

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

PROTEST OF:

ENTERPRISE INFORMATION SOLUTIONS, INC.

Solicitation No. DCKA-2011-G-0182

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CAB No. P-0901

For the Protester: William W. Goodrich, Jr., Esq., Judith B. Kassel, Esq. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Administrative Judge Monica C. Parchment, with Chief Administrative Judge Marc D. Loud, Sr. and Administrative Judge Maxine E. McBean, concurring.

OPINION

Filing ID #42425982

Enterprise Information Solutions, Inc. protests the District's exclusion of its proposal from consideration for a contract award based upon its alleged submission of a late proposal. The protester contends that the District's issuance of multiple solicitation modifications to the original due date for submission of proposals effectively created an ambiguity with respect to any corresponding change to the exact time deadline for receipt of proposals on the required submission date.

The District moves to dismiss this protest as an untimely protest against the terms of the solicitation and further asserts that the solicitation was unambiguous and was never modified by the District with respect to the original time deadline for receipt of proposals.

The Board finds this protest to be untimely and the underlying protest allegations to be without merit. The protest is dismissed.

BACKGROUND

The District's Office of Contracting and Procurement, on behalf of the District Department of Transportation, issued Request for Task Order Proposal No. DCKA-2011-G-0182 ("Solicitation"), on September 28, 2011, through the General Service Administration's ("GSA") procurement website ("E-Buy"). (Agency Report ("AR") Ex. 1.) The Solicitation sought a contractor to provide automated vehicle pavement data collection services. (*Id.*) The original Solicitation terms specified a closing date and time of October 17, 2011, at 2:00 p.m. (*Id.*)

Subsequently, eleven modifications were made to the Solicitation by the District after it was issued on September 28, 2011. (AR Ex. 2.) Four of these modifications specifically changed the original due date for receipt of proposals under the Solicitation. (*Id.*) In particular, Modification 1 changed the due date for receipt of proposals from October 3, 2011, to October 17, 2011¹; Modification 7 changed the closing date for receipt of proposals from October 17, 2011, to October 24, 2011; Modification 8 changed the closing date for receipt of proposals from October 24, 2011, to October 28, 2011; and Modification 9 changed the closing date for receipt of proposals from October 28, 2011, to November 4, 2011. (*Id.*) However, none of the aforementioned modifications in any way addressed or directed a change to the original time of 2:00 p.m. stated in the Solicitation by which proposals had to be submitted to the District on the required due date.

The protester submitted its quote to the District on November 4, 2011, at 2:36 p.m. (AR Ex. 6.) After submitting its quote to the District, the protester sent a follow-up email to the District stating that it had attempted to submit its bid the morning of November 4, 2011, through the GSA E-Buy website but had experienced technical difficulties in attempting to make this submission. (AR Ex. 4.) In this correspondence, the protester seemingly acknowledged that the deadline for proposal submission was at 2:00 p.m. on November 4, 2011, and asked the District for the opportunity to have its proposal considered for award despite it being filed after this 2:00 p.m. deadline:

We tried to submit [the proposal] on GSA website this morning, and the web site seems to hang upon hitting submit. We found out just after 2pm and I sent you the documents right after.

Please accept our apologies and I hope the proposal can still be accepted and reviewed based on merits.

(emphasis added). (*Id.*)

The District, however, advised the protester that its proposal could not be considered for award because it was filed after the 2:00 p.m. deadline on November 4, 2011. (AR Ex. 7.) The present protest followed.

DISCUSSION

The Board exercises jurisdiction over this protest and its underlying allegations pursuant to D.C. CODE §2-360.03(a)(1) (2011).

¹ For unknown reasons, Modification 1 was issued by the District notwithstanding the fact that it was redundant of the original Solicitation terms, which had previously designated October 17, 2011, as the due date for receipt of proposals.

The basis for the protester's present challenge to its exclusion from consideration for the contract award is fairly straightforward. The protester contends that the four modifications to the Solicitation noted above that specifically changed the deadline for submission of proposals did not similarly address or provide an exact new time by which proposals were required to be submitted to the District. (Protest; Supplemental Protest 4.) Hence, the protester essentially argues that these modifications changing the deadline date for receipt of proposals also effectively removed the original time deadline in the Solicitation (2:00 p.m.) by which proposals had to be submitted on the specified due date, without ever providing a new time deadline in any subsequent modification. (Supplemental Protest 4.) The protester further maintains that this created an ambiguity in the Solicitation documents that must be construed against the District as the drafter of the documents, as the protester was unable to reach the District for clarification about this ambiguous requirement prior to the deadline for receipt of proposals. (*Id.*)

In moving to dismiss this action, the District argues that the present protest is untimely as it challenges the terms of a solicitation provision as ambiguous and, therefore, was required to be filed by the protester prior to the deadline for receipt of proposals in accordance with D.C. CODE §2-309.08(b)(1) (2001)² and Board Rule 302.2(a). (AR 7.) Additionally, with respect to the underlying merits of the protester's allegations, the District asserts that none of its eleven modifications to the Solicitation were intended, or attempted, to change the original time deadline for submission of proposals and, thus, the original time deadline remained unambiguously the same. (AR Ex. 6.)

