



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Radar Devices, Inc.

File: B-249118

Date: October 27, 1992

Lawrence F. Anderson, for the protester.
Alfred J. Verdi, Esq., for Magnavox Electronic Systems Company, an interested party.
Richard A. Crouch, Esq. and T. M. Callaghan, Esq., Department of the Army for the agency.
Ronald L. Oleson, Esq., and Charles F. Roney, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Late proposals transmitted by facsimile may be considered only if it is determined that late receipt was due solely to mishandling by the agency after timely receipt of entire proposal at the agency installation. The offeror bears the risk of any deficiencies in transmitting or receipt of facsimile proposals.
2. Where a solicitation provision clearly puts offerors on notice not to rely on the oral representations of agency personnel, an offeror must suffer the consequences of its reliance upon such advice.
3. Protest of alleged improprieties in solicitations which are apparent prior to the date set for initial proposal opening must be filed prior to the time set for receipt of initial proposals.

DECISION

Radar Services, Inc. (RDI), protests any award under the request for proposals (RFP) No. DAAC09-92-R-0110 issued by the Department of the Army, Army Materiel Command, Sacramento Army Depot, for Armed Forces Satellite Transmittal Radio Service Shipboard Receiving Systems. RDI protests on the basis that the government prevented RDI from submitting its proposal on a timely basis, that RDI was given misleading information regarding the acceptability of facsimile-transmitted proposals, and that the agency refused to respond to RDI's questions seeking clarification of the solicitation.

We deny the protest.

The Sacramento Army Depot (SAAD), in support of the Navy Broadcast Service (NBS), issued the RFP on April 3, 1992, with a deadline for submitting proposals of May 5, 1992. As a result of inquiries from prospective offerors, five amendments were issued, the last amendment being issued on May 19, setting a final deadline for submitting proposals of 1:00 p.m. on May 22. The solicitation authorized facsimile transmission of proposals.

RDI sought additional clarifying information via a telephone conversation with SAAD on May 19. RDI was advised that it should submit via facsimile transmission any questions to SAAD, but that further extensions were not anticipated. RDI submitted additional questions to SAAD on May 20, which forwarded the questions to NBS for its evaluation. NBS determined that the questions were "non-issue" and that further amendments were not required.

At approximately 10:00 a.m. on May 22, RDI telephoned SAAD to advise that RDI had completed its technical proposal, but that the cost proposal was incomplete. RDI inquired about transmitting the technical proposal via facsimile. A SAAD employee mistakenly advised RDI that a facsimile transmitted proposal was not acceptable. Subsequently, at approximately 12:10 p.m., RDI again telephoned SAAD to advise that RDI had chartered an airplane and would hand-deliver the proposal and that RDI would transmit via facsimile a cover sheet.

SAAD records show that a facsimile transmission was initiated from RDI at 12:25 p.m. (the time notation printed on each page by RDI's facsimile machine states a time of 12:24 p.m.), and that the proposal was being transmitted at an approximate rate of two pages per minute. There were two breaks in transmission one at 12:39, lasting for about 5 minutes, and a second beginning at 12:46, which lasted about six minutes. By the 1:00 p.m. deadline for receipt of proposals, 51 pages, out of a total of 159 pages, of RDI's proposal had been received. The RDI transmission continued until 1:27 p.m., totaling 92 pages. Subsequently, at approximately 1:30 p.m., RDI's hand-delivered copy arrived.

RDI disputes the time that the transmission was initiated, alleging that RDI actually began transmitting at 11:24 a.m. and that there would have been sufficient time to complete the transmission had SAAD not continuously interrupted the transmission. However, for the reasons that follow, we

determine that the actual time that the transmission was initiated is not relevant.¹

It is the responsibility of the offeror to deliver its proposal to the proper place at the proper time, and late delivery generally requires rejection of the proposal. Carter Machinery Company, Inc., B-245008, August 7, 1991, 91-2 CPD ¶ 143. While there are exceptions to the "late is late" rule in certain situations (for example, if improper government action was the paramount cause of the late receipt of a hand-carried proposal), the regulations provide a strict standard for facsimile transactions, imposing upon the offeror the risk of any deficiencies in transmitting or receipt of facsimile offers, including the failure of the agency to receive a complete offer, the availability of government facsimile equipment at the time of the offeror's transmission, and any delay in transmission or receipt of the offer. See Defense Federal Acquisition Regulation Supplement (DFARS) § 252.211-7008, Facsimile Submission of Offers, which was incorporated by reference in the solicitation.

Likewise, the DFARS clause pertaining to late submission of proposals, included in the solicitation, provides that late proposals may be considered only if it is determined that late receipt was due solely to mishandling by the government after receipt at the Government installation. See DFARS § 252.211-7018(a)(2). In this case, agency records clearly demonstrate that a complete proposal was not received at the designated place prior to the time set for opening. Thus, SAAD is not required to consider RDI's proposal. See Phoenix Research Group, Inc., B-240840, December 21, 1990, 90-2 CPD ¶ 514. In Phoenix, as in this case, the contracting office had received only a portion of a facsimile-transmitted offer by the deadline. We held that the agency was not required to consider that portion of the proposal which was received prior to the deadline. In any event, we note that in this case, no portion of RDI's cost proposal had been received by the 1:00 p.m. deadline.

RDI also argues that the erroneous advice of SAAD personnel prevented it from making timely delivery of its proposal. RDI states that a representative of the contracting office

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1 However, we note that RDI argues that a one-hour discrepancy in the time date stamped on the proposal was caused by RDI's failure to adjust its facsimile machine's internal time clock forward one hour for the recent time change to Pacific Daylight Savings Time. If RDI failed to adjust the clock forward, as it alleges, then the actual transmission time would have been 1:24 p.m., not 11:24 a.m. as RDI argues.

advised RDI three hours prior to the time set for receipt of proposals that facsimile-transmitted proposals were not acceptable. SAAD argues that RDI had the contracting office's facsimile telephone number and that there is no credible evidence that SAAD prevented RDI from transmitting its proposal.

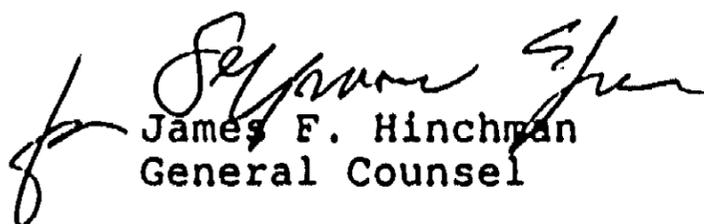
We agree with SAAD. The solicitation specifically provided that proposals could be submitted by facsimile, and RDI in fact did attempt to submit a timely proposal via facsimile despite SAAD's erroneous advice. In any event, even if RDI's failure to submit a timely proposal was due to SAAD's erroneous advice, we note that the solicitation warned offerors not to rely on the oral representations of agency personnel. See DFARS § 252.215-0014, Explanation to Prospective Offerors, which was incorporated by reference in the solicitation.

Where a solicitation provision clearly puts offerors on notice not to rely on the oral representations of agency personnel, an offeror must suffer the consequences of its reliance upon such advice. Systemetrics, Inc., B-220444, February 14, 1986, 86-1 CPD ¶ 163. We think this is particularly so where the erroneous advice contradicts a provision of the solicitation. Moreover, we note that an offeror is more likely to be harmed by erroneous oral advice when he waits until the last moment to submit his proposal.

Finally, RDI alleges that SAAD improperly declined to respond to questions seeking clarification of the solicitation and its amendments. On May 20, two days prior to the deadline for receipt of proposals, RDI raised "specific technical issues" alleging, among other things, that SAAD had failed to adequately respond to questions previously submitted by other prospective offerors. RDI was advised by SAAD that no further extensions were contemplated and that RDI should plan to submit its proposal by the designated time.

Alleged improprieties in solicitations which are apparent prior to the date set for initial proposal opening must be filed prior to the time set for receipt of initial proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1992); ERI Environmental Services, Inc., B-246169, February 18, 1992, 92-1 CPD ¶ 196.

Accordingly, the protest is denied.


James F. Hinchman
General Counsel