

DECISION



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

52755
97222

FILE: B-182693

DATE: June 6, 1975

MATTER OF: Systems, Science and Software

DIGEST:

1. Agency's determination that unsuccessful offeror's proposal was not low is supported by record where lower price offered in telegraphic best and final offer clearly referred to alternate items not awarded rather than to item awarded. Moreover, unsuccessful offeror's price would not be low in any event as reasonable interpretation of offer indicates that price of one of two items awarded was not included in the other as contended.
2. In absence of showing of prejudice, prompt notification to offeror that modification of offer has been received late is matter of form rather than material factor affecting validity of award.

The present matter concerns a protest by Systems, Science and Software (SSS) against the award to Maxwell Laboratories, Inc. (MLI), of a contract for an electron-beam sustained CO₂ laser system under request for proposals (RFP) No. N00173-74-R-C088, issued by the Naval Research Laboratory (NRL), Washington, D.C.

The RFP requested proposals for one electron-beam sustained CO₂ laser system consisting of either the Prime Offer, Item 0001, or one of five alternate offers, Items 0002 through 0006. In addition, offers were requested for contractor acceptance testing services, Item 0007, and technical data, test procedures and instruction manuals, Item 0008. The RFP was issued August 12, 1974, to 13 potential sources, but only SSS and MLI responded by the closing date, September 16, 1974.

SSS offered the following prices:

ITEM 0001 PRIME OFFER	\$117,051
ITEM 0002 ALTERNATE OFFER "A"	111,051
ITEM 0003 ALTERNATE OFFER "B"	106,051
ITEM 0004 ALTERNATE OFFER "C"	103,051

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ITEM 0005 ALTERNATE OFFER "D"	\$108,536
ITEM 0006 ALTERNATE OFFER "E"	103,535
ITEM 0007 ACCEPTANCE TEST	4,856
ITEM 0008 TECHNICAL DATA	NSP

MLI offered the following prices:

ITEM 0001 PRIME OFFER	\$84,799
ITEM 0002 ALTERNATE OFFER "A"	82,799
ITEM 0003 ALTERNATE OFFER "B"	82,799
ITEM 0004 ALTERNATE OFFER "C"	79,299
ITEM 0005 ALTERNATE OFFER "D"	82,999
ITEM 0006 ALTERNATE OFFER "E"	82,999
ITEM 0007 ACCEPTANCE TEST	4,925
ITEM 0008 TECHNICAL DATA	1,950

Since both offers were found technically acceptable, it was determined that discussions were unnecessary. On October 23, 1974, NRL requested best and final offers from both SSS and MLI. The request for best and final offers clearly stated the cut-off date as October 29, 1974, and emphasized the consequences of a late offer as follows:

"ACCORDINGLY, 29 OCTOBER 1974 (TUESDAY) IS SET AS THE CUT-OFF DATE FOR CLOSING NEGOTIATIONS AND YOU ARE REQUESTED TO SUBMIT YOUR (BEST AND FINAL) PRICE OFFER TO THIS OFFICE BY THE ABOVE CUT-OFF DATE. YOU ARE CAUTIONED THAT ANY REVISION RECEIVED AFTER THIS DATE WILL BE TREATED AS A LATE PROPOSAL IN ACCORDANCE WITH THE PROVISIONS OF THE 'LATE PROPOSAL, MODIFICATIONS OF PROPOSALS AND WITHDRAWALS OF PROPOSALS' CLAUSE (SECTION C OF THE RFP). AFTER THAT DATE NO INFORMATION OTHER THAN NOTICE OF UNSUCCESSFUL OFFER, IF APPLICABLE, (AS PRESCRIBED IN ASPR 3-508) WILL BE FURNISHED TO ANY OFFEROR UNTIL AWARD HAS BEEN MADE."

Since MLI did not respond, its initial offer was considered its best and final. SSS replied on October 29, 1974, by restating its original offer and by proposing two alternate offers as follows:

"BEST AND FINAL OFFER FOR SYSTEMS PER REFERENCE 1 SPECIFICATIONS:

ITEM 0001 PRIME OFFER	\$117,051
ITEM 0002 ALTERNATE OFFER A	111,051
ITEM 0003 ALTERNATE OFFER B	106,051
ITEM 0004 ALTERNATE OFFER C	103,051
ITEM 0005 ALTERNATE OFFER D	108,536
ITEM 0006 ALTERNATE OFFER E	103,535
ITEM 0007	4,856
ITEM 0008	NSP

ALTERNATE OFFER 1. SYSTEM BASED ON EXISTING SSS HARDWARE. SPECIFICATIONS SAME AS ALTERNATE OFFER B PER REFERENCES 1 AND 3. \$85,000

ALTERNATE OFFER 2. SAME AS ALTERNATE OFFER 1, but 15 CM X 15 CM DISCHARGE CHAMBER APERTURE. \$91,000."

On the same day, Mr. Horan of SSS telephoned the contracting officer at NRL to ask various questions concerning the solicitation. Although SSS and NRL differ on their interpretations of the content of the telephone conversation, it is undisputed that Mr. Horan was told that Item 0001, the Prime Offer, had been chosen for award. On November 1, 1974, NRL received a "clarification" from SSS in which SSS stated in pertinent part:

"SSS UNDERSTANDS THAT NRL HAS CHOSEN THE PRIME OFFER, ITEM 1 OF THE SOLICITATION, AS THE SYSTEM TO BE PROCURED.

