



Office of the General Counsel

Matter of: M.J.S., Inc.
File: B-244410
Date: October 17, 1991

June H. Jones for the protester,
Millard F. Pippin, Department of the Air Force, for the
agency.
David Hasfurther, Esq., and Michael R. Golden, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Where the evidence establishes that the offeror's revised proposal was received by the agency within sufficient time to permit delivery to the contracting officer prior to the closing date, but was misfiled by an agency employee, the agency action was the sole or paramount cause of the contracting officer's late receipt of the revision; consequently, consideration of the revision for award purposes was proper.
2. An offeror, who in submitting its best and final offer (BAFO), does not expressly extend, as requested, its proposal acceptance period, implicitly agrees to the required extension of the proposal acceptance period by its submission of the BAFO.

DECISION

M.J.S., Inc. protests the award made to Lanson Industries, Inc. under request for proposals (RFP) No. F09650-91-R-0019, a total small business set-aside, issued by the Warner Robins Air Logistics Center, Robins Air Force Base, for portable unitized stacking and nesting racks (13,201 production units and four first article units). M.J.S. contends that the award to Lanson was improper since it cannot be shown that Lanson submitted its revised pricing in a timely manner. M.J.S. also contends that the award was improper because Lanson did not extend the acceptance period for its proposal, as requested by the agency as part of the best and final offer (BAFO) request. Performance has been stayed on the contract pending a resolution of the protest.

We deny the protest.

The RFP, issued on December 14, 1990, required that proposals be submitted by a closing date of January 14, 1991. Offerors were to submit unit and total prices for the first article units and unit and total prices for the 13,201 production units. The initial proposal acceptance period was 90 calendar days after the closing date, unless the offeror inserted a different period in its proposal. On December 20, the RFP was amended to change the agency's required delivery schedule, to establish a date for a site visit, and to extend the closing date to January 22. Initial proposals were received and evaluated. By letter of March 18, the agency conducted negotiations and advised that revised proposals were to be submitted by March 29. Revised proposals were submitted and reviewed. By letter of April 4, the agency reopened discussions with all offerors and asked that revised proposals be submitted by April 8. By letter of May 2, the agency advised that discussions were concluded and asked for BAFOs with an extension of each offeror's proposal acceptance period to May 31. BAFOs were to be submitted by 4:00 p.m. on May 6.

The agency report shows that M.J.S. responded to all the agency's requests for proposal revisions. By letter of May 6, it submitted its BAFO, which included a revised unit price of \$71.75, and extended its proposal acceptance period to May 31. M.J.S. had originally offered a unit price of \$72.75 on the production items. The agency report also shows that Lanson responded to all the agency's requests for proposal revisions. One of its responses, a letter of March 26, contained a revised unit price of \$69.50, which was lower than M.J.S.'s original price and lower than the revised price M.J.S. submitted in its BAFO. Lanson's original unit price for all items was \$75.72. By letter of April 5, Lanson stated that its offer and the prices set forth in its March 26 letter remained unchanged. In response to the BAFO request, Lanson, in a letter dated May 3, again confirmed its offer of March 26. In that letter, Lanson did not specifically extend its proposal acceptance period.

On May 8, the agency advised offerors that M.J.S. had been the successful offeror. Lanson subsequently advised the agency that it was "quite surprised that anyone could offer a bid better than ours." It suggested that due to the duration of the negotiations its final price, "which was offered to you on March 26 (copy attached) may have gotten lost or perhaps failed to get considered." As a result of this letter, the agency discovered that Lanson's March 26 letter had been misfiled. Thus, in a letter of May 16, the agency revoked its prior award notice and stated that Lanson was the successful offeror based on "pricing received as of 13 May 91, the date for receipt of Best and Final offers." On the same day, the agency mailed a notice to the offerors

to advise that the correct BAFO closing date was May 6 and that the award was based on a timely BAFO. Award was made to Lanson on May 31.

M.J.S argues that there is no evidence that Lanson's revised prices were timely received. M.J.S. does not believe that the agency reasonably could have ignored the references to the March 26 pricing in Lanson's revised offer and BAFO and could have failed to locate the March 26 letter had it been timely submitted and received by the agency. It notes that simply because Lanson can submit evidence that the Federal Express delivered a piece of correspondence from Lanson to the agency on March 28 does not prove that what was submitted was the March 26 letter with its revised pricing. It also points out that the use by the agency of the wrong BAFO closing date in the Lanson award notice, in addition to the failure to locate the March 26 offer earlier, suggests that the agency's position on the M.J.S. protest should be given no credence.

