12052 Transp. Mr. Feinstein

DECISION

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

FILE: B-195717 DATE: November 16, 1979

DLG0 3358

MATTER OF: John Wile Construction Company, Inc.

[Protest of Bid Rejection for Late Receipt]

DIGEST:

Where evidence does not show that Government mishandling in process of receipt of telegraphic best and final offer was paramount reason for late receipt, best and final offer properly was rejected.

AGC00017

John Wile Construction Company, Inc. (Wile) protests the rejection as late of its best and final offer for Contract No. GS-05BC-82173 (NEG) issued by the General Services Administration (GSA) for alterations to a building to be used by the Census Bureau. Wile contends that the reason for the late receipt was a malfunction or other problem in GSA's TWX terminal. For the reasons stated below, the protest is denied.

GSA issued the solicitation for the requirement on June 21, 1979, and received offers from Wile and Henry A. Steilberg, Inc. (Steilberg) by July 19, the date specified for the receipt of initial proposals. On July 24, GSA issued Amendment No. 3 to the solicitation by mailgram which, among other things, set the time for the receipt of best and final offers at 4:00 p.m., July 27, and authorized telegraphic responses. Also on July 24, GSA read Amendment No. 3 to both offerors over the telephone.

GSA received a telegraphic best and final offer from Steilberg through the agency's TWX terminal on July 27, at 12:33 p.m. No other messages were received on the terminal until 4:27 p.m. that date, when GSA received Wile's telegraphic best and final offer. A telegraphic modification to Wile's offer was received on July 30. Since Wile's best and final offer did not arrive by the required time, GSA advised the firm that it could not be considered for award.

Wile alleges that it submitted its best and final offer to Western Union at 10:06 a.m. on July 27, and its modification at 1:00 p.m. the same date. Wile

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suggests that the contracting officer did not timely receive them because GSA's TWX terminal was either busy or inoperative. In support of this position, Wile has submitted an unsigned mailgram from Western Union stating that "two attempts were made to deliver message by TWX and terminal was busy, tried again and indicated that machine was either busy or out of service." On that basis Wile contends that its offer and modification should be considered by GSA.

An offeror has the responsibility to assure the timely arrival of its offer, see B. E. Wilson Contracting Corp., 55 Comp. Gen. 220 (1975), 75-2 CPD 145, although a late telegraphic bid or proposal may be considered where it can be shown mishandling by the Government in the process of receipt was the paramount reason for the late receipt. Hydro Fitting Mfg. Corp., 54 Comp. Gen. 999 (1975), 75-1 CPD 331.

In a report on the protest GSA points out that neither Wile nor Western Union has presented any meaningful written record of the alleged unsuccessful attempts to deliver the items. GSA further states that although no messages were received at the TWX terminal on July 27 between the receipt of Steilberg's and Wile's offers, it is not unusual for that terminal to be idle for even six or more hours, and that in any event the agency has been unable to uncover any indication that the terminal in fact was inoperative during that period.

The protester has the burden to affirmatively prove its case. Airwest Helicopters, Inc., B-193277, June 7, 1979, 79-1 CPD 402. In our view, the record as set out above does not support the position that the late receipt of Wile's best and final offer was caused by some problem with the Government's equipment rather than by a malfunction in Western Union's own transmitting apparatus. See Surplus Tire Sales, B-187322, December 13, 1976, 76-2 CPD 479 (which included similar speculation by Western Union as to the reasons for its failure to complete the transmission of a message). See also Record Electric, Inc., 56 Comp. Gen. 4 (1976), 76-2 CPD 315. We therefore conclude that Wile has failed to show that Government mishandling in the process of receipt was the paramount cause for the late receipt of its best and final offer.

The protest is denied.

Milton J. Socolar

For The Comptroller General
of the United States