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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tyger Construction Co., Inc. and S&Q Corporation,
a joint venture
File: B-224400
Date: September 4, 1986

DIGEST

National Aeronautics and Space Administration (NASA) properly rejected a late proposal, despite NASA's failure to give required public notice that it repealed its regulation permitting the consideration of late proposals in the government's interest, where the Federal Acquisition Regulation was amended to reflect the repeal and the solicitation contained the standard late clause which did not permit the consideration of late proposals in the government's interest.

DECISION

Tyger Construction Company, Inc. and S&Q Corporation, a joint venture, protests the rejection of its proposal as late under request for proposals (RFP) No. 1-20-5680.0011 issued by the National Aeronautics and Space Administration (NASA), Langley Research Center, Hampton, Virginia. The RFP is for the modification of a wind tunnel for testing hypersonic propulsion engines. The protester's representatives arrived at the Air Force Base where the contracting activity is located within 2 minutes before the scheduled closing date for the receipt of proposals--4:30 p.m. on May 23, 1986. By the time they were cleared for entrance and arrived at the room designated in the RFP for submission of proposals, the time set for submitting proposals had transpired; the time stamp evidencing receipt by the activity was 4:35 p.m. The protester argues that NASA's regulations permit the consideration of late proposals where such action is in the best interest of the government and contends that consideration of its proposal is in the government's interest.

The protest is denied.

The NASA regulations relied upon by the protester are NASA Federal Acquisition Regulation Supplement (NASA FAR Supp.), 48 C.F.R. §§ 1815.412 and 1852.215-10 (1985). The first

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section expressly provides that late proposals may be considered if there is a probability of a significant reduction in cost to the government or if there are significant technical improvements, as compared with proposals previously received. The second section sets forth a clause for inclusion in an RFP reserving the government's right to consider late proposals in the government's best interest.

The FAR, applicable to federal procuring agencies including NASA, originally provided that except as authorized for NASA in its regulations, a late proposal could be considered only where: (1) it was sent by registered or certified mail not later than the fifth calendar day before the closing date for receipt of proposals; (2) it was sent by mail (a telegram if authorized) and the late receipt was due solely to mishandling by the government after receipt at the government installation, or; (3) it was the only proposal received. FAR, 48 C.F.R. §§ 15.412(c) and 52.215-10(a) (1984). Thus, except as authorized by NASA in its regulations, there was no exception for considering late proposals in the government's best interest.

NASA subsequently decided it would comply with the generally applicable late proposal policy expressed in the FAR, and stated as much in a final rule published on January 7, 1985. 50 Fed. Reg. 784. The explanatory information preceding the rule expressly stated that in the future NASA officials no longer would be authorized to consider a late proposal deemed advantageous to the government, and that FAR, 48 C.F.R. §§ 15.412 and 52.215-10 (as well as similar provisions), were deleted in their entirety. The text of the rule, however, failed to reflect NASA's express intention and did not repeal the NASA FAR Supp., 48 C.F.R. §§ 15.412 and 52.215-10.

Since no procurement policy, regulation or procedure that has a significant effect on offerors may take effect absent notice to the public through the Federal Register, see 41 U.S.C. § 4186 (Supp. III, 1985), the protester argues that the cited NASA FAR Supp. provisions were not repealed and that NASA must give these provisions effect by considering the protester's late proposal.

The protester's argument lacks merit for several reasons. First, the NASA FAR Supp. provisions only may have effect as authorized by the FAR. See FAR, 48 C.F.R. §§ 1.301 and 1.302 (1985). While the FAR originally exempted NASA from application of the general rules regarding late proposals,

such authority was repealed by Federal Acquisition Circular No. 84-7, published in 50 Fed. Reg. 2.3606 (June 1985), reflecting NASA's decision to conform to the general rule. The change to the FAR was made with proper notice to the public. The current FAR, applicable to this procurement, provides that all late proposals not meeting the stated exceptions must be rejected, and the exception for NASA in its regulations is deleted. FAR, 48 C.F.R. § 15.412 (1985).

Further, the subject RFP contained the standard "Late Submissions, Modifications, and Withdrawals of Proposals" clause prescribed by FAR, 48 C.F.R. § 15.407(c)(6) and set forth in FAR, 48 C.F.R. § 52.215-10, which contains no exception permitting the consideration of late proposals in the government's best interest. Since the protester's proposal did not meet any of the stated circumstances under which late proposals could be considered, NASA was legally required to reject the protester's proposal as late under the established ground rules for the procurement. See SCM Corp., B-201835, June 3, 1981, 81-1 C.P.D. ¶ 442.

The protester argues that the NASA FAR Supp. provisions should be incorporated into the RFP by operation of law under the "Christian Doctrine." See G.L. Christian & Assoc. v. United States, 312 F.2d 418 (Ct. Cl. 1963). Even if those provisions were valid, the Christian Doctrine calls for the incorporation of certain mandatory contract provisions into otherwise properly awarded contracts and cannot be invoked to incorporate clauses into solicitations before award. Rainbow Roofing, Inc., 63 Comp. Gen. 452 (1984), 84-1 C.P.D. ¶ 676.

The protester also makes some suggestion that wrongful government action caused its proposal to be late. The protester alleges that no one was in the room designated for receipt of proposals when its representatives arrived with the proposals. The contracting agency explains that an official was in the designated office until after the time set for submitting proposals (4:30 p.m.), and that the protester's representatives therefore arrived after that time. The fact that the protester, by its own admission arrived at the base less than 2 minutes before the time set for receipt of proposals supports the agency's explanation and indicates that the paramount cause of lateness was the timing of the protester's representatives' arrival at the base. See Hallcrest Sys., Inc., B-215328, Sept. 24, 1984, 84-2 C.P.D. ¶ 334. An offeror has the responsibility to assure the timely arrival of its hand-carried proposal and must bear the responsibility for lateness except where wrongful government

action is shown to be the paramount cause of delay.
Discovery International, Inc., B-219664.2, Nov. 19, 1985,
85-2 C.P.D. ¶ 565.

Regarding the protester's contention that its proposal would be advantageous to the government, we have held that a late proposal that does not meet any of the exceptions listed in the RFP for consideration of late proposals must be rejected since the maintenance of confidence in the integrity of the government procurement system outweighs the possible advantage to be gained from considering a late proposal in a particular procurement. Discovery International, Inc., B-219664.2, supra.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel