



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Leggett & Platt, Incorporated
File: B-246733
Date: March 27, 1992

Jim Crocker for the protester.
Janet Zoe Barsky, Esq., and David B. Dempsey, Esq., Akin, Gump, Hauer & Feld, for Foamex LP, an interested party.
James L. Ropelewski, Esq., Department of Justice, for the agency.
Paula A. Williams, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where procuring agency did not realize that protester's Federal Express envelope, which was not marked as to its contents, contained two bids, and agency returned envelope unopened to bidder because of action taken with respect to the other procurement for which one of the enclosed bids had been submitted, although opening the envelope to verify the contents would have been prudent, the bid may not be considered because the protester bears the primary responsibility for the results since it failed to properly identify the outer envelope as containing bids, and the envelope has been opened by the bidder and there is now no way to verify the original contents.

DECISION

Leggett & Platt, Incorporated (L&P) protests the award of a fixed-price requirements contract to Foamex LP under invitation for bids (IFB) No. 2PI-0013-92CM, issued by UNICOR, Federal Prison Industries, Inc., for urethane foam to be used in the production of mattresses by federal prisoners. The protester alleges that the agency improperly refused to consider its bid which had been received by the agency prior to bid opening.

We deny the protest.

The solicitation required bids to be submitted by 2 p.m. on October 24, 1991, the time and date set for bid opening. A different solicitation, IFB No. 2PI-0015-92CM, which sought bids for mattress innerspring units was also scheduled for that same opening time and date. L&P sent two bids in the

same Federal Express envelope, one for each solicitation. The Federal Express envelope was addressed to UNICOR to the attention of the contracting officer. It did not identify the contents, and agency personnel apparently surmised that the envelope contained a bid for the innerspring units procurement only, and so treated the envelope. As the result of a protest filed with our Office, bid opening for the innerspring units procurement was suspended on bid opening day. Representatives of the bidders who had submitted bids for the innerspring units solicitation--L&P and Holland Wire--were both present and were notified that their bids would be held, unopened, until further notice. The contracting officer subsequently returned these bid packages without opening them as a result of the protest disposition.

Bid opening for the urethane foam solicitation occurred as scheduled and, of the three bids opened, the Foamex bid was low. L&P states that it received the package containing its returned bids on November 13, and that it opened the Federal Express envelope, but not the bid envelope for the urethane foam procurement. On that same day, L&P notified the contracting officer by telephone that its bid for the urethane foam procurement had been improperly returned. Award was subsequently made to Foamex on November 18. By letter dated November 18, L&P filed an agency-level protest challenging the agency's refusal to consider its bid for the urethane foam solicitation and requesting that it be permitted to submit the bid, which L&P states it has not opened. On November 21, L&P filed this protest with our Office, raising the same issue.

L&P argues that improper government action was the sole reason for the exclusion of its bid from the competition because the bid was received by the agency prior to bid opening but the agency failed to open the Federal Express envelope which contained its bid. In L&P's view, the improper government action consisted of the contracting officer incorrectly assuming that the Federal Express envelope contained only the innerspring units bid, and not opening the envelope. Had the contracting officer opened the envelope, Leggett & Platt asserts that he would have found two bids, each enclosed in its own individually sealed envelope with a sealed bid label affixed to the lower left corner of the envelope to identify the contents of each. The protester has furnished a copy of the Federal Express envelope to support its argument that since the envelope was not marked as to its contents, the agency improperly assumed that the package contained a bid only for the innerspring units procurement.

While the agency states that L&P's Federal Express package referenced the innerspring units procurement, in fact, the copy of the envelope which L&P has provided does not reference either solicitation. Thus, it appears that agency personnel simply assumed that the unlabeled package contained an innerspring units bid. It is not clear how the agency determined that the unopened package contained a bid or which of two procurements scheduled for the same date and time at the same location the package was intended. To the extent that L&P argues that the contracting officer was required to open the Federal Express package, we disagree. Generally, envelopes which are marked as bids but which do not identify the bidder or the solicitation may be opened for the purpose of identification. See Federal Acquisition Regulation § 14.401(b). However, the regulation is inapplicable here since, as the protester points out, the Federal Express envelope simply was not marked as a bid.


The solicitation instructed bidders to plainly write the solicitation number and the date and time set for bid opening on the outside of the bid envelope, and the agency provided a sticker for this purpose in the solicitation package with instructions that the sticker was to be pasted on the lower left corner of the envelope. While it may be, as the protester argues, that the individual bids which were placed in the Federal Express envelope were identified as to their contents, the protester concedes that there was nothing on the outer Federal Express envelope to indicate the contents of the envelope. By submitting its bids in this manner, the protester assumed the risk that its bid package might not be handled under procedures applicable to bids. See Weather Data Servs., Inc., B-238970, June 22, 1990, 90-1 CPD ¶ 582; Systems for Business, B-224409, Aug. 6, 1986, 86-2 CPD ¶ 164.

There is no requirement that agency personnel must treat an unlabeled Federal Express package as if it contains a bid. As noted above, the agency made an assumption that L&P's Federal Express package contained a bid. This assumption was, in fact, partially correct. Under these circumstances, while it would have been prudent for the contracting officer to have opened the package, it was L&P's obligation to ensure that the Federal Express package was treated as a bid. Cf. John Holtman and Sons, Inc., B-246062, Feb. 19, 1992, 92-1 CPD ¶ _____. Having failed to mark the Federal Express envelope as to its contents, L&P bears the primary responsibility for the manner in which the envelope was handled.

It is true that the protester's bid arguably was in the bid opening official's hand, in the bid opening room, and on time. However, because the bid was returned to L&P, we cannot treat it as merely a misplaced bid that may be

considered. The agency never opened the Federal Express envelope and thus never examined the contents, and the envelope was then returned to the bidder who opened it. We have no way of knowing the actual contents of the Federal Express package which was delivered to the agency on bid opening day. We have no reason to question the good faith of the protester here. However, to allow consideration of bids that could have been altered while out of the government's control would be inconsistent with maintaining the integrity of the competitive system. Elrich Constr. Co., Inc., B-212040.3, Oct. 12, 1983, 83-2 CPD ¶ 455; Rodeo Rd. Equip., Inc., B-242093, Mar. 7, 1991, 91-1 CPD ¶ 256; see Interstate Diesel Serv., Inc., B-229622, Mar. 9, 1988, 88-1 CPD ¶ 244.

The protest is denied.


for James F. Hinchman
General Counsel