

DECISION



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

10, Feb

FILE: B-193933

DATE: July 17, 1979

MATTER OF:

Federal Sales Service, Inc.

DLG 02136

[Protest Against Acceptance of Competitors Late Proposals]

DIGEST:

Manufacturers' late proposals submitted after closing date for receipt of proposals and timely receipt of dealer's proposal for "identical" product, do not constitute "only proposal received" within meaning of Federal Procurement Regulation 1-3.802-1(c) which permits consideration of late proposals and may not be considered for award.

Federal Sales Service, Inc. (Federal Sales), has protested against the solicitation and acceptance of proposals by the Federal Supply Service, General Services Administration (GSA), from K/Tronic, Inc. (K/Tronic), and Verbatim Corporation (Verbatim) after the closing date for receipt of proposals specified in request for proposals (RFP) No. FPHO-D-75051-N-3-9-78.

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The RFP, issued on February 9, 1978, contemplates the award of indefinite quantity contracts for video and sound recording tapes, magnetic cards and digital cassettes for fiscal year 1979. GSA received 12 proposals by March 9, 1978, the closing date for receipt of proposals, and began negotiations with the offerors on April 12, 1978.

On June 22, 1978, GSA asked ^{was asked} the protester to furnish a bona fide manufacturer's commercial price list for its cassettes. Federal Sales submitted a K/Tronic price list, stating that the cassettes are made by K/Tronic in accordance with an unwritten specification and sold under the protester's "Unicopy" label. On August 3, 1978, GSA requested a preaward survey of K/Tronic's facilities, pursuant to Federal Procurement Regulations (FPR) § 1-1.1205-4 (1964 ed. amend. 95) and GSA Procurement

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Regulations (GSPR) § 5A-1.1205-4 (1977 ed.), in order to verify the protester's statements. The Plant Facilities Report (PFR), dated August 25, 1978, stated that the K/Tronic and Unicopy cassettes are the same, except that the Unicopy cassette is of lower quality, and concluded that the protester is capable of performing under the RFP. *WS*

Manufacturers
K/Tronic *late* submitted a proposal on September 6, 1978. Although GSA had decided on the basis of the PFR to return the protester's proposal, after a September 14, 1978, conversation between Federal Sales and GSA personnel the firm's proposal was instead held in abeyance.

On November 8, 1978, Federal Sales added 1/4-inch data cartridges manufactured by Verbatim to its original proposal. GSA contacted Verbatim on the same day. The firm expressed an interest in representing itself under the Federal Supply Schedule (FSS) and submitted a proposal for 1/4-inch data cartridges on December 6, 1978.

GSA stated that the protester, K/Tronic and Verbatim have offered identical products under GSA Special Item Number 165-25-Digital Cassettes/Cartridges. While five contracts for this item have been awarded to other offerors, no award has been made to any of the three firms involved. GSA has advised us that if Federal Sales' protest is denied, the protester, K/Tronic and Verbatim will be asked to submit their best and final offers and the offer which presents the most favorable discount advantage to Government and meets established benchmark criteria will be recommended for award.

Federal Sales essentially contends that the offers submitted by K/Tronic and Verbatim after the March 9 closing date should be rejected as late proposals and that award should be made to Federal Sales for both manufacturers' products.

GSA asserts that late proposals submitted in response to multiple-award FSS solicitations may be evaluated and considered for award in accordance with the agency's procedures. The RFP incorporates by reference GSA Form 1424, GSA Supplemental Provisions

(June 1977 ed.); paragraph 62 sets forth the late proposal clause prescribed in FPR § 1-3.802-1(a) (1964 ed. amend. 194) which permits consideration of a late proposal received before award if "[i]t is the only proposal received." The term "only proposal received" is defined to include a proposal offering proprietary items where the RFP specifies that awards will be made on the basis of such items identified by the offeror by brand name, model, type or other identification. FPR § 1-3.802-1(c)(3) (1964 ed. amend. 194). GSPR § 5A-3.802-1 (1978 ed.) implements that definition to include offers received in response to multiple-award FSS solicitations in accordance with FPR § 1-3.802-1(c)(3) in the term "only proposal received." GSA therefore concludes that the K/Tronic and Verbatim proposals, albeit late, fall within the "only proposal received" exception and were properly entitled to evaluation and consideration for award.

We cannot, however, agree with GSA's interpretation and proposed application of these regulations. GSA has stated that the products offered by the protester, K/Tronic and verbatim are identical and that in the event negotiations were reopened only one contract would be awarded. We therefore believe that the "only proposal exception" cannot be applied to the late proposal submitted by K/Tronic and Verbatim. GSA had already received a timely proposal, that of the protester, for the product by the March 9 closing date. Thus proposals for the "identical" product submitted after the closing date could hardly be considered the "only proposal received", nor does GSPR § 5A-3.802-1 expand that exception as it applies to FSS procurements because it pertains to proposals submitted in accordance with FPR § 1-3.802-1(c)(3). See Office & Interior Furnishings, B-191655, September 15, 1978, 78-2 CPD 168.

Because the proposals do not fall within any of the exceptions under which they may be considered, notwithstanding their lateness, they must be rejected as late. FPR § 1-3.802-1(b) (1964 ed. amend. 194). Although the Government may lose proposals which offer terms more advantageous than those timely received, the paramount consideration in applying the late proposal rules

is the maintenance of confidence in the integrity of the Government procurement system rather than the possible advantage to be gained in a particular procurement. Emergency Care Research Institute, B-181204, August 23, 1974, 74-2 CPD 118.

K/Tronic and Verbatim, having failed to submit timely initial proposals, may not participate in further negotiations and reopening negotiations without a valid reason tends to undermine the integrity of the competitor negotiation process. See ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301; 50 Comp. Gen. 547, 552-53 (1971). We therefore recommend that GSA reject the late proposals of K/Tronic and Verbatim and make award to Federal Sales, if otherwise appropriate.

^{WLD}
The protest is sustained.


Deputy Comptroller General
of the United States