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DECISION



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

FILE: B-204249

DATE: August 24, 1981

MATTER OF: Environmental Health Systems, Inc.

DIGEST:

1. Protester's late proposal was properly rejected by agency notwithstanding mailing of proposal by U.S. Postal Service express mail, which guaranteed timely delivery, in absence of showing that proposal was mishandled by procuring agency after its receipt.
2. Failure of U.S. Postal Service to deliver express mail by guaranteed time is not "mishandling by Government" within meaning of late proposal clause.
3. Timely submission of proposal is exclusively responsibility of offeror and risk of late delivery is not shifted to Government by virtue of fact that Postal Service guarantees timely delivery.
4. Protest alleging late proposal clause in RFP should permit consideration of late proposals delivered by express mail, is untimely since alleged defect was apparent on face of RFP but protest was not filed until more than one month after closing date for receipt of proposals. 4 C.F.R. § 21.2(b)(1).

Environmental Health Systems, Inc. (EHS) protests the rejection of its proposal to supply certain medical equipment under request for proposals (RFP) No. M2-Q65-81, issued by the Veterans Administration (VA) Marketing Center.

EHS transmitted its proposal by U.S. Postal Service Express Mail Service, but it was not received until May 29, 1981, one day after the designated closing date for submission of proposals. VA deemed the proposal late

[Protest of Proposal Rejection For Lateness]

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and would not consider EHS for award. VA reaffirmed its position in a July 16 ruling on a protest by EHS and EHS then protested to our Office on August 3. EHS concedes that its proposal was received by VA after the closing date, but contends it should have been accepted since it was delivered to the Postal Service, and thus was "in Government hands," the day before the closing date. EHS also believes it had a right to rely on the Postal Service's guarantee of next day service, and that it should not be penalized because the Postal Service failed to meet its obligation. We deny the protest.

Standard Form 33-A (1-78), "Solicitation Instructions and Conditions," was incorporated in the RFP. Paragraph eight of this form, entitled "Late Proposals, Modifications of Proposals, and Withdrawals of Proposals," states that proposals received in the designated office after the exact time specified for receipt will be considered for award only where:

1. the proposal was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of offers;
2. the proposal 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
3. the late proposal was the only proposal received.

The EHS proposal was not the only one received by VA and was not sent by registered or certified mail, so the first and third exceptions clearly do not apply here. The proposal also was not late due to mishandling after receipt at the VA installation and we thus conclude that the second exception is inapplicable. Although EHS seems to argue that the delay by the Postal Service constituted Government mishandling, we have consistently rejected this line of argument in prior cases. See, for example, Enrico Roman, Inc., B-196350, January 21, 1980, 80-1 CPD 61; Kessel Kitchen Equipment Co.,

B-189447, October 5, 1977, 77-2 CPD 271. As used in the RFP's late proposal clause, the term "Government installation" refers to the Government complex or building in which the procuring activity, here the VA Marketing Center, is located, and does not include the Postal Service. Thus, the phrase "mishandling by the Government after receipt at the Government installation" does not encompass delivery delays caused by the Postal Service, and the EHS proposal does not come within the scope of the second exception. Walker's Royal, Incorporated, B-200583, October 20, 1980, 80-2 CPD 301.

Further, while it is unfortunate that EHS relied to its detriment on the Postal Service's guarantee of next day service, this fact does not provide a basis for relief. It is exclusively the responsibility of the offeror, not the Government, to assure that its proposal arrives at the designated office by the deadline specified in the RFP. Walker's Royal, Incorporated, supra; Devoe & Reynolds Company, B-197457, February 7, 1980, 80-1 CPD 111. EHS chose express mail as the means for transmitting its proposal and therefore assumed any risk that delivery would take more than one day. This risk of late delivery was not shifted to VA by virtue of the Postal Service's guarantee of next day delivery. We have specifically held in this regard that an offeror assumes the risk of late delivery where, as here, it elects to use express mail rather than registered or certified mail when using the Postal Service for delivery of its proposal. Graphic Controls Corporation, B-194698, May 23, 1979, 79-1 CPD 373. Here, even had the protester used registered or certified mail, its late proposal could not have been considered since it was not mailed at least five days prior to the closing date.

The protester finally maintains that the late proposal clause should allow consideration of late proposals delivered by express mail since timely delivery is at least as likely by this method as by certified and registered mail. This allegation is untimely raised, however. Our Bid Protest Procedures require that protests based on alleged improprieties apparent on the face of the solicitation be filed prior to the closing date for submission of proposals 4 C.F.R. § 21.2(b)(1) (1981). It was clear that the late

proposal clause here did not provide for consideration of late proposals delivered by express mail. Thus, since EHS did not raise this protest until more than a month after the closing date, it is untimely and not for consideration on the merits. See generally, Data Technology Industries, B-197858, July 1, 1980, 80-2 CPD 2.

Since it was clear from the protester's initial submission that this protest is legally without merit, we have decided the matter without further case development. Walker's Royal, Incorporated, supra; Devoe & Raynolds Company, supra.

The protest is summarily denied.

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General
of the United States