

DECISION

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

FILE: B-221337**DATE:** March 19, 1986**MATTER OF:** Tyler Construction Corporation**DIGEST:**

Protester's late offer that was submitted in response to an agency's second request for best and final offers for design and construction of housing is not a late modification of an otherwise successful proposal where significant deficiencies existed in previous proposal submission and offeror therefore was not already in line for award. Therefore, the agency's decision not to consider the late proposals was proper.

Tyler Construction Corporation protests the rejection of its two alternate best and final proposals as late under request for proposals (RFP) No. DACA65-85-R-0012, issued by the Department of the Army, Corps of Engineers, Norfolk, Virginia, for the design and construction of 439 military family housing units at Aberdeen Proving Grounds, Maryland. The proposals were not considered or evaluated for acceptability because they were hand-delivered 47 minutes after the closing time that was established for receipt of proposals by the Army's second request for best and final offers. Further, since no other acceptable proposals were received, the Army has canceled the solicitation.

We deny the protest.

The RFP was issued on April 11, 1985, and, as amended, requested initial proposals by July 17, 1985. The amended solicitation contained a clause entitled, "Cost Limitations," which imposed a total cost ceiling of \$21,692,000 for the design and construction of the project. The solicitation cautioned offerors that proposals in excess of this amount would not be considered. Further, the solicitation established the following proposal evaluation criteria and their weights: 1) housing unit design (46 percent); 2) site design (27 percent); 3) housing unit engineering (9 percent); 4) site engineering (9 percent); and 5) passive energy system design (9 percent). The RFP stated that

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quality ratings of proposals would be assigned, that a price/quality ratio would be established and that award would be made on the basis of price, technical and other salient factors in the government's best interest.

Five proposals were received by the initial closing date, two of which were alternate proposals submitted by Tyler based on designs from separate architectural firms. After the Army's "National Evaluation Team" (NET) evaluated the proposals, all proposals were deemed to require revisions to correct certain deficiencies. Accordingly, by letter dated August 21, 1985, which also contained a statement of the deficiencies of each proposal, the Army solicited best and final offers with a closing date of September 13, 1985. Four best and final offers were subsequently received, again including the two alternate proposals of the protester. Only the two Tyler proposals offered prices within the solicitation's funding levels. Thus, only these two proposals were initially evaluated. According to the contracting officer, the NET found one of Tyler's proposals to be "non-conforming" because of its failure to meet certain passive solar energy savings requirements, while the other proposal allegedly had deficiencies in site design.

After the evaluation of the Tyler proposals, the chairman of the NET recommended that the government reopen the competition and make one final attempt to procure the housing. Accordingly, the chairman was advised of the identity of the offerors (which had been previously withheld to insure impartiality) and a series of discussions were held with all three offerors that had submitted best and final offers, including two separate meetings with Tyler concerning its two separate proposals. During discussions, the NET provided offerors its evaluation notes regarding remaining deficiencies, apparently including deficiencies concerning excessive prices above the cost limitations of the RFP. After the series of meetings, by letter dated October 22, 1985, the Army requested a second round of best and final offers with a closing time of 2 p.m., November 27, 1985.

In response to the Army's request for a second round of best and final offers, two timely proposals were received from two offerors other than Tyler; Tyler's two alternate proposals were hand-carried late--47 minutes after the closing time of 2 p.m.^{1/} Shortly after receipt of these

^{1/} Tyler explains that the day set for receipt of proposals was the Wednesday before Thanksgiving and that airline traffic was congested, causing delay.

proposals, the Army found that both of the proposals that were timely received were unacceptable because the price proposals again exceeded the solicitation's cost limitation provisions. Further, Tyler's proposals were determined by the Army to be late under the terms of the solicitation. By letter dated December 10, the Army notified Tyler that it was not considering its late proposals and that the solicitation was being canceled.

Tyler contends that its late second best and final offer was a "late modification of an otherwise successful bid." In support of its position, Tyler states that the deficiencies found by the Army in its prior proposal submissions (first best and final offers) were minor and easily correctable during the design stage of the project.

