



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Hausted, Incorporated

File: B-257087

Date: July 28, 1994

Dennis M. Daar for the protester.
Michael Trovarelli, Esq., and Gale Furman, Esq., Defense Logistics Agency, for the agency.
Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency is justified in rejecting protester's proposal where there is no evidence which establishes that the proposal was timely received by the agency.
2. Where protester's offer could not be accepted, protester is not an interested party to challenge agency decision to cancel solicitation.

DECISION

Hausted, Incorporated protests the cancellation of request for proposals (RFP) No. DLA120-92-R-0662, issued by the Defense Personnel Support Center (DPSC), Defense Logistics Agency (DLA) for recovery beds. Hausted, whose proposal had originally been selected for award, contends that cancellation of the solicitation is not in the best interests of the government.

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

The RFP, issued on August 11, 1992, contemplated award of a firm, fixed-price, indefinite quantity contract to supply certain Stryker Medical Post-Anesthesia Care Beds Model 946, or equal. Award was to be made to the offeror whose proposal represented the best value to the government.

On August 26 and 27, 1992, DLA twice amended the RFP to add missing contract clauses, to change the specifications, and to extend the closing date for receipt of proposals from September 11 to September 25. Two offerors, United Scientific Corporation (as agent for Guild Medical

Industries) and Hill-Rom Company, submitted offers prior to the original closing date and receipt of their proposals was recorded on a DPSC Form 20 (Response Register for Bids/Proposals), executed on September 11. By the amended closing date, Stryker Sales Corporation submitted a proposal and Guild provided additional submittals. These submissions were recorded on a separate DPSC Form 20 dated September 25. Some time prior to December 24, when DLA conducted an initial evaluation of the proposals, DLA received a copy of Hausted's proposal. The date and time of receipt were not stamped on the proposal and DLA has no evidence of when the proposal was received; Hausted's name does not appear on either DPSC Form 20 and the agency did not retain the outer wrapper in which the proposal was sent. At the time of the initial evaluation, DLA did not notice these discrepancies.

From December 1992 to August 1993, DLA conducted discussions with the offerors and reevaluated their proposals. Guild's proposal was eliminated from the competitive range, and the three remaining offerors were invited to submit best and final offers (BAFOs) by September 3, 1993. After receipt of BAFOs, the agency amended the RFP a fifth time to change the specifications and to add missing contract clauses. DLA issued a second request for BAFOs and all three offerors responded by the November 30 closing date. The source selection authority determined that award to Hausted represented the best value to the government and submitted the recommendation to the DLA legal office for review.

During this legal review, DLA realized that it had no evidence to establish the timely receipt of Hausted's proposal, and, thus, determined that it could not award the contract to Hausted. DLA also found that throughout this procurement it had violated its own regulations concerning handling and recording the receipt of proposals, acknowledgments of amendments, and BAFOs. DLA then determined that to preserve the integrity of the competitive process, cancellation of the RFP was appropriate. Hausted then filed this protest, in essence challenging the agency's decision to reject its offer as late and alleging that

¹The DPSC Contracting Policy Manual (CPM) at section 91.201 requires that all bids, proposals, samples, etc. be safeguarded until award and to this end be marked with the date and time of receipt and registered on a DPSC Form 20.

²For example, while all three offerors submitted initial BAFOs by the closing date, only Stryker's name was entered on a DPSC Form 20. With regard to acknowledgment of the amendments, no DPSC Form 20 was completed for the first four amendments and only one offeror's acknowledgment was recorded on the form for amendment 0005.

cancellation was not in the best interests of the government.

It is the responsibility of the offeror to deliver its proposal to the proper place at the proper time, and late delivery generally requires that a proposal be rejected. Federal Acquisition Regulation (FAR) § 15.412; see Robert R. Nathan Assocs., Inc., B-230707, June 28, 1988, 88-1 CPD ¶ 615. A proposal delivered to an agency by a commercial carrier is considered to be hand-carried and, if it arrives late, can only be considered for award if it is shown that some government impropriety during or after receipt by the government was the sole or paramount cause of the late arrival at the designated place. The Chappy Corp., B-252757, July 20, 1993, 93-2 CPD ¶ 44.

The protester alleges that its proposal was delivered by commercial carrier to the agency mail room on September 19. Had the agency received the proposal 6 days before the September 25 closing date, it might be inferred that government mishandling prevented timely receipt at the designated place before the closing date and time. However, we do not reach the question of wrongful government action in delivering an offer unless timely receipt can be established. Qualinetrics, Inc., B-213162, Mar. 20, 1984, 84-1 CPD ¶ 332. Under the solicitation's late proposal clause, the only acceptable evidence to establish the time of receipt at the government installation is the time/date stamp of that installation on the proposal wrapper or other documentary evidence of receipt maintained by the installation. FAR § 52.215-10. Timely receipt can be established by all relevant evidence, including statements of procurement officials as to the time of receipt. Santa Cruz Constr., Inc., B-226773, July 2, 1987, 87-2 CPD ¶ 7.

Here, the agency maintained no evidence of when the proposal was received. The proposal itself bears no date/time stamp, the outer wrapper which would have been stamped was not retained for any of the proposals, and Hausted's name was not entered on either of two DPSC Forms 20 which listed all other offerors. The mail room has no record of the receipt of Hausted's proposal at any time during the month of September 1992.

Hausted's only proof of the September 19 delivery is a UPS receipt signed by the protester's representative and dated September 8. This receipt shows when a package was given to UPS for delivery to a DPSC address, but it does not establish when delivery was made to the agency and, in any event, is not evidence maintained by the agency; records of a commercial carrier as to time of receipt, standing alone, cannot serve to establish time of receipt. See Kings Point

Indus., B-228150, Nov. 10, 1987, 87-2 CPD ¶ 474;
Qualinetrics, Inc., SURRA.

The UPS receipt also establishes that Hausted was at least partially responsible for its apparently late offer. The RFP provided two separate destinations at DPSC in Philadelphia: a post office box number (for mailed proposals) and a building, floor, and room designation (for hand-delivered proposals). The protester did not use either of these destinations on the shipping label for its hand-delivered proposal. Instead, Hausted's label identified the solicitation number, and identified the contracting officer at the "Equip. Branch," as the destination within DPSC. By misaddressing its label, and by choosing a method of delivery other than those methods specified in the late proposal clause (registered, certified, or Express mail, or where authorized, telegram or telefacsimile), Hausted assumed a high degree of risk that its proposal would be rejected if untimely received. See Sear Publishing, Inc., B-237359, Feb. 12, 1990, 90-1 CPD ¶ 181.

We recognize that application of the late proposal clause sometimes may seem harsh, especially where, as here, the agency treated Hausted's proposal as timely throughout a lengthy period of negotