

01621

Alan Zuckerman
Proc. II

DECISION



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

FILE: B-188084

DATE: March 22, 1977

MATTER OF: E-Systems, Inc.

DIGEST:

1. A timely submitted general letter offering to comply with RFP specifications at a firm-fixed price and incorporating by reference the offeror's actual technical, managerial and financial proposal which was delivered after the deadline set for the receipt of proposals by means other than specified in the standard ASPR late proposal clause included in the solicitation, does not satisfy the requirement for timely submission of the portion of the proposal incorporated by reference. The qualification for inclusion in the competitive range should be determined only on the basis of material timely submitted.
2. Government issuance of RFP amendment 9 days prior to date set for receipt of proposals which does not extend such date, and delivery by technical office of a study "for use" with the RFP, both of which were received 8 days prior to the date set for receipt of proposals, is not Government action which would permit acceptance of a late proposal. Responsibility for the delivery of proposal, on time, rests with offeror.

This is a protest by E-Systems, Inc. over the contracting officer's decision to consider a "Technical, Managerial and Financial proposal" incorporated by reference into a timely submitted "contract letter" as late and not for consideration under the late proposal provision of RFP No. DAAG54-7-R-0006.

The facts are not in dispute. The RFP was issued by the United States Army Security Agency on October 8, 1976. Four amendments were issued. Amendment No. 1, dated October 15, 1976, related to the submission of questions by prospective offerors prior to the pre-proposal conference; Amendment No. 2, dated October 28, 1976, extended the date specified for the receipt of offers from November 22, 1976, 2:00 p.m. local (Warrenton, Virginia) time to November 24, 1976, 2:00 p.m. local time; Amendment No. 3, issued November 5, 1976, added definitions to the Late Proposal clause for shipment of proposals classified "Top Secret" or "SI", clarified instructions covering proposal structure and the preparation of one data item, and answered questions submitted at the "pre-proposal" conference; Amendment No. 4, issued November 15, 1976, clarified the answers to questions submitted on the pre-proposal conference and corrected certain typographical errors. The agency states that Amendment No. 4 did not modify the RFP purchase description or add new requirements. Neither Amendments 3 nor 4 extended the date set for the receipt for proposals.

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On November 15, 1976, a document classified "Secret" (the "IBM Report") was sent to all prospective contractors by the technical officer without the knowledge of the contracting officer. The transmittal slip accompanying the "IBM Report" stated that it "presents further information to be used in connection with the CAC RFP." No RFP amendment was issued and no time extensions were indicated. The agency states that it was not intended that proposals be evaluated on the basis of the "IBM Report" or that the "IBM Report" would require "substantiated revision" to the offerors' proposals.

Protester states the "IBM Report" was received at its facility in Greenville, Texas on Friday, November 19, 1976, at its document control office. It is also stated that the "IBM Report" was addressed only to "E-Systems, Inc., Greenville Division, Greenville, Texas," with the instruction that it be used in connection with the RFP in question. Because of the classified nature of the "IBM Report" and the intervening weekend, protester states that it was not brought to the attention of the appropriate company employees until Monday, November 22, 1976, too late, it is stated, to incorporate into the proposal.

Protester states it received amendment 4 "on or about November 19, 1976," and that such amendment required a "total running time of 18 hours to comply with the requirements of Amendment 0004." No extension of the receipt of proposal date was requested at that time.

The protester arranged for shipment of its proposal with Federal Express Corporation, which provides scheduled delivery service between Dallas, Texas and Washington, D. C., and which is asserted to be the only commercial carrier available to the company for transporting classified secret materials. Protester states that the carrier's "priority one" service guarantees that packages will be delivered to consignee's door not later than 12:00 noon on the business day following pick-up. The proposal was delivered to Federal Express in Dallas at 6:05 p. m., using "priority one" service. However, the proposal never left Dallas in time to meet the 2:00 p. m. delivery date.

As an alternate to delivering the complete proposal, E-Systems furnished a letter by the 2:00 p. m. deadline, incorporating therein by reference the managerial, technical and price proposal which had not arrived. This letter offered a firm-fixed price to furnish labor, materials, and facilities to perform the requirements of the RFP specification, and specified two other E-Systems divisions as participants in the program. The letter stated that "six copies of our Technical, Managerial and Financial proposal are submitted * * * under separate cover." The latter documents were delivered to the Government 4:00 p. m. on November 24, 1976, or 2 hours after the closing.

