Notopoulos
P.L. II

DECISION

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

047719

FILE: B-190051 DATE: January 5, 1978

MATTER OF: LaBarge, Incorporated

DIGEST:

1. Where amendment to RFP, issued after initial proposals had been received and evaluated, added a previously deleted contract line item and requested proposals thereon from those offerors within competitive range, agency properly rejected as late proposal delivered after time specified by amendment.

2. Award of contract while protest was pending was not improper where it was determined at level above that of contracting officer that prompt award was required and GAO was notified of intent to make award in accordance with ASPR § 2-407.8(b). Failure of protester to receive notification of award was procedural deficiency not affecting validity of award.

LaBarge, Incorporated protests the rejection of its amended proposal by the U.S. Army Mobility Equipment Research and Development Command (MERADCOM) under request for proposals (RFP) No. DAAK70-77-R-0356, issued by Fort Belvoir, Virginia to procure various quantities of Joint Service Intrusion Detection System add-on components. LaBarge's amended proposal, called for in part by an amendment to the RFP issued after initial proposals had been received and evaluated and in part by a request for clarification of LaBarge's initial proposal, was rejected because it was received approximately two hours after the time set for receipt.

The amendment to which LaBarge had attempted to respond was issued August 5, 1977 and was inadvertently labeled as Amendment 0005 when it was actually the sixth amendment to the RFP. The initial Amendment 0005 had been issued July 12, 1977, prior to the receipt of initial proposals, and made various changes to the RFP unrelated to those in the second Amendment 0005.

The second Amendment 0005 was issued to reinstate Line Item 0001, a digital data converter, of the solicitation. Line Item 0001 had previously been deleted from the RFP by Amendment 0002, because of a deficient Technical Data Package (TDP). The second Amendment 0005 added Item 0001, as revised, to the scope of contractual requirements and specified that only one award for all items would be made, and gave offerors to 1 P.M., August 23, 1977 to respond.

The amendment was transmitted to LaBarge by letter of August 5, 1977. The letter made reference to various informational deficiencies perceived in the evaluation of LaBarge's initial proposal, and requested that clarifying information be provided. The letter also called attention to the enclosed Amendment 0005, noting that the digital data converter, which had been previously deleted from the solicitation, was reinstated with a revised TDP, attached thereto. The contracting officer's letter, enclosing the amendment, concluded with the following:

> "It is requested that the clarifying information addressed above and a proposal revision, technical and price, concerning the reinstated item, be submitted no later than 1 P.M. ET, 23 August 1977."

LaBarge's proposal was hand-delivered at 3:10 P.M. on that date.

LaBarge argues that the amendment must be considered as a request for written or oral discussions during the usual conduct of negotiations, as contemplated by Armed Services Procurement Regulation (ASPR) § 3-805.3 (1976 ed.), prior to the request for a best and final offer. As such, LaBarge believes its response should have been governed by ASPR § 3-506(d) which states:

> "The normal revisions of proposals by offerors selected for discussion during the usual conduct of negotiations with such offerors are not to be considered as late proposals or late modifications of proposals."

LaBarge states that it was improper for the contracting officer to treat LaBarge's response under ASPR § 3-506(b), which requires proposals or modifications thereof to be submitted by the designated time, and which specified that proposals (and modifications) received after the exact time will be "late" and considered only under circumstances not applicable here, because the "late proposal" provision clearly refers only to the initial offer submitted pursuant to the RFP and does not otherwise include revisions made during the course of negotiations after receipt of initial proposals but prior to a request for best and final offers.

In this regard, LaBarge contends that the amendment neither called for best and final offers nor did it clearly apprise offerors that late replies would be treated in accordance with the "late proposal" clause of the RFP. Accordingly, LaBarge interprets the letter of August 5, 1977 to mean that MERADCOM's evaluation of LaBarge's offer would be completed after receipt of LaBarge's reply, and if the offer still remained acceptable, LaBarge would be subsequently requested to submit a best and final offer.

Additionally, LaBarge contends that the amendment was ambiguous and misleading because "either through error or design, the enclosed amendment was designated as Amendment 0005, the same designation given to the last amendment to the RFP prior to receipt of initial offers." LaBarge asserts that the late receipt of its amended proposal was due to the confusion engendered by the mislabeling of the amendment because in checking the deadline for submission of a response to Amendment 0005, it read the 4:15 P.M. closing time specified in the original Amendment 0005.

The Army's position is simply that while the letter requesting clarification from LaBarge may have constituted the opening of discussions, the Amendment also called for submission of an initial proposal for Item 0001 so that offeror response to the amendment was to be governed by the late proposal rules. We agree.

We think it is clear that two separate and distinct responses were requested by MERADCOM's letter of August 5, 1977 and enclosed amendment.

