

10,963 PLII

DECISION



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

FILE: B-194810

DATE: August 7, 1979

MATTER OF: Blue Cross of Maryland, Inc.

DLG 02533

DIGEST:

1. [Protest concerning agency's refusal to consider late modification] of otherwise acceptable proposal is timely because it was filed within 10 days of notice of proposal rejection.
2. Agency properly rejected late modification from offeror where initial proposal was not acceptable and best and final offer was received late.

Blue Cross of Maryland, Inc. (Blue Cross), protests the refusal of the Department of Defense, Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS) to consider Blue Cross' late modification of its proposal, and the award of a contract to Pennsylvania Blue Shield (Blue Shield), on request for proposals (RFP) MDA 906-78-R-0015 for development and implementation of an OCHAMPUS Fiscal Intermediary System for Maryland.

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On March 19, 1979, OCHAMPUS requested Blue Cross to correct certain deficiencies in its initial proposal and to submit a best and final offer by April 2. Blue Cross indicates that it responded to this request on March 30. Due to an airline strike OCHAMPUS did not receive Blue Cross' best and final offer until four days after the April 2 due date. Apparently, Blue Cross learned on the due date by telephone conversation with the agency that its best and final offer had not been received and on April 3 it sent OCHAMPUS another modification of its proposal which corrected all deficiencies and lowered its bid price to \$6.50 per claim. On April 30 OCHAMPUS awarded the contract to Blue Shield at a bid price of \$7.00 per claim.

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OCHAMPUS contends that this protest is untimely under our Bid Protest Procedures, which require that protests be filed with either GAO or the procuring agency within 10 days after the basis for protest is known. 4 C.F.R. § 20.2(b)(2)(1979). OCHAMPUS argues that Blue Cross submitted an unsolicited proposal modification on April 3 because it had been informed by the contracting officer that OCHAMPUS would not consider its best and final offer of March 30 which was not received on time. The agency argues that its refusal to consider the late best and final is the basis for the protest. Since Blue Cross knew on April 3 that its best and final offer would not be considered, OCHAMPUS states that the protest filed with this Office on May 8 is untimely.

In response, Blue Cross states that, pursuant to a solicitation provision, it could modify its proposal any time prior to award, and therefore it is protesting OCHAMPUS' refusal to consider its April 3 modification, not the refusal to consider its best and final offer. Since Blue Cross states that it did not learn until April 30 that its late modification was not considered, we believe its protest filed within 10 days of that date is timely.

Blue Cross argues that OCHAMPUS was required to consider the late modification under § C-19a of the RFP, which provides:

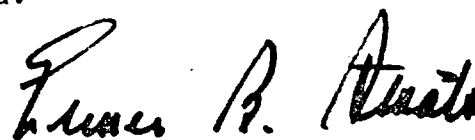
"* * * a late modification of an otherwise successful proposal which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted."

Blue Cross argues that its initial proposal was "an otherwise successful proposal" because its price was lower than the award price. It believes its deficiencies were minor or in any event cured in its April 3 modification, and it notes that OCHAMPUS had scheduled a preaward visit to Blue Cross to discuss the final arrangements for contract award. Thus Blue Cross argues that OCHAMPUS' refusal to consider its late modification which made the offer more favorable to the Government violated the RFP and invalidated the award to Blue Shield.

The purpose of § C-19a is to allow the Government to accept more favorable terms from the low offeror that will be awarded the contract. If the Government elects to consider a late modification received from an otherwise acceptable low offeror, other offerors may not complain because their relative standing is not affected.

However, a late modification may only be accepted pursuant to the subject provision if the offer is acceptable as originally submitted. See King-Fisher Company, B-192480, November 3, 1978, 78-2 CPD 321. The protester's initial proposal was not acceptable, and its deficiencies could not be cured by a late modification to make it acceptable. We believe that OCHAMPUS reasonably required Blue Cross to respond to the numerous deficiencies noted in the agency's March 19 request for best and final offers. For example, Blue Cross' failure to commit itself to RFP provisions on liquidated damages, financial management and the confidentiality of files, and OCHAMPUS' objections to aspects of Blue Cross' proposed subcontract cannot be dismissed as minor deficiencies. See Dubie-Clark Company, B-186918, August 26, 1976, 76-2 CPD 194. OCHAMPUS properly refused to consider the late modification since Blue Cross had not timely submitted an "otherwise successful proposal" that could be modified under § C-19a.

The protest is denied.


James B. Attala
Comptroller General
of the United States