

Burkard



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Wilsyk Alaska Inc.

File: B-238210.2

Date: September 14, 1990

James Williams, Jr. for the protester.
Herbert F. Kelly, Jr., Esq., Department of the Army, for the agency.
Richard P. Burkard, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A late proposal modification resulting from an agency's request for best and final offers may be accepted only if the late receipt is due solely to government mishandling or if the late modification makes the terms of an otherwise successful proposal more favorable to the government. The term "government" as used in the late proposal clause means the contracting activity, not the Postal Service.

DECISION

Wilsyk Alaska Inc. protests the rejection of its best and final offer (BAFO) as late, under request for proposals (RFP) No. DABT10-89-R-0044, issued by the Department of the Army for food services.

We deny the protest.

The RFP was issued on September 15, 1989, and was amended eight times. Proposals were received on January 5, 1990, and discussions were thereafter conducted. Amendment No. 7, issued May 10, 1990, incorporated revisions to the RFP and extended the date for receipt of revised proposals until May 22. Wilsyk submitted a revised proposal (sent by certified mail the fifth calendar day before the revised closing date) which was received on May 30. Despite the late receipt of the revised proposal, the agency accepted

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it under Federal Acquisition Regulation (FAR) § 52.215-10(b) (FAC 84-53), which allows for consideration of late modifications of offers, other than BAFOs, which are mailed by certified mail not later than the fifth calendar day before the closing date.

Following additional discussions, the agency requested BAFOs. The BAFO request contained in amendment No. 8 to the RFP, states that offers must be received by July 10 and are subject to FAR § 52.215-10 (FAC 84-53). The record shows that the protester mailed its BAFO on July 5 but that it was not received until July 18. The agency determined that it could not accept the late BAFO under FAR § 52.215-10 (FAC 84-53) since the proposal was in response to a request for BAFOs. We find that the agency properly determined that it could not open the late BAFO even though it had been mailed 5 days prior to the due date.

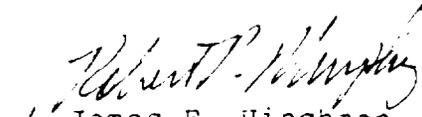
Except for a late modification to an "otherwise successful proposal," a late proposal modification resulting from the contracting officer's request for a BAFO received after the time and date specified in the request may not be considered unless received before award, and the late receipt is due solely to mishandling by the government after receipt at the government installation. FAR § 52.215-10(c) (FAC 84-53); Environmental Tectonics Corp., B-225475, Feb. 17, 1987, 87-1 CPD ¶ 175. Unlike the protester's late submission in response to amendment No. 7, where the agency accepted its late revised proposal, the agency here is specifically prohibited from accepting late BAFOs except under the circumstance described above. See 52.215-10(b) and (c) (FAC 84-53).

We find no evidence of government mishandling. The record shows that the Postal Service did not deliver the BAFO until July 18 as evidenced by the certified mail return receipt. The protester argues that the delayed delivery was due to government mishandling because the Postal Service is an agency of the government. The word "government" in the late proposal clause, however, refers to the procuring agency, not the Postal Service. Thus, the proposal must be delivered to the procuring agency installation before the mishandling contemplated by the clause can occur. See Machine Research Co., B-230188, Mar. 2, 1988, 88-1 CPD ¶ 224.

Wilsyk also asserts that its late BAFO should be accepted under FAR § 52.215-10(g) (FAC 84-53), which provides for the exception allowing consideration of a late modification when the modification makes the terms of an otherwise successful proposal more favorable to the government. We

find this exception to be inapplicable. The term "otherwise successful" restricts this exception to permit the government's acceptance of a late modification offering more favorable terms only from the offeror already in line for the contract award. Environmental Tectonics Corp., B-225474, supra. Here, the agency had requested BAFOs, and clearly no firm was yet in line for award.^{1/}

The protest is denied.


James F. Hinchman
General Counsel

^{1/} We also note that Wilsyk alleges that it made substantial price reductions in its BAFO and does not allege that it would be in line for award based on its previously revised proposal.