

DECISION



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

FILE:

B-221390

DATE: March 31, 1986

MATTER OF:

Sunset Realty Sales Associates

DIGEST:

1. Protester's best and final offer, received 1 day after the date specified for receipt of best and final offers, was properly rejected where none of the exceptions outlined in the solicitation permitting consideration of a late offer applies.
2. Protest based upon an alleged solicitation impropriety which does not exist in initial solicitation, but which is subsequently incorporated therein, must be protested not later than the next closing date for receipt of proposals. Accordingly, protester's contention that agency should have extended the deadline for receipt of best and final offers is untimely because this contention was not raised until well after the closing date for receipt of best and final offers.
3. Best and final offer received 1 day late cannot be considered on the basis that it may offer the government certain advantages over offers which have been timely received.
4. Where a firm is not prejudiced by an agency's failure to notify it promptly that its best and final offer will not be considered because it was received late, the failure is a procedural deficiency that does not affect the validity of the contract award.

Sunset Realty Sales Associates (Sunset) protests the award of a contract by the General Services Administration (GSA) to Elmwood Development Company, under solicitation for offers (SFO) No. R7-17N-85, for leased office space. The protester contends that it was entitled to the award as the low offeror and protests rejection of its best and final offer as late.

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

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Four firms, including Sunset, submitted proposals by the May 16, 1985, closing date. By letter dated July 19, 1985, the contracting officer changed the solicitation's lease term and requested best and final offers by July 26, 1985. By telephone on July 24, 1985, Sunset asked for a 2-day extension for the submittal of best and final offers. The contracting officer notified all offerors by letter dated July 24, 1985, sent by overnight delivery, that the time for submission of best and final offers was extended to 4 p.m., July 31, 1985. Offerors were also asked to submit a more detailed plan for the proposed removal of asbestos from the building. Two best and final offers were received by the deadline. Sunset's best and final offer was received 1 day after the specified closing date.

Sunset protests that GSA made two miscalculations when analyzing offerors' costs and mistakenly determined that its offer was not low. GSA concedes that it made an error by comparing a previously submitted proposal by Sunset with other offerors' best and final offers. GSA responds, however, that it could not consider Sunset's best and final offer because it was not received until 1 day after the cutoff date for best and final offers. Moreover, GSA contends that award could not be based on Sunset's offer of May 15, 1985, because the change in the solicitation lease term had not yet been made at that time, the operating expense base was at least \$1 per square foot per annum too high, the protester had based its offer on a Consumer Price Index (CPI) adjustment for overtime services and a CPI adjustment was not permitted, the offer expired June 18, 1985, and had not been extended, and Sunset's plan to remove asbestos from the premises only on weekends was unsatisfactory.

A proposal modification received after the time set for receipt of best and final offers generally may be considered only under the circumstances stated in the solicitation. See Potomac Systems Resources, Inc., B-219896, Oct. 8, 1985, 85-2 C.P.D. ¶ 393. Here, paragraph (a) of the solicitation's Late Submissions, Modifications and Withdrawals of Offers clause permits consideration of a late proposal only if it is both received before award and it was sent by certified or registered mail at least 5 days prior to the date specified for receipt of offers, or it was sent by mail and the late receipt was due solely to mishandling by the government after timely receipt at the government installation, or it was the only offer received. None of these exceptions applies here. Sunset sent its offer by Federal Express; it has not shown that the delay was attributable to wrongful government action; and other proposals were received by GSA.

Sunset asserts that the solicitation specifically authorizes consideration of a late offer under the circumstances here involved. We can only infer that Sunset is referring to paragraph (c) of the clause cited above, which states that, "Notwithstanding (a), of this provision, a late modification of an otherwise successful offer which makes its terms more favorable to the government will be considered at any time it is received and may be accepted." This clause allows the government to accept more favorable terms only from an offeror that would receive the contract anyway. See Woodward Associates, Inc.; Monterey Technologies, Inc., B-216714 et al., March 5, 1985, 85-1 C.P.D. ¶ 274. In such circumstances, other offerors cannot complain because their relative standing would not be affected. The clause, however, does not permit acceptance of a late modification from a firm not already in line for award. See Windham Power Lifts, Inc., et al., B-214287, March 7, 1984, 84-1 C.P.D. ¶ 278. GSA's above-cited reasons for not awarding a contract to Sunset based on its May 15, 1985, offer show that Sunset was not the otherwise successful offeror. Thus, there was no basis for accepting a modification of Sunset's proposal received after the time set for receipt of best and final offers. Poli-Com, Inc., B-198494, Nov. 6, 1980, 80-2 C.P.D. ¶ 341.

In commenting on the agency report, Sunset alleges that the contracting officer granted it an oral extension of the closing date. According to Sunset, on the day best and final offers were due, Sunset notified the contracting officer by telephone that its offer had been misdirected, and the contracting officer stated that it would be all right if the offer arrived 1 day late. The contracting officer's contemporaneous record of the telephone conversation, however, shows that an extension was not granted. Where, as here, the conflicting statements of the protester and the agency constitute the only available evidence of what really transpired in the past, the protester has not carried its burden of affirmatively proving its case. DBA Systems, Inc.--Reconsideration, B-212101.2, Aug. 23, 1983, 83-2 C.P.D. ¶ 244. Moreover, such an extension to only one offeror would violate the requirement for a common cutoff date for all offerors. EHE National Health Services, Inc., B-219361.2, Oct. 1, 1985, 65 Comp. Gen. ___, 85-2 C.P.D. ¶ 362.


Sunset contends that GSA should have extended the deadline for receipt of best and final offers when Sunset notified it on July 31, before the 4:30 p.m. deadline, that an offer on which it had been working for many months had been misdirected and would be 1 day late. This protest

ground is untimely raised. Our Bid Protest Regulations require that protests based on alleged improprieties in a negotiated procurement which did not exist in the initial solicitation, but which are subsequently incorporated therein, must be protested not later than the next closing date for the receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1985). GSA incorporated the revised closing date for the receipt of best and final offers into the RFP and, therefore, any protest involving an extension of the time period for the submission of best and final offers should have been filed with the contracting agency or our Office by the time set for receipt of those offers. Sunset, however, did not protest this issue until March 3, 1986, in its comments on the agency report. Thus, this protest issue is untimely and not for consideration by our Office. See Logus Manufacturing Corporation, B-216775, Jan. 8, 1985, 85-1 C.P.D. ¶ 25.

Sunset also contends that GSA's refusal to consider its offer increases the government's costs. While we realize that by application of the late proposal rules the government at times may lose the benefit of proposals that offer terms more advantageous than those received timely, maintenance of confidence in the competitive system is of greater importance than the possible advantage to be gained by considering a late proposal or modification in a single procurement. Real Fresh, Inc., B-204604, Dec. 31, 1981, 81-2 C.P.D. ¶ 522.

Sunset comments that at no time prior to being advised of this protest did the agency inform Sunset that its proposal was not being considered because of the late best and final offer. As noted above, initially, GSA erroneously determined that Sunset was not low. Even if GSA should have notified Sunset more promptly that its best and final offer was considered late, the firm's late best and final offer properly was rejected, and the firm therefore was not prejudiced by any delay in notification. In such a case, failure to receive prompt notification of the rejection of a late offer or modification is a procedural deficiency that does not affect the validity of an award. Real Fresh, Inc., B-204604, supra, at p. 6.

The protest is denied in part and dismissed in part.


for Harry R. Van Cleave
General Counsel