



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Data General Corporation

File: B-252239

Date: June 14, 1993

Richard J. Webber, Esq., and Vangel L. Perroy, Esq., Arent, Fox, Kintner, Plotkin & Kahn, for the protester.
Maj. Bobby G. Henry, Jr., Department of the Army, for the agency.

Robert C. Arsenoff, Esq., and Linda C. Glass, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against acceptance of a late bid is denied where record shows that the bid was received at the agency prior to bid opening, remained in the exclusive control of the government and as the result of government mishandling was untimely delivered to the contracting activity.

2. Protest against awardee's alleged failure to satisfy definitive responsibility criteria is dismissed where requirements in question concerned performance obligations under the contract and, thus, were the subject of the contracting officer's general responsibility determination, a matter not for review absent a showing of fraud or bad faith.

DECISION

Data General Corporation protests the award of a contract to Telos Field Engineering under invitation for bids (IFB) No. DAHC35-93-B-0002, issued by the Directorate of Contracting (DOC), Fort Belvoir, Virginia, for the maintenance of government-owned computer equipment manufactured by the protester. The protester contends that Telos' late bid should not have been considered and that the awardee failed to meet definitive responsibility criteria relating to training and experience in maintaining Data General equipment.

We deny the protest in part and dismiss it in part.

The IFB was issued on October 27, 1992, with bid opening scheduled for 1:30 p.m. on December 2. Bidders were instructed to address their bids to DOC, Contracting

Division, Building S-742, Fort Belvoir, VA 22060-5075, and to indicate on the envelope the time specified for receipt, the solicitation number and the name and address of the bidder. The IFB contained a standard late bid clause, see Federal Acquisition Regulation (FAR) § 52.214-7, which provided in pertinent part, that:

"Any [mailed] bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless . . . it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation. . . ."

At the bid opening on December 2, one bid was received from Data General in the amount of \$37,198.08. Shortly after the time set for bid opening, the Adjutant General's Post Locator's office delivered an envelope to DOC containing Telos' bid, dated November 24, in the amount of \$24,705. Although the bid wrapper was eventually lost, the contracting officer determined that the late receipt of Telos' bid was due to government mishandling on the basis of an explanation provided by the Fort Belvoir Installation Postal Officer (IPO).

According to the IPO, his office received a certified envelope from the United States Postal Service (USPS) on November 30 from Telos. At that time, he logged the receipt of the envelope on a PS Form 3849 which is used both by USPS and Army postal officials to record receipt and delivery of "accountable mail" which includes certified mail. He also states: that the envelope was placed in the Accountable Mail Room until delivery could be made; that DOC was not verbally notified of the presence of the envelope because, in accordance with Fort Belvoir policy, verbal notification is only made for mail marked for "overnight delivery"; that all accountable mail is normally delivered the same day it is received but that the Telos' envelope was not delivered until December 2 because the driver who takes the daily mail did not have an appropriate security clearance until that date. The envelope was delivered to DOC at 2:40 p.m. on December 2, at which time a DOC official signed for its receipt on the reverse side of the PS Form 3849. In addition to the statements from the IPO, the Army has provided us with a copy of a PS Form 3849 indicating that a piece of certified mail addressed to "DOC" was received on November 30; the reverse side of that form contains the signature of a DOC employee and is dated December 2.

It is Data General's position that this evidence is insufficient to conclude that government mishandling was the "sole" cause of the late receipt of Telos' bid at DOC. In

this regard, the protester argues that the absence of the bid wrapper, and the fact that the PS Form 3849 contains no indication that the mail to which it refers was actually sent by Telos, compels a conclusion that Telos failed to appropriately address its bid. Thus, the protester concludes that Telos significantly contributed to the late receipt of its bid by DOC and argues that, therefore, the bid should not have been considered.

Data General's position rests on a literal interpretation of the word "solely" in FAR § 52.214-7(a), which provides that late bids may not be considered unless their late receipt is "due solely to mishandling by the Government . . . after receipt at the Government installation" (emphasis supplied); however, such a strict and literal application of the late bid rules should not be used to reject a bid where to do so would contravene the intent and spirit of the mandate for full and open competition. See Hydro Fitting Mfg. Corp., 54 Comp. Gen. 999 (1975), 75-1 CPD ¶ 331; Sun Int'l, B-208146, Jan. 24, 1983, 83-1 CPD ¶ 78; St. Louis Tuckpointing and Painting Co., Inc., B-212351.2, Nov. 18, 1983, 83-2 CPD ¶ 588; Howard Mgmt. Group, B-221889, July 3, 1986, 86-2 CPD ¶ 28; Select, Inc., B-245820.2, Jan. 3, 1992, 92-1 CPD ¶ 22. Thus, the government should not be denied the opportunity to consider an otherwise advantageous late bid for award if government mishandling was the "paramount" cause for its late receipt at the precise place designated for bid opening and if consideration of the bid would not compromise the integrity of the procurement process because the bid was in the sole custody of the government, and therefore unalterable by the bidder, from its receipt at the installation until its actual opening. See John J. Kirlin, Inc., B-250244, Dec. 15, 1992, 92-2 CPD ¶ 419. Finally, in making an assessment regarding the acceptability of a late bid, we will consider whether a preponderance of all relevant evidence, including statements of cognizant government personnel, supports a conclusion that government mishandling has occurred. See M.J.S., Inc., B-244410, Oct. 17, 1991, 91-2 CPD ¶ 344.

The evidence in this case is sufficient to permit the acceptance of Telos' bid. The PS Form 3849 and the statement of the IPO show that the installation postal authorities received an envelope from Telos Field Engineering addressed to DOC on November 30--two days before bid opening. The sworn statement of the cognizant IPO states that this form was attached to the Telos envelope and both were delivered to DOC on December 2 at 2:40 p.m. The reverse side of the form is signed by a DOC official and dated December 2, and the contracting officer states that he received Telos' bid at that time. Further, the statement of the IPO indicates that under normal operating procedures--which were not followed due to the absence of a driver with

a security clearance--the certified mail would have been delivered the day it was received.

Thus, the record shows that Telos' bid was received by the agency in sufficient time for it to have been timely delivered to the bid opening office if established procedures had been followed. Even if Data General were correct in its surmise that Telos had somehow misaddressed its bid, government mishandling was the paramount cause of the late receipt of the bid to the contracting activity because the certified envelope intended for DOC should have been delivered to that office prior to bid opening. See 50 Comp. Gen. 71 (1970); B-162390, Nov. 20, 1967. Further, since it appears from a preponderance of the evidence that Telos' bid was exclusively in the control of the government from November 30 until it was opened, we have no basis to object to the Army's decision to consider it. John J. Kirlin, Inc., supra. Accordingly, we deny this aspect of the protest.

Data General also maintains that the responsibility investigation performed by the Army was insufficient to permit a reasoned determination that Telos met the following requirements contained in the IFB statement of work, which the protester characterizes as "definitive responsibility criteria":

"All maintenance personnel performing under the resulting contract must have a minimum of one year experience in maintaining equipment and must have training in maintaining the equipment in accordance with [Data General] standards."

It is the protester's contention that the awardee does not meet these qualifications with respect to the particular equipment being maintained at Fort Belvoir and that the check of Telos' references--which did not include experience in maintaining the same equipment--could not have established that Telos met the criteria.

A definitive responsibility criterion is defined as a specific and objective standard, i.e., qualitative and quantitative, that is established by a procuring agency in a solicitation to measure a bidder's ability to perform a contract. W. H. Smith Hardware Co., B-228576, Feb. 4, 1988, 88-1 CPD ¶ 110. Such criteria do not include a bidder's performance obligations under the contract, as set forth in the specifications. Id. The portion of the IFB relied upon by Data General relates to requirements applicable to personnel "performing under the contract." The experience provision is, therefore, a performance requirement and does not establish an experience standard with which the bidder, as a condition of award, must demonstrate compliance. See

Power Testing, Inc., B-197190, July 28, 1980, 80-2 CPD ¶ 72. The ability to satisfy performance requirements is a subject for the contracting officer's general responsibility determination, which we will not review absent a showing of fraud or bad faith--circumstances which are not present here. King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel