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R. Heitzman

DECISION



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

FILE: B-192261

DATE: September 18, 1978

MATTER OF: Robert Yarnall Richie Productions

DIGEST:

1. Protester's late proposal was properly rejected by agency notwithstanding that protester was advised by Postal Service one day prior to date set for receipt of proposals that use of express mail would allow delivery at agency prior to deadline, in absence of showing that proposal was mishandled by agency after its receipt.
2. Failure to solicit an offeror in time for him to submit a timely offer does not, absent showing of deliberate intent to exclude, afford sufficient basis to question otherwise proper award.
3. Award of contract while protest was pending is not improper where determination was made at higher level than contracting officer in accordance with applicable regulations.

Robert Yarnall Richie Productions (Richie), protests the rejection of its proposal by the Department of the Army, Office of the Chief of Engineers, under Request for Proposal (RFP) No. DACW 31-78-R-0008. The basis of rejection was that the proposal was received by the contracting activity after the date set for the opening of proposals and that none of the circumstances permitting consideration of late proposals were present as shown in paragraph 20 of the RFP.

The date and time designated for receipt of proposals was established as 4:00 P.M. on June 8, 1978. The Richie proposal was sent at 11:00 A.M., June 7, 1978, by United States Postal Service Express Mail Service, which guaranteed delivery the next day before 3:00 P.M. Richie's proposal was received by Government personnel of the Army Corps of Engineers at 4:35 P.M., which was 35 minutes late, and therefore was not opened and considered.

Richie alleges that an air traffic controller slowdown was responsible for the late delivery, and that the lateness is attributable to agencies of the Government beyond the control and negligence of the offeror. Richie also states that it did not receive sufficient time to prepare its proposal since the solicitation date was May 9, 1978, and it did not receive the proposal until May 19, 1978.

Part 1, Section C, paragraph 20 of the RFP states in pertinent part:

"(c) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made; and

(1) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of offers (e.g. an offer submitted in response to a solicitation requiring receipt of offers by the 20th of the month must have been mailed by the 15th or earlier);

(ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or

(iii) it is the only proposal received."

It is our view that Richie's proposal was properly rejected by the contracting officer. While it may be that delivery should have been made prior to the deadlines for receipt of proposal, it was not received until after the date set for receipt of proposals. The fact that Richie's proposal was sent by express mail or that delivery in that manner is guaranteed, did not remove from Richie its obligation to assure timely arrival of its proposal. Our Office has consistently held that an offeror has the responsibility to assure timely arrival of its offer and must bear the responsibility for its late arrival. Late receipt of an offer will result in its rejection unless the specific conditions of the proposal are met. B. E. Wilson Contracting Corp. 55 Comp. Gen. 220 (1975), 75-2 CPD 145, and cases cited therein; Dynamic's International, B-190026, November 30, 1977, 77-2 CPD 426.

It is clear that under the terms of the RFP, a late offer may be considered only if sent by registered or certified mail in the manner outlined above or where "the late receipt was due solely to mishandling by the Government after receipt at the Government installation (emphasis supplied)." Additionally, we have held that mishandling by a Government agency refers to mishandling after receipt of the offer or bid in the agency's local office. The Koedads, B-185919, July 8, 1976, 76-2 CPD 21. Thus, an alleged slowdown of air controllers or a failure on the part of the Postal Service does not

constitute mishandling at a Government installation. Kessel Kitchen Equipment Co., Inc., B-189447, October 5, 1977, 77-2 CPD 271; D. M. Anderson Co., B-186907, August 3, 1976, 76-2 CPD 123.

Richie also states that it was not given sufficient time to prepare its proposal because it did not receive it until May 19, 1978, 10 days after the advertising date. We have held that where the method of solicitation in fact provided adequate competition and reasonable prices, the failure to solicit a particular bidder, or the failure to solicit him in time for him to submit a timely bid, does not, absent a showing of a deliberate intent to exclude that bidder, afford a sufficient basis to cancel a solicitation or question an otherwise proper award. See Oil Country Materials of Houston, Inc., B-189646, December 13, 1977, 77-2 CPD 459 and the cases cited therein. In this case the contracting officer says that the specifications were mailed to Richie on May 9, 1978, and in addition some 30 timely bids were received. Further, Richie had at least 19 calendar days to prepare its proposal. Thus, there was adequate competition and time to prepare a proposal, and no showing that Richie was deliberately precluded from competing.

Richie has also protested our bid protest procedures because it states that the contracting officer's report is dated July 18, 1978, and it did not receive it until August 22, along with a letter from this Office, and that in the meantime, authorization was given to award the contract.

The record shows that the agency report was dated August 1, 1978, with a carbon copy to Richie. In the absence of contrary evidence we assume that Richie received a copy of that report. And the time frame approximates our requirement that a report be submitted by the agency generally within 25 working days. 4 C.F.R. 20.3(c)(1978).

The decision to go ahead with the award was made at a higher level than the contracting officer and in accordance with applicable regulations, ASPR 2-407.8(b)(3), because it was determined that an award must be made promptly. Where such actions have been undertaken, the determination to proceed with an award prior to protest resolution is not subject to question by our Office. LaBarge Incorporated, B-190051, January 5, 1978, 78-1 CPD 7.

The protest is denied.


Deputy Comptroller General
of the United States