First, as the Army concedes, the letter initiated written and oral discussions, as contemplated by ASPR § 3-805.3, with regard to Line Items 0002 through 0008, upon which LaBarge had already submitted a timely initial proposal. However, Amendment 0005, enclosed with the letter, and issued pursuant to ASPR § 3-805.4, clearly requested a proposal for the first time with regard to Line Item 0001 and further advised offerors that because only "a single contract for all items will be awarded," a proposal, to be considered, must offer to furnish what was called for by Item 0001. Thus we believe that MERADCOM could properly apply ASPR § 3-506(b) and the late proposal clause to LaBarge's response to the amendment. It follows that even though the amendment response was the only part of LaBarge's proposal that was late, it had the effect of rendering LaBarge's total proposal as late and unacceptable since no timely proposal had ever been submitted for the totality of the line items for which a single contract would be awarded. The cases relied on by the protester, ABC Food Service, Inc., B-181978, December 17, 1974, 74-2 CPD 359 and ALI Systems, B-181729, February 27, 1975, 75-1 CPD 117, are inapposite here since neither involved what is here regarded as an untimely submission of an initial proposal.

Although LaBarge asserts that it is unfair to apply the late proposal rules to its response to Amendment 0005 because it did not clearly apprise offerors that late replies would be subject to the clause, we note that Block 12 of the amendment states:

> "Except as provided herein, all terms and conditions of the document referenced in block 8, as heretofore changed, remain unchanged and in full force and effect."

Block 8 references the RFP, which included the late proposal clause as one of its provisions. Accordingly, we think all offerors were placed on notice that replies to the amendment would be treated in accordance with the provisions of that clause. In this regard, it is noted that all of the five firms in the competitive range, except for LaBarge, did submit timely responses to the amendment.

Generally, an offeror is charged with the responsibility of assuring its proposal arrives at the proper place at the proper time. By choosing a method of delivery other than those specified (mail

or telegraph if authorized) in the late proposal clause, 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. Where the delay in delivering a proposal is not due to improper action of the Government, a late proposal is not for consideration, even if due to unanticipated causes. E-Systems, Inc., B-188084, March 22, 1977, 77-1 CPD 201. Moreover, even if confusion or ambiguity may be cause to find improper action on the part of the Government, such improper action by the Government must be the proximate cause of the lateness, and where it is shown that actions of the offeror are the significant or intervening cause of the delay in delivering the proposal, a late proposal is not for acceptance. Bertolini Engineering Company, B-186292, June 16, 1976, 76-1 CPD 386, and citations therein. Here, even though the amendment was improperly numbered 0005 instead of 0006, the record clearly establishes that it was LaBarge's actions in confusing the two amendments that led to the late delivery. In this connection, we think the second Amendment 0005 is clearly distinguished from the first since more than three weeks separated them, they specified different dates for receipt of offers (July 26 as opposed to August 23), and the subject matter of each was entirely different. Therefore, we do not agree that any offeror could reasonably conclude that they were one and the same, notwithstanding their inadvertent identical numbering. Under such circumstances, we must conclude that LaBarge contributed to the situation and under such circumstances is not entitled to have its proposal considered on grounds of improper Government action. See Avantek, Incorporated, 55 Comp. Gen. 733 (1976), 76-1 CPD 75.

LaBarge also challenges the award made in this case on the grounds that award was made while this protest was pending and that LaBarge was not provided with written notice of that award.

While the protest was pending with this Office, MERADCOM determined pursuant to ASPR § 2-407.8(b)(3) to proceed with an award prior to resolution of the protest because (1) the program was funded with stock funds which expired September 30, 1977; (2) there were no programmed funds for the item in fiscal year

1978; and (3) the Corps of Engineers' construction programs could not acceptably accommodate any slippage in the installation of these systems since the testing required for the initial production items (assuming award by September 30, 1977) would not be completed until May 1979, the due date for the items at the construction site.

Our Office was notified of MERADCOM's intent on September 20, 1977, prior to award. ASPR § 2-407.8(b)(3) provides that award shall not be made while a protest is pending unless it is determined that award must be made promptly. MERADCOM made that determination and as required by ASPR § 2-407.8(b)(2), approval was given at a level above that of the contracting officer (Office of the Assistant Secretary). Where such actions have been undertaken, the determination to proceed with an award prior to protest resolution is not subject to question by our Office. AMF Incorporated Electrical Products Group, 54 Comp. Gen. 978, 988 (1975), 75-1 CPD 318; 52 Comp. Gen. 718 (1973); ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301.

While LaBarge may not have been provided with written notice of the decision to proceed with award as provided for by ASPR § 2-407.8(b)(3), this section does not require notice to be given to the protester prior to award. 51 Comp. Gen. 787, 791 (1972). Moreover, it appears that LaBarge was orally informed of the Army's intent to make award by September 30, 1977 during a proceeding in open court in connection with a suit initiated by LaBarge but subsequently dismissed without prejudice after LaBarge's request for a temporary restraining order in this matter was denied. In any event, notification deficiencies of this type are regarded as procedural irregularities which do not affect the validity of the award. Solar Laboratories, Inc., B-179736, February 25, 1974, 74-1 CPD 99; B-176291, December 29, 1972.

Accordingly, the protest is denied.

Paul G. Dembling

For the Comptroller General
of the United States