and evaluation of its submission despite its late receipt caused no hardship to other offerors. *Id.*

CAB No. P-292, 40 D.C. Reg. at 4643. Hence, given this precedent, we reject the protester's contention that the District violated public policy by disqualifying its late SOQ.

Lastly, the parties dispute the applicability of the CPO's procurement regulations encompassing the late proposal rules, to the OCFO. The protester argues that the OCFO's statutory exemption from the CPO's authority also exempts the OCFO from the late proposal rules promulgated by the CPO as codified in title 27 of the District of Columbia Municipal Regulations.<sup>6</sup> (Protester Comments 5.) However, we find it unnecessary to opine on the matter of the applicability of CPO's procurement regulations, in particular, to the procuring agency as the Board has otherwise found that the terms of the RFQ and procurement law support the OCFO's rejection of the protester's late SOQ submission as set forth above.<sup>7</sup>

### CONCLUSION

For the reasons set forth herein, the Board finds that the District did not violate procurement law or regulation when it properly rejected the protester's response to the subject RFQ due to its untimely submission. The present protest is, therefore, denied.

### SO ORDERED.

Date: September 4, 2013

/s/ Monica C. Parchment  
MONICA C. PARCHMENT  
Administrative Judge

### CONCURRING:

/s/ Maxine E. McBean  
MAXINE E. MCBEAN  
Administrative Judge

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<sup>6</sup> Under District statute, the OCFO, though subject to the provisions of the Procurement Practices Reform Act ("PPRA"), is expressly exempt from the authority of the CPO. D.C. CODE § 2-352.01(b)(1).

<sup>7</sup>The Board notes, nonetheless, that the OCFO itself has acknowledged the procurement regulations codified in title 27 of the District of Columbia Municipal Regulations govern its procurements. *See* OFFICE OF THE CHIEF FINANCIAL OFFICER, OFFICE OF CONTRACTS, <http://cfo.dc.gov/page/office-contracts> (last visited September 4, 2013).

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