The solicitation contained a clause, entitled "Late Submissions, Modifications and Withdrawals of Bids (APR. 1984)," which permitted consideration of late "bids" only if the bid was sent by registered or certified mail not later than the fifth calendar day before the date specified, or was sent by mail and the late receipt was due solely to government mishandling, or was a late modification of an otherwise successful bid that made its terms more favorable to the government. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.214-7 (1984). However, this clause is applicable to sealed bidding and was mistakenly used into this negotiated procurement. The clause specified by the FAR for inclusion in negotiated procurements provides that any modification to a proposal resulting from the contracting officer's request for best and final offers received after the time and date specified in the request will not be considered, unless it is received before award and the late receipt is due solely to mishandling by the government after receipt at the government installation or unless it is a late modification of an otherwise successful proposal that makes its terms more favorable to the government. See 48 C.F.R. § 52.215-10.

As noted previously, Tyler's sole argument is that its late second best and final offer was a "late modification of an otherwise successful bid." In this connection, both the sealed bidding late bid clause that was inserted into the solicitation and the late proposal clause properly applicable to negotiated solicitations provide that a late submission from an offeror can be considered if it is "otherwise successful." Because the standard is the same under both clauses and our review shows that Tyler's offer was not "otherwise successful," we need not decide the effect of the erroneous insertion of the sealed bidding

clause into this negotiated solicitation. See MET Electrical Testing Co., B-198834, Nov. 28, 1980, 80-2 CPD ¶ 398. We have interpreted the "otherwise successful" language in the negotiated solicitation clause as only permitting the government to accept more favorable terms from an offeror that was already in line for contract award. See Blue Cross of Maryland, Inc., B-194810, Aug. 7, 1979, 79-2 CPD ¶ 93; Windham Power Lifts, Inc., et al., B-214287, Mar. 7, 1984, 84-1 CPD ¶ 278.

Concerning Tyler's first alternate proposal, the solicitation stated:

"Passive Energy Thermal Performance . . . A 10 percent contribution for the total project is required and the minimum evaluation points will be awarded. Proposals below the 10 percent mark will be considered nonconforming."

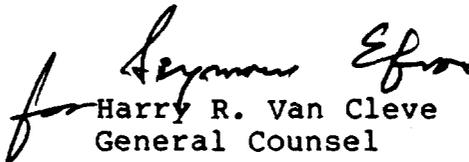
Tyler's calculations in its first best and final offer showed an 18.33-percent passive energy savings. The Army found a mathematical error in this calculation which, if corrected, showed an energy savings of 10.19 percent, based solely on Tyler's own figures. However, the Army also noted on Tyler's proposal that energy savings, if "calculated correctly," would only amount to 6 percent. While Tyler argues that discussions concerning this deficiency lasted only approximately 2 minutes and that the deficiency could be corrected with minor modifications, we are not persuaded that Tyler's first best and final proposal fully met the minimum mandatory passive energy savings requirements. Accordingly, we find it was not an otherwise successful proposal from a firm that was already in line for award.

Concerning the other alternate proposal, the NET found as follows:

"Proposer was directed . . . to site all units within [plus or minus] 20 degrees of south. Proposer complied, however, now the site design is not compatible with the solar orientation. Street patterns were not changed in the resubmission. Reorientation without street pattern change has created awkward or strange-shaped driveways, which are or can cause hazardous conditions for vehicles. To correct these conditions, a major site redesign is required."

The protester argues that this deficiency was minor in relation to the total scope of work. The record, however, contains scant information as to what these changes would entail, although it is clear that the agency considers the deficiency to be major. Based on this record, we therefore, are unable to determine how extensive the required changes were or what impact these design changes would or could have on other design requirements. The protester has the burden of affirmatively proving its case, and we will not consider that burden met when the only evidence is conflicting statements by the protester and the agency. Alchemy, Inc., B-207954, Jan. 10, 1983, 83-1 CPD ¶ 18. Accordingly, we find that the protester has failed to establish that its first best and final offer, without significant design changes, was already in line for award. The late modification was thus properly not considered.

The protest is denied.


for Harry R. Van Cleve
General Counsel