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DECISION



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

FILE: B-192356

DATE: August 25, 1978

MATTER OF: Jerry Warner and Associates

DIGEST:

1. Late proposal sent via commercial carrier may not be considered for award and was properly rejected.
2. In absence of any guidance in Federal Procurement Regulations, contracting officer immediately returned late proposal to offeror. GAO recommends that proposals be held by agency, unopened, until after award.

Jerry Warner and Associates (Warner) protests the determination that its late proposal could not be considered under request for proposals (RFP) 6111, for production of a motion picture, issued by the U.S. Geological Survey, Department of Interior. The solicitation provided that proposals would be received at the Geological Survey, Reston, Virginia, until 3:00 p.m., local time, June 27, 1978. Warner's proposal was received at 12:49 p.m., June 28, 1978. The contracting officer determined it was a late proposal and returned it unopened, to Warner on June 29, 1978.

Warner had obtained the services of a commercial air carrier to deliver its proposal. However, because of a mechanical malfunction of the aircraft, the proposal was not delivered by the time set for receipt.

The general rule followed by our Office is that the offeror has the responsibility for the delivery of its proposal to the proper place at the proper time. Exceptions to the general rule requiring rejection of late

proposals may be permitted only in the exact circumstances provided for in the solicitation. The late proposal clause, Federal Procurement Regulations 1-3.802-1 (Second Edition, FPR Amendment 178, June, 1977), incorporated by reference into the solicitation, reads in part:

"(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:

(1) It was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of offers (e.g., an offer submitted in response to a solicitation requiring receipt of offers by the 20th of the month must have been mailed by the 15th or earlier);

(2) It was sent by mail (or telegram if authorized) 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 * * *."

By choosing a method of delivery other than 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, as here, the delay in delivering a proposal is not due to improper action of the Government, the proposal is not for consideration even if the delay resulted from unanticipated causes. E-Systems, Inc., B-188084, March 22, 1977, 77-1 CPD 201.

The protest is therefore denied.

We note that Warner's late proposal was returned to it, unopened. FPR § 1-2.303-7 provides with respect to formally advertised procurements that late bids which are not for consideration are to be held by the agency, unopened, until after award. Unlike the Defense Acquisition Regulation/Armed Services Procurement Regulation, however, the FPR provides no guidance as to the disposition of a late proposal received in a negotiated procurement. Therefore, in returning to Warner that firm's unopened proposal, the contracting officer violated no regulation and in this case we believe the contracting officer correctly determined that firm's late proposal could not be considered.

Once a late bid has been returned to the bidder it no longer can be considered for award because one cannot ignore the possibility that the bidder has altered the bid with knowledge of its competitors' prices. The agency's return of a purportedly late bid can therefore deprive a bidder of an award it otherwise would have received should the agency or our Office subsequently determine that the bid was timely. See, e.g., Dima Contracting Corporation, B-186487, August 31, 1975, 76-2 CPD 208.

Since there is no public opening of proposals in a negotiated procurement, and information concerning the proposals received is to be kept confidential, there would seem to be less opportunity for an informed tampering of a late, returned proposal. Nevertheless, the mere fact that a proposal has passed out of the Government's possession after others' proposals have been submitted could create distrust in the event that proposal is resubmitted and considered. Although it is not a requirement of the FPR, we believe the most prudent course of action is for the agency to hold a late proposal, unopened, until after award.

R. F. Kellin

Deputy Comptroller General
of the United States