The agency states that its clerical errors should not deprive the low offeror, Lanson, of the award. It states that when Lanson raised the issue of the March 26 offer by Lanson after the initial award notice, it went back to locate the letter in its files and that with the letter was a Federal Express receipt showing that the letter had been delivered at 9:20 a.m. on March 28, more than 1 day before the revised offers had to be submitted.¹ Thus, the agency concludes that Lanson's revised prices properly were for consideration and that the award to Lanson was proper.

We agree with the agency that Lanson's revised prices in its March 26 letter were properly for consideration in determining the successful offeror. As a general rule, offerors are responsible for delivering their proposals, or modified proposals, to the proper place at the proper time. Weather Data Servs., Inc., B-238970, June 22, 1990, 90-1 CPD ¶ 582. A late proposal, hand-carried by a commercial carrier, can be considered for award only if government mishandling, after timely receipt at the agency, was the sole or paramount cause for the late receipt in the place designated for receipt of proposals. Remstar Int'l Inc., B-242680, Jan. 23, 1991, 91-1 CPD ¶ 65. Timely receipt may


¹ The agency apparently does not use a time-date stamp to establish correspondence receipt, since none of the responses from either M.J.S. or Lanson have a time and date stamped on the correspondence to show when they were received by the agency.

be shown by a preponderance of all relevant evidence, including statements of the protester's representatives and government personnel. See IPS Group, B-235988, Oct. 6, 1989, 89-2 CPD ¶ 327. In the instant case, the agency maintained a record of when the Lanson revised proposal (the March 26 letter) was received by keeping a copy of the Federal Express receipt signed by an agency employee dated March 28 at 9:20 a.m. This, in our view, is sufficient to establish timely receipt by the agency. Since the revision apparently was misfiled immediately and not delivered to the contracting officer by the close of business on the following day (March 29), this failure was caused solely by government mishandling. While we believe, as the agency appears to recognize, that the agency should record the time and date of receipt on proposals at the time they are received, the record contains sufficient evidence to establish that Lanson's initial offer was timely delivered to the government. In these circumstances, it was proper for the agency to consider Lanson's revised pricing in determining which offeror was successful.

M.J.S. also maintains that award may not be made to Lanson because Lanson in its May 3 letter submitting its BAFO did not extend its proposal acceptance period to May 31 as the agency requested. In sealed bidding situations, we have held that when an agency does request that bidders extend their acceptance periods, it is the responsibility of each bidder that desires to extend its acceptance period to communicate assent, either by ensuring that the agency receives an express extension or by conduct from which the agency can infer the bidder's intent to extend. J.A.K. Constr. Co., Inc., B-230056, Apr. 28, 1988, 88-1 CPD ¶ 413. Where we have permitted agencies to infer an extension of an acceptance period, the bidder has taken some affirmative step that provides clear evidence of its intent to extend, and the agency has been fully aware of this action. See, e.g., Surplus Tire Sales, 53 Comp. Gen. 737 (1974), 74-1 CPD ¶ 161 (bidder signs waiver of description of specifications and submits it to the contracting agency). We believe that the same logic applies in this case. Here, Lanson submitted a timely BAFO. By its action, it obviously intended that the agency could act on its offer. There would have been no reason to submit the BAFO if Lanson had considered that the agency would not be able to accept it because the proposal had expired. We think in these circumstances, Lanson's offer remained open for a reasonable time. See Western Roofing Serv., B-232666.4, Mar. 5, 1991, 70 Comp. Gen. _____, 91-1 CPD ¶ 242, aff'd 91-1 CPD ¶ 566. Here, award was made within 1 month of BAFO submission.

M.J.S. also questions whether its offer should have received an evaluation preference because M.J.S. is a minority-owned business. However, the evaluation preference for small disadvantaged business concerns does not apply to total small business set-asides. Department of Defense Federal Acquisition Regulation Supplement § 219.7000(a)(1)(v) (DAC 88-14).

The protest is denied.


James F. Hinchman
General Counsel