"SSS IN OUR TWX 10/29/74, REFERENCE 4 ABOVE, INTENDED TO OFFER THE 'PRIME OFFER' SYSTEM FOR A BEST AND FINAL PRICE OF \$91,000.00. THIS TWX IS INTENDED TO CLARIFY ANY AMBIGUITY AND RESTATE THAT OFFER TO SUPPLY THE SYSTEM SPECIFIED AS ITEM 1 FOR \$91,000.00."

Nevertheless, the agency concluded that the foregoing was a late modification and SSS's price was \$121,907 (Item 0001 plus Item 0007). Award of items 1, 7 and 8 was made to MLI on November 7, 1974, at a total price of \$91,674. On November 15, 1974, in accordance with 4 C.F.R. § 20 (1974), SSS formally protested the award to MLI.

SSS contends that its offer was the lowest technically acceptable offer since (1) its best and final offer of \$91,000 on Item 0001, the Prime Offer, was timely as the November telegram was confirmation concluding the October 29 telephonic negotiations, and (2) in accordance with the RFP, the price for Item 0001, as modified by

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the November telegram, included the price of Items 0007 and 0008. SSS further contends that NRL has violated Armed Services Procurement Regulation (ASPR) § 2-303.2 (1974 ed.) by not promptly notifying SSS that its modification was late.

The telegram from SSS received by NRL on October 29, 1974, restating its original offer and proposing two alternate offers was timely. The price quoted for Item 0001 was \$117,051, which is significantly higher than the price quoted by MLI for the same item. Furthermore, we agree with NRL's position that Alternate Offer 1 and Alternate Offer 2 each pertain to Item 0003, as is clearly stated in the telegram quoted above. Since NRL determined that award would be for Item 0001, the prices quoted for Item 0003 were properly disregarded in determining the low offeror.

The telegram received on November 1, 1974, was the first formal offer by SSS in which Item 0001 was priced at \$91,000. This offer was untimely since October 29, 1974, was the last day on which offers could be submitted. The request for best and final offers, as quoted above, explained that a late revision would be treated in accordance with Section C of the RFP. That section provides that a modification resulting from the contracting officer's request for "best and final" offer received after the time and date specified will 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. Since the late receipt was not due to Government mishandling, the telegram was not for consideration.

SSS further contends that negotiations were not closed on October 29, 1974, since the contracting officer had revived negotiations by participating in the telephone conversation with its representative on that date, and that its telegram was merely a confirmation of the negotiations. SSS cites ASPR § 3-506(d) (1974 ed.), quoted below, to substantiate that contention:

"(d) The normal revisions of proposals by offerors selected for discussion during the usual conduct of negotiations with such offerors are not to be considered as late proposals or late modifications to proposals."

This regulation applies only to the discussions conducted "during the usual conduct of negotiations". It is the Navy's position that negotiations between NRL and potential offerors

were officially closed on October 29, 1974, and that the telephone conversation of that date did not have the effect of reopening negotiations since the discussion essentially involved the response to certain inquiries by SSS and because the protester's best and final offer was clear there was no necessity to discuss it.

We recognize that there is strong disagreement between the protester and the Navy with respect to the content and import of the October 29th conversation. We do not believe, however, that it is necessary to attempt to resolve this dispute as we agree with the Navy's position that SSS's offer is not low even if the November 1st telegram is considered. The Navy notes that the telegram stated that in its October 29th telegram that SSS "intended to offer the 'Prime Offer' system for a best and final price of \$91,000.00" and that it offered to "supply the system specified as item 1 for \$91,000.00." The Navy points out that award was made for Items 0001, 0007, and 0008, which totaled \$91,674, and that SSS's offer for the same items was \$95,856 (0001-\$91,000 + 0007 - 4,856 + 0008 - "NSP").

It is the protester's position that the prices for Items 0007 and 0008 were included in the prices for Items 0001 through 0006 because the technical specification required this and, therefore, the price for Item 0007 stated in its proposal was improperly added to its offer by \$91,000.

While acceptance testing (Item 0007) and technical data (Item 0008) are required under the specifications, it is also clear that the RFP called for separate pricing of those items. Therefore, inclusion of its price for those items in other priced items would need to be clearly stated. Furthermore, we believe that SSS's use of the letters "NSP" which is commonly understood to mean "Not Separately Priced" for Item 0008, is inconsistent with its argument that the price for Item 0007 had been included in other items since the use of "NSP" would have been appropriate to denote this method of pricing.

Since "NSP" was not used in connection with Item 0007 and it was for Item 0008, and a price was stated for Item 0007, we believe the price of SSS's offer must reasonably be evaluated on the basis of the prices stated for both Items 0007 and 0008 and, therefore, its offer would not be low in any event.

SSS also contends that NRL has failed to comply with ASPR § 2-303.2 (1974 ed.) by not promptly notifying SSS that its modification was late. The cited regulation pertains to notification

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to late bidders involved in advertised procurements. Since this case does not involve an advertised procurement ASPR § 2-303.2 does not apply. However, ASPR § 3-506(c) (1974 ed.), requiring prompt notification to a late offeror that its offer has been received late is applicable. Since SSS was notified on November 8, 1974, that its November 1, 1974, message was considered a late modification, ASPR § 3-506(c) has been substantially complied with. In any event, we have held that if an offeror is not prejudiced by its failure to receive the notice contemplated by the regulation, the deficiency is regarded as a matter of form rather than a material factor affecting the validity of the award. B-176424, September 26, 1972.

In view of the foregoing, the protest is denied.


Deputy Comptroller General
of the United States