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Comptroller General
of the United States

Decision

Matter of: Cyberlux Corporation

File: B-400770

Date: January 23, 2009

William G. Alexander, Esq., WG Alexander & Associates, PLLC, for the protester.
Jon W. van Horne, Esq., Jon W. van Horne Law Office, for Patriot Taxiway Industries, Inc., the intervenor.
Michael G. McCormack, Esq., Department of the Air Force, for the agency.
Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency misled the protester as to the price it should offer is denied where the specifications in the solicitation conflicted with the alleged oral direction from the contracting officer and the record contains no written substantiation of that direction.

DECISION

Cyberlux Corporation, of Durham, North Carolina, protests the award of a contract to Patriot Taxiway Industries, Inc., of Omro, Wisconsin, by the Department of the Air Force, Air Mobility Command (AMC), under request for proposals (RFP) No. FA4452-08-R-0025 for portable LED lighting component systems. Cyberlux alleges that it was misled by the contracting officer regarding the price that it should offer to the agency.

We deny the protest.

Cyberlux has expertise in developing and supplying the types of lighting equipment required under this procurement and was, according to the agency, "persistent and proactive" in bringing its products to the attention of the agency. Agency Report (AR), Memorandum of Law at 1. As a result of its familiarity with Cyberlux, the agency used the characteristics of the protester's products as the basis for the RFP's technical specifications and the protester's prices as a basis for the internal estimate of the number of lighting equipment sets that could be purchased, given the funds available. *Id.* at 1-2. Although, according to the agency, the primary customer had

requested that the agency procure the products sole-source through Cyberlux, the agency's market research identified another small business that was a potentially viable source for the required equipment, and, as a result, AMC determined that the procurement should be conducted on a competitive basis.¹ The procurement was set aside for small businesses, but it was not limited to General Service Administration (GSA) contract holders.²

The RFP, issued September 17, 2008, stated that the agency intended to award a fixed-price contract to the offeror with the lowest total price, whose technically acceptable offer met the stated requirements for all the solicitation line items. The RFP indicated that "[c]ost/price proposals shall be in accordance with items listed above and include any shipping cost within the unit price."³ RFP at 1. Attachment two to the solicitation stated that the "contractor shall fill out the unit price and total amount for the Firm Fixed Price [contract line items]," and that the price must include shipping costs. RFP, Attach. 2, Request for Proposal Information Sheet, ¶ 15.

Two proposals, from the awardee and the protester, were received by the closing date. In the initial evaluation, both proposals were found technically unacceptable. The agency then conducted discussions with both offerors and, as a result of the discussions, issued two amendments to the RFP. At the conclusion of discussions, both proposals were determined to be technically acceptable, and the agency requested final revised proposals.

The protester was concerned about incorporating all of the changes resulting from the discussions into its proposal by the final proposal deadline, which was later that day, September 29, the same day that the agency issued the second RFP amendment.⁴ According to the agency, the contracting officer advised Cyberlux that the changes had already been incorporated into its proposal and that Cyberlux should simply submit new changes, if any. The contracting officer denies ever having discussed with Cyberlux the protester's proposed prices, which she considered complete, realistic, and reasonable.

¹ The record suggests that, based on its marketing contacts with the primary customer in the agency, the protester anticipated that it would receive the contract on a sole-source basis.

² Cyberlux holds a GSA contract that includes the lighting equipment being sought here.

³ "Items listed above" included, most importantly, the technical requirements contained in the Essential Characteristics Document, attachment one to the RFP. See RFP at 1.

⁴ The agency was operating against the imminent deadline of September 30 to commit the contract funds in fiscal year 2008.

The final evaluated prices for Patriot and Cyberlux were \$7,696,199 and \$8,196,302, respectively.⁵ The agency made award to Patriot, which offered the lowest-priced, technically acceptable proposal, and this protest followed.

Cyberlux alleges that the contracting officer instructed the protester—but not the awardee—to use GSA pricing in its proposal, and, as a result, effectively prevented the protester from offering a lower price. As noted above, the contracting officer categorically denies the allegation.⁶ See Contracting Officer's Statement of Facts at 5.

As discussed below, even if it could be shown that the contracting officer gave the disputed direction, the protester was not permitted to rely on such a statement since offerors cannot reasonably rely on oral modifications to an RFP that are inconsistent with its written terms, absent a written amendment or confirmation of the oral modification. S3 LTD, B-287019.2 et al., Sept. 14, 2001, 2001 CPD ¶ 165 at 6.

We have reviewed the RFP, the written record of the procurement, and other written evidence offered by the parties. None of the documents in the record includes any written agency instruction to Cyberlux directing the protester to offer only GSA contract prices. With the exception of the RFP, no communications from the agency make any mention of a method for pricing proposals; as noted above, the RFP stated that price proposals would be evaluated in accordance with the items listed in paragraph one, and nowhere in that paragraph was there mention of GSA pricing or directions to price a proposal a particular way, except that prices should include shipping. At the hearing, the protester produced an e-mail from Cyberlux to an Air Force official in the using activity stating that “contracting” had told Cyberlux to submit GSA pricing.⁷ Hearing Exh. 1, E-mail from Cyberlux to Air Force, Sept. 1, 2008. The e-mail was sent on September 1, more than 2 weeks before the issuance of the RFP; as noted above, there was no indication in the RFP itself that offerors were to use their GSA pricing. Further, while the protester points to the fact that the contracting officer made no contemporaneous record of the several telephone calls

⁵ The protester's price was below the independent government cost estimate of \$8,365,989.

⁶ Because of the conflicting statements in the record, we conducted a hearing at our Office to consider the limited issue of whether the contracting officer had instructed the protester to offer GSA pricing. The testimony of two officers of Cyberlux—Cyberlux's President and Chief Executive Officer (CEO), and the Director of Governmental Affairs—and the contracting officer was consistent with their prior sworn statements, credible, and, again, contradictory.

⁷ The relevant sentence from the e-mail is as follows: “We are told that although we should submit GSA pricing, the RFP will be published on FedBizOpps, where names of companies are not noted in the description like they are on the GSA site.”

between the parties during the course of discussions,⁸ the protester itself has also produced no contemporaneous account of any of those conversations. Accordingly, any direction from the contracting officer to the protester to submit GSA pricing would have been an oral modification to the RFP that was not reduced to writing as an amendment or otherwise confirmed and thus could not reasonably be relied on by the protester.⁹ *S3 LTD, supra*. This principle provides fairness to all the parties by ensuring that competitions are conducted under equal terms and protects protesters and agencies from the type of credibility disputes raised here. *Id.*

In any event, while we recognize that the protester's representatives appear to have been under the impression that they were to price their offer based on their GSA pricing, and we have no basis to question their testimony in this regard, we likewise see no basis to question the credibility of the contracting officer, who denies having given any such direction. Further, as discussed above, there is no other evidence in the record supporting the protester's position. Accordingly, even if the alleged direction by the contracting officer did not contradict the terms of the solicitation, based on the record here, we could not conclude that the contracting officer directed the protester to submit only GSA pricing in its final proposal.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁸ The evaluation documents do contain a summary of one teleconference between the protester and the agency, see AR, Tab 11, Best Value Memorandum at 3, and the record of that discussion includes no reference to pricing.

⁹ Cyberlux also alleges that an ambiguous statement of work in the initial RFP unfairly prevented its offer from being considered technically compliant and unfairly caused it to increase its price relative to other offerors, and that solicitation amendments issued after receipt of initial proposals prejudiced Cyberlux's ability to compete—specifically, that the later amendments nullified the advantage Cyberlux enjoyed of having superior equipment. As discussed above, the original solicitation stated the agency's intent to award to the firm with the lowest-priced technically acceptable offer; this provision remained unchanged by the two amendments. Protests challenging the terms of a solicitation, to be timely, must be filed prior to the due date for proposal submissions, or, if the terms are introduced after the initial closing date, they must be protested prior to the next closing date. 4 C.F.R. § 21.2(a)(1) (2008). The protest grounds here, filed after the closing date for final proposal submission, are untimely.