Upon review of the record, and as a fundamental matter in this case, we do not conclusively accept the protester's assertion in this proceeding that it, in fact, believed the time deadline for receipt of proposals to be unclear or ambiguous as the result of the multiple modifications to the Solicitation that were issued. Indeed, as noted earlier, on the very day that proposals were due, the protester sent an e-mail correspondence to the District where it appears to acknowledge the 2:00 p.m. deadline for receipt of proposals and the fact that it realized that its proposal was not submitted by this time. (AR Ex. 4.) The protester specifically requested that its proposal still have the opportunity to be considered for the award because of technical difficulties that it allegedly experienced when attempting to submit the document through the GSA website.³ (*Id.*) Moreover, in no instance did the foregoing e-mail correspondence, sent on the due date for proposals, even attempt to assert that the protester did not know or understand the deadline by which its proposal had to be submitted to the District. Thus, the protester's

² D.C. CODE §2-309.08(b)(1) (2001) has been repealed, but this same language is presently codified in D.C. CODE §2-360.08(b)(1) (2011).

³ The District counters the protester's allegation that it had problems attempting to submit its proposal through the GSA E-Buy website by virtue of the fact that this website did not report any problems accepting proposals on November 4, 2011 through the appropriate system reporting mechanism. (AR 7-8; AR Ex. 8.) The District also notes that the Solicitation, in multiple instances, advised offerors that proposals could be submitted directly to the District independent of utilizing the GSA website. (AR 8.)

contrary statement, in this proceeding, that it found the Solicitation modifications to have created an ambiguity as to the time deadline for receipt of proposals lack veracity.

Moreover, to the extent that the protester believed that the Solicitation was ambiguous with respect to the applicable time deadline for submission of its proposal, it was legally required to challenge this alleged ambiguity in advance of the deadline for receipt of proposals. “A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.” D.C. CODE § 2-360.08(b)(1) (2011).⁴ Accordingly, in comparable situations, the Board has held that “[a] bidder who fails to seek clarification of an ambiguity on the face of a solicitation prior to bid opening risks a contrary interpretation of the allegedly ambiguous provision and is precluded from raising such issues to the Board after opening.” *Fort Myer Constr. Corp.*, CAB No. P-0688, 52 D.C. Reg. 4173, 4197 (Apr. 22, 2005) citing *Maryland Constr., Inc.*, CAB No. P-0650, 50 D.C. Reg. 7347, 7398 (Aug. 29, 2003).

Thus, to the extent that the protester is now representing that it attempted to contact the District for clarification regarding this time deadline issue prior to submitting its proposals, it would have also been aware of this alleged ambiguity from the face of the Solicitation documents prior to the deadline for submission of proposals. Consequently, the protester’s failure to protest this matter prior to the deadline for submission of proposals renders the present protest untimely.

Further, the Board also finds the underlying protest allegations in this matter to be lacking in merit even if they could be assumed to be timely raised, which they are not.⁵ A solicitation may be considered ambiguous when it is susceptible to two or more reasonable interpretations. *Koba Assoc., Inc.*, CAB No. P-350, 41 D.C. Reg. 3446 (June 10, 1994). In this case, however, the four relevant modifications to the Solicitation only expressly modified the calendar due date for submission of proposals. (AR Ex. 2.) The modifications did not, on the other hand, expressly remove, alter, or even address the original 2:00 p.m. time deadline for receipt of proposals stated in the Solicitation. (*Id.*) Therefore, it is clear, and in no way ambiguous, that the original 2:00 p.m. deadline in the Solicitation remained unchanged notwithstanding the other multiple changes to the original calendar due date for receipt of proposals.

For the reasons set forth herein, the Board dismisses the present matter as it is an untimely protest against the terms of the Solicitation, and finds that the protester was properly rejected from consideration for receiving the contract award.

⁴ The language of Board Rule 302.2(a) mirrors this statutory language.

⁵ The Board still opts to address the merits of the underlying allegations in this matter, although the matter is ripe for dismissal on the timeliness grounds discussed herein.

SO ORDERED.

DATED: February 9, 2012

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

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

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