

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

60507

FILE: B-185433

DATE: February 12, 1976

MATTER OF: Young Engineering Systems

98619

DIGEST:

1. Protester is not justified in relying on oral statements of contracting personnel prior to closing date for receipt of proposals, which would have changed the standard cost and pricing data form specified in RFP. Oral representation one day prior to closing date for receipt of proposals without confirmation in writing does not constitute amendment of RFP.
2. Protester's proposal, hand-delivered after time specified as closing date for receipt of proposals, was properly not considered since it did not fall within one of exceptions in applicable late proposal clause in RFP which would permit its consideration. Protester's delay in obtaining documents until day before closing date for receipt of proposals, which allegedly caused lateness of proposal, is deemed a significant intervening cause of the lateness.
3. Protest against alleged action of contracting personnel in orally amending RFP so that only protester was required to use standard cost and pricing form different than all other competitors on day before closing date for receipt of proposals, submitted within 10 days of notification of reasons why agency would not consider proposal is timely notwithstanding that action occurred before closing date for receipt of proposals since it was not an impropriety apparent on the face of the solicitation. See 40 Fed. Reg. 17979, April 24, 1975.

Young Engineering Systems (Young) protests the refusal of the Naval Electronic Systems Command (Navelex) to consider its proposal submitted 95 minutes after the time specified as the closing date for receipt of proposals under request for proposals (RFP) N00039-76-R-0054(Q) for an air traffic control and automatic landing system engineering support.

The RFP established 3:30 p.m. EDST, October 31, 1975, as the closing date for receipt of proposals. Young's proposal was hand-carried to the proper room at 4:05 p.m. EDT (5:05 EDST). The RFP contained the clause entitled "Late Proposals, Modifications of Proposals and Withdrawals of Proposals (1974 Apr)." None of the exceptions in the clause which would permit consideration of Young's otherwise late proposal are applicable. Accordingly, by letter dated November 4, 1975, received by Young on November 6, 1975, Navelex informed Young that its proposal would not be considered because it was late.

On November 3, 1975, Young wrote to the contracting officer requesting that its proposal be considered because the Government, at its discretion, may consider a late proposal if its price is low, the proposal is technically superior or is otherwise in the Government's best interest. Additionally, Young alleged that on the day prior to the closing date for receipt of proposals (October 30) the contracting officer verbally instructed Young's owner to utilize DD Form 633-4, rather than the DD Form 633-1 referenced in the RFP. Young asserts, in part, that changes required to be made in its cost proposals due to the difference in forms caused the proposal to be late. On November 4, 1975, Young wrote the Commander, Navelex, and requested a meeting on the matters outlined above, which occurred on November 14, 1975. In the interim, by letter dated November 13, 1975, received by the General Accounting Office (GAO) on November 19, 1975, Young filed its protest with our Office.

By letter dated November 21, 1975, Navelex responded to Young's charges. The response noted that although the RFP was issued October 6, 1975, it was not until October 29, 1975, that Young telephoned the contracting officer to notify him that Young's RFP did not contain any DD Form 633-1. Also noted was the fact that Young's RFP was the only one out of 30 issued which did not contain a DD Form 633-1. It is further stated by Navelex that on October 30, 1975, when Young arrived at the contracting office, the individual named in the RFP as the person to contact for information states that he gave Young copies of both DD Form 633-1 and 633-4 with the instructions to use whichever form was more convenient.

Navelex maintains that Young's protest is untimely under section 20.2(a) of our Bid Protest Procedures, 40 Fed. Reg. 17979, April 24, 1975, which requires that protests based upon alleged improprieties in the solicitation must be protested prior to the initial closing date for receipt of proposals. We view the protest as timely. There was no impropriety on the face of the solicitation. The problem arose as a result of actions taken, not as a result of improprieties apparent in the solicitation. Thus, Young's protest, being filed on November 19, 1975, within 10 days of the date Navelex informed Young of the reasons the proposal would not be considered (November 6), is timely.

Young challenges Navelex's version of the October 30 events. Young maintains that the Navelex official who gave him the DD Form 633's instructed Young to use DD Form 633-4 which is applicable to research and development work, rather than the DD Form 633-1 for technical services. Young maintains that this directive constituted a verbal amendment of the RFP, with which only Young was required to comply. Young notes that the DD Form 633-1 required estimates on a per man-month basis, whereas the DD Form 633-4 required more detailed estimates for the entire term of the proposed contract.

On the basis of the foregoing, Young asserts that since it submitted the only proposal responsive to the RFP, as verbally amended, all other proposals should be rejected and award made to Young. Additionally, Young has requested Navelex to provide a deposition of the contracting officer's response to certain questions regarding whether Young was directed to use DD Form 633-4, and specifically not to use DD Form 633-1. Alternatively, Young requests that GAO direct the Navy to reduce all amendments to writing, and start the procurement over on the basis of the RFP, as orally amended.

