



Comptroller General
of the United States

Washington, D.C. 20548

152205

Decision

Matter of: Ling Dynamic Systems, Inc.

File: B-252091

Date: May 24, 1993

Dominic L. Acquarulo for the protester.
Major William R. Medsger and Major Shawn T. Gallagher,
Department of the Army, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Agency-level protest challenging the postponement of bid opening was timely filed with the agency after bid opening but within 10 working days of the date the protester learned the basis of the protest for purposes of determining timeliness under our Bid Protest Regulations, where the protester learned the basis of its protest only 2 hours before bid opening and did not have a reasonable opportunity to file its protest before bid opening.

2. In a sealed bid procurement, a procuring agency may postpone the time set for bid opening for the purpose of enhancing competition, where the contracting officer has reason to believe that a significant segment of the competition would otherwise be excluded from the competition for reasons beyond the bidder's control.

DECISION

Ling Dynamic Systems, Inc. (LDSI) protests the award of a contract to Ling Electronics, Inc. (LEI), under invitation for bids (IFB) No. DAAD01-92-B-0258, issued by the Department of the Army for a vibration amplifier. LDSI contends that the Army improperly postponed the time for bid opening to provide LEI with an opportunity to submit its bid.

We deny the protest.

The IFB was issued on a brand name or equal basis for a vibration amplifier, and identified the products of LDSI and LEI as the brand names. Bid opening was stated to be

December 17, 1992, and two bids were received by that date.¹ In response to concerns raised by prospective bidders, the Army, on December 17, postponed the bid opening date until December 28 at 1:30 p.m. On December 18, the Army issued amendment No. 0003 to amend the solicitation to require that all bidders provide evidence and certification of the compliance of its amplifier with the specifications and provide a list of customers with operational amplifiers.

On December 28, at 9:00 a.m., LEI informed the contracting officer that it had attempted to submit its acknowledgement of amendment No. 0003 by Federal Express but that, due to mechanical problems experienced by the Federal Express aircraft carrying LEI's acknowledgement letter, it would not be delivered until after the scheduled bid opening. LEI requested that the contracting officer authorize submission of the acknowledgement by facsimile transmission. The contracting officer properly informed LEI that the facsimile transmission of bids and acknowledgements was not authorized by the IFB, and recommended that LEI deliver its acknowledgement by hand. LDSI's acknowledgement of amendment No. 0003 was received by the Army on December 28, at 10:30 a.m., but was misdirected by the agency to its contract administration division, since LDSI's envelope did not identify the contents as relating to the IFB.

At 1:00 p.m. on December 28 (shortly before bid opening), the contracting officer was informed by the contract specialist that no new bids (other than the two bids received on December 17) and no acknowledgements of amendment No. 0003 had been received. The contracting officer was unaware at that time that LDSI's acknowledgement had been received by the agency but misdirected to another office. The contracting officer then contacted LDSI and LEI and informed them that their acknowledgements of amendment No. 0003 had not been received, that facsimile transmission of the amendment acknowledgements was now authorized, and that bid opening was postponed until 3:00 p.m. on December 28.

Acknowledgements were received from LDSI and LEI by facsimile transmission by 3:00 p.m. At bid opening, LEI was determined to be the low bidder, and award was ultimately made to that firm. On January 5, 1993, LDSI protested the

¹The bids received were from LDSI and LEI, but were not opened.

postponement of bid opening to the agency. The agency denied LDSI's agency-level protest as untimely on January 21, and this protest to our Office followed.

As an initial matter, the Army argues that LDSI's post-bid opening, agency-level protest of the postponement of bid opening was untimely, and therefore its protest to our Office is likewise untimely. See 4 C.F.R. § 21.2(a)(3) (1993). Generally, to be timely, a protest of an apparent solicitation impropriety must be filed before bid opening, either with our Office or the agency. See 4 C.F.R. § 21.2(a)(1). However, where, as a result of extremely limited time periods, the protester did not have a reasonable opportunity to file its protest before the due date, section 21.2(a)(1) does not apply, and a protest, to be timely, is required to be filed within 10 working days of the date the protester learned of its basis for the protest. See Culligan, Inc., 58 Comp. Gen. 307 (1979), 79-1 CPD ¶ 149; ImageMatrix, Inc., B-243170, Mar. 11, 1991, 91-1 CPD ¶ 270. Here, LDSI learned of the postponement of the bid opening only 2 hours before the amended time for bid opening. In our view, this did not provide LDSI with a reasonable opportunity to file its protest prior to bid opening. See Culligan, Inc., supra (protester received IFB amendment less than 3 hours before bid opening).

The Army argues that while our Office recognizes a "reasonable opportunity to protest" exception to the timeliness rule that requires protests of apparent solicitation improprieties to be filed before the bid opening or proposal closing date, the Army's timeliness rules do not. It is true that our Regulations provide that a contracting agency may impose a more stringent time for initially filing agency-level protests, with which protesters must comply, in order to have a subsequent protest to our Office considered timely. See 4 C.F.R. § 21.2(a)(3). In this case, however, the regulations concerning the timeliness rules for filing agency-level protests are identical to ours, see Federal Acquisition Regulation (FAR) § 33.103(b)(2) (FAC 90-3), and the agency has not directed our attention to any agency rule or regulation that contradicts our exception for situations where bidders or offers do not have a reasonable opportunity to protest prior the bid opening or proposal closing date. Therefore, for purposes of determining timeliness under our Bid Protest Regulations, we find LDSI's agency-level protest and the subsequent protest to our Office to be timely.

The crux of LDSI's protest is that the postponement of the time set for bid opening was unreasonable, because LDSI's acknowledgement of amendment No. 0003 had been timely received by the agency before the time for bid opening

(notwithstanding that the contracting officer was not aware of its receipt). In this regard, LDSI states that it was informed by the contracting officer that if she knew that a responsive bid had been received by the time set for bid opening, she would not have postponed the bid opening. LDSI concludes that if bid opening had not been postponed "[LDSI's] bid would then have been the only bid received on time and available for consideration."

The FAR provides procuring agencies with specific authority to amend invitations to change the date and time set for bid opening. FAR § 14.208. Bid opening may be postponed, even after the time scheduled for bid opening, where the contracting officer has reason to believe that a significant segment of the competition would otherwise be excluded from competition for reasons beyond their control. See FAR § 14.402-3; Combustion Equip. Co., Inc., B-228291, Dec. 24, 1987, 87-2 CPD ¶ 627. A principal purpose of this regulation, as well as a primary concern of our bid protest process, is to ensure that competition in the procurement of goods and services is enhanced rather than restricted. Id.

We see no basis to object to the postponement of the time set for bid opening for the purpose of enhancing competition, where, as here, the contracting officer believes no responsive bids will be submitted by the bid opening time. Even assuming the contracting officer should have been aware of the receipt of LDSI's amendment acknowledgement, we think that the contracting officer acted appropriately in postponing bid opening, given LDSI's own view that only LDSI and LEI could provide a product compliant with the stated specifications. Id.; McNamara-Lunz Vans & Warehouses, Inc., B-230859, Apr. 18, 1988, 88-1 CPD ¶ 380.

The protest is denied.


for James F. Hinchman
General Counsel