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The protester asserts the following alternative ground as the basis of its protest:

E-Systems, Inc. submitted a timely proposal [the "contract letter"] which must be considered in its entirety, i. e., including the material incorporated by reference.

2. The Government delay in issuing the final amendment and the IBM study precluded the offeror from complying with the 5 day mail requirement of the late proposal clause so that the failure of the only other means of transportation [Federal Express] to deliver the offeror's proposal on time through no fault of the offeror, excuses lateness.

In addition the protester states that the Government must conduct negotiations with E-Systems, Inc. under Armed Services Procurement Regulation (ASPR) § 3-805.1 (1976 ed.) because the existence of a technical, financial and management proposal "makes it a foregone conclusion that E-Systems' proposal" is reasonably subject to being made acceptable.

The timely deposited "contract letter" offered a firm-fixed price to perform in accordance with the purchase description identified in the solicitation, offered to provide the "necessary disciplines and facilities to develop the requirement from concept formulation to production," and to "utilize proven, effective technical and managerial approaches and personnel to insure the * * * best possible * * * results". We do not believe by incorporating the actual proposal by reference into a timely submitted but general letter, that the offeror has satisfied the requirement for timely submission of the late material. The cases cited by protester in defense of its position involve incorporation by reference either directly or by implication of materials which were common to all competitors and readily identifiable, such as missing pages of an IFB. None of the cases cited involves incorporation by reference of materials unique to an offeror such as a technical proposal offering the offeror's approach to achieving contract requirement. We are of the opinion that the late proposal clause of the RFP precludes consideration of the material which was received after the specified time for receipt of proposals.

Moreover, we do not believe that the issuance of an RFP amendment 9 days prior to the required submission date which protester acknowledges was received 6 days prior to that date is sufficient to charge the Government with the responsibility for the late delivery. Similarly, we do not believe the issuance of the "IBM study", which admittedly was not included in the proposal, warrants a different

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conclusion. ASPR § 1-605(b) advises that the need for an extension of the closing date should be considered when only a short time remains between the issuance of a necessary amendment and the specified closing date, and we believe the record supports a conclusion that the agency acted reasonably in not extending the closing date in this case. Neither the protester nor any other offeror requested an extension at the time the amendment or the "IBM Report" was received. Moreover, we note that the protester waited until the last possible moment for the dispatch of its proposal. We have long held that an offeror is charged with the responsibility of ensuring that its proposal arrives on the proper date and time, and that by choosing methods of delivery other than those specified in the late proposal clause, an offeror assumes the risk that its proposal will be rejected if late. Young Engineering Systems, 55 Comp. Gen. 754 (1976), 76-1 CPD ¶ 98. We have not objected to the acceptance of late proposals which are not encompassed by the late proposal clause only where the lateness was due to improper Government action and acceptance would not compromise the procurement system. However, where, as here, the delay is not due to improper action of the Government, we have held that a late proposal is not for consideration, even if due to unanticipated causes. Associate Control Research and Analysis, Inc., B-184071, September 25, 1975, 75-1 CPD 188.

The manner in which the Government conducts its procurements must be subject to standards so that all who deal with it will be treated equally and impartially. By the application of its late proposal rules, the Government may lose a proposal that offers terms more advantageous than those received timely. However, we think the main consideration, in the overall view, is the maintenance of confidence in the Government's procurement system, rather than the possible advantage to be gained in a single procurement. Emergency Care Research Institute, B-181204, August 23, 1974, 74-2 CPD 118.

Protester also states that it "must be given an opportunity to submit * * * additional information * * * in the form of the three volume attachment. There is no doubt that E-Systems CAC proposal [the "contract letter"] * * * is reasonably subject to being brought within the competitive range." In the protester's view, the late materials need not be considered in establishing the competitive range, but that the existence of such material should make it a foregone conclusion that the "contract letter" is reasonably subject to being made acceptable.

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The determination of whether a proposal is to be included in the competitive range is a matter of administrative discretion which will not be disturbed, unless it is clearly arbitrary or capricious. *El Camp, Gen. Inv. 300 (1973), 40 Id. 300 (1980)*. Here, while the competitive range determination has not yet been made, we think it is appropriate to note the qualification for inclusion in the competitive range should be determined only on the basis of material timely submitted.

The protest is denied.

Arthur J. ...
Deputy Comptroller General
of the United States