Navelex has declined to submit the deposition requested. As indicated at a conference held at our Office pursuant to section 20.7 of our Procedures, Young was informed that GAO could not compel the Navelex to comply with the request. Our Procedures are not intended to be a full-scale adversary proceeding with sworn testimony. Julie Research Laboratories, Inc., B-183288, October 14, 1975, 55 Comp. Gen. _____, 75-2 CPD 232.

The RFP, at section C, paragraph 12, deleted paragraphs 7 and 8 of Standard Form 33A, dated March 1969, Modification or Withdrawal of Offers and Late Offers and Modification or

B-185433

Withdrawals. Inserted in their stead was the provision entitled "Late Proposals, Modification of Proposals and Withdrawals of Proposals (1974 Apr)," which provides as pertinent:

"(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made; and

"(i) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of offers * * *;

"(ii) it was sent by mail * * * and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation;

"(iii) it is the only proposal received.

* * * * *

"(e) Notwithstanding the above, a late modification of an otherwise successful proposal which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted."

On the strength of subsection (e) above, Young alternatively argues that since its proposal was the only "responsive" proposal submitted, it was the most favorable to the Government and may, therefore, be considered and accepted.

Generally, an offeror is charged with the responsibility of ensuring that its proposal arrives at the proper place at the proper time. By choosing a method of delivery other than those specified in the late proposal clause for possible consideration in the event the proposal arrived late, an offeror assumes a high degree of risk that its proposal will be rejected if untimely delivered. Emergency Care Research Institute, B-181204, August 23, 1974, 74-2 CPD 118. Even when a hand-carried proposal is delivered late, we have permitted acceptance of the proposal where improper action by the Government was the proximate cause of the lateness.

B-185433

Hyster Company, B-182995, September 24, 1975, 75-2 CPD 176, and cases cited therein. But when actions of the offeror are the significant or intervening cause of the delay in delivering the proposal, whether anticipated or not, a late proposal is not for acceptance. Associate Control Research and Analysis, Inc., B-184071, September 25, 1975, 75-2 CPD 186, and cases cited therein.

It is germane to our consideration that subsection C(15) of the RFP indicates in two places that offerors were required to submit DD Forms 633-1 with their proposals. It is also significant that paragraph 3 of Standard Form 33A which was incorporated in the RFP, requires that:

"Any explanation desired by an offeror regarding the meaning or interpretation of the solicitation, drawings, specifications, etc., must be requested in writing and with sufficient time allowed for a reply to reach offerors before the submission of their offers. Oral explanations or instructions given before the award of the contract will not be binding. Any information given to a prospective offeror concerning a solicitation will be furnished to all prospective offerors as an amendment of the solicitation, if such information is necessary to offerors in submitting offers on the solicitation or if the lack of such information would be prejudicial to uninformed offerors."

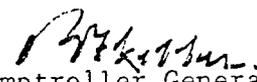
On the foregoing record, we agree that Navelex acted properly in rejecting Young's untimely proposal. Initially, there is a dispute of fact whether the Navelex personnel instructed Young to use the DD Form 633-4, or merely provided copies of both DD Form 633-1 and 633-4, with direction that either one would be acceptable. We need not decide this controversy since even assuming, arguendo, that Young had been instructed to use the DD Form 633-4, the RFP provided that such oral instruction would not be binding on the Government. Proceeding further on the assumption that Young was instructed to use the DD Form 633-4, Young has presented no evidence to indicate why utilizing the DD Form 633-4 (as opposed to using the DD Form 633-1), required such extra time that occasioned the lateness in delivering its proposal. Moreover, there is no explanation why Young waited until the day before proposals were due to attempt to get a copy of the applicable DD Form 633. Such delay on Young's part must be viewed as a significant intervening cause of the tardiness.

B-185433

As for Young's contention that Navelex, in its discretion, could consider Young's proposal, we agree with Navelex that Young is mistaken on this point. The Government may accept a late modification of an otherwise timely and apparently successful proposal only if it makes the terms more favorable to the Government. Notwithstanding Young's assertion that only its proposal could be accepted as complying with what Young erroneously considers an oral amendment of the RFP, Young's lateness concerns its initial proposal, not a modification of a timely proposal. Therefore, subsection (e) of the late proposal clause, quoted above, is inapplicable.

Nor can we sustain Young's argument that its proposal was the only responsive one submitted. First, the concept of responsiveness is not apposite to negotiated procurement. Second, since the statements of the Navelex personnel did not constitute an amendment of the RFP, proposals submitted on the basis of DD Form 633-1, as specified in the RFP, were acceptable.

On the present record, the protest is denied.


Deputy Comptroller General
of the United States