



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Moltech Corporation

File: B-236490

Date: October 11, 1989

DIGEST

1. Protester's late proposal, sent by U.S. Postal Service express mail 1 day prior to closing date for receipt of proposals, was properly rejected notwithstanding assurance by Postal Service of timely delivery. Late proposals that are not sent by registered or certified mail 5 days prior to closing date for receipt of initial proposals can only be considered if there was government mishandling after receipt at the government installation. Express mail is not the equivalent of registered or certified mail, and the term "government" in government mishandling means the contracting activity, not the Postal Service.

2. Protest that agency erred in not classifying solicitation as a research and development acquisition, raised after closing date for receipt of initial proposals, is untimely because protests of alleged improprieties in a solicitation which are apparent on its face are required to be filed prior to the closing date for receipt of initial proposals.

DECISION

Moltech Corporation protests the rejection of its proposal as late under request for proposals (RFP) No. 271-89-8157, issued as a small business set-aside by the National Institute on Drug Abuse (NIDA), Department of Health and Human Services, for computer services to develop and maintain a database for therapeutic drugs. The RFP contemplated the award of a cost-reimbursement contract for a base year with two 1-year option periods. Moltech contends that its proposal should be considered by NIDA because its late receipt was the result of government mishandling. Moltech also contends that the solicitation should be amended to include a different late proposal clause under which its proposal could be considered.

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

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Six proposals were received by the July 24, 1989, closing date for receipt of proposals. Moltech's proposal, mailed on July 23 from San Francisco, California, by U.S. Postal Service express mail, arrived at NIDA in Rockville, Maryland, on July 25, and was rejected as late.

Under the RFP's late submission provision, a late proposal may only be considered if it was received before contract award and either (1) it was sent by registered or certified mail not later than the fifth calendar day before the date specified for receipt of offers; or (2) it was sent by mail and it is determined by the government that the late receipt was due solely to government mishandling after receipt at the government installation; or (3) it is the only proposal received. Federal Acquisition Regulation (FAR) § 52.215-10. Moltech's late proposal was rejected by the agency because none of the above exceptions applied.

The agency's rejection of Moltech's proposal was proper. Since Moltech's proposal was sent by express mail, rather than certified or registered mail, the first exception does not apply. West Canyon Boiler, Inc., B-232571, Dec. 9, 1988, 88-2 CPD ¶ 578. In any event, even if the proposal had been sent by registered or certified mail, the exception would not have applied because the proposal was mailed just 1 day prior to the closing date for receipt of proposals. The third exception also does not apply because six proposals, rather than just one, were timely received.

With regard to the second exception, Moltech argues that the Postal Service guaranteed that its proposal would be delivered by the specified time and that the late receipt therefore was solely the result of "government" mishandling. In order to reach this result, Moltech argues that our Office should broaden the definition of the word "government" in FAR § 52.215-10 to include the Postal Service.

As a general rule, an offeror is responsible for delivering its proposal to the proper place at the proper time. Larry J. Robinson & Co., Inc., B-234991, June 13, 1989, 89-1 CPD ¶ 559. The fact that the Postal Service guaranteed that Moltech's proposal would be delivered on time does not relieve the firm of that responsibility. G & G Patrol, B-233170, Oct. 27, 1988, 88-2 CPD ¶ 401. Further, § 52.215-10 states that the "government mishandling" referred to in the provision occurs after receipt at the government installation, thus clearly indicating, as we have consistently held, that the term "government" in the FAR provision refers to the procuring agency, not the Postal Service.

Machine Research Co., Inc., B-230188, Mar. 2, 1988, 88-1 CPD ¶ 224; Kessel Kitchen Equipment Co., B-189447, Oct. 5, 1977, 77-2 CPD ¶ 271. Thus, the proposal must be delivered to the procuring agency installation before the mishandling contemplated by the FAR clause can occur. Machine Research Co., Inc., B-230188, supra. Since Moltech has not alleged and there is no evidence in the record of any mishandling by the procuring activity, the second exception also does not apply, and its proposal was properly rejected as late.

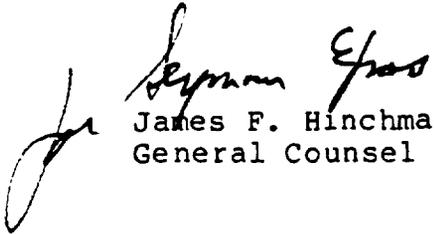
Moltech also alleges that the FAR late submission clause that was incorporated in the RFP should not be applied here because, if the RFP had properly been classified by NIDA as a research and development (R&D) acquisition, a different late proposal provision, Public Health Service (PHS) Acquisition Regulation § 352.215-10, would have been incorporated into the RFP. Under that provision, a proposal received after the closing date may be considered by the government if it offers significant cost or technical advantages and it was received before proposals were distributed for evaluation or within 5 days of the time specified for receipt of proposals. Moltech contends that since the RFP is properly characterized as an R&D acquisition, the solicitation should now be amended to incorporate the PHS late proposal clause under which its late proposal may be considered.

By alleging that the RFP was improperly classified and should now be amended, Moltech is, in effect, contending that the solicitation was defective. Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent on its face must be filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1989). Here, the RFP clearly incorporated the FAR late submission provision rather than the PHS late proposal clause. Thus, to the extent that Moltech believed that the RFP represented an R&D acquisition and therefore should have included the PHS late proposal clause, Moltech was required to raise the issue before the due date for initial proposals; Moltech could not simply wait until its proposal was rejected as late to claim that the RFP was defective. See Oakland Scavenger Co., B-232958, Feb. 1, 1989, 89-1 CPD ¶ 101. Accordingly, since Moltech's protest was filed on August 9, well after the July 24 closing date, it is untimely on this ground.

Moltech contends that even if its protest is determined to be untimely, it should be considered under the significant

issue exception to our timeliness rules. 4 C.F.R. § 21.2(b). Whether a protest presents a significant issue is necessarily determined on a case-by-case basis. We will, in a given case, invoke the exception when a protest raises an issue that has not been considered on its merits in a previous decision and is of widespread importance or interest to the procurement community. See Hunter Environment Services, Inc., B-232359, Sept. 15, 1988, 88-2 CPD ¶ 251. The exception is strictly construed and used sparingly to prevent our timeliness rules from being rendered meaningless. Id. Protests of improprieties in solicitations have been previously been considered in numerous decisions by our Office. See, e.g., Nationwide Roofing & Sheet Metal Co., B-234222.2, June 22, 1989, 89-1 CPD ¶ 588. Moreover, we fail to see how consideration of Moltech's protest of an alleged solicitation impropriety is of widespread importance or interest to the procurement community so as to warrant invoking the significant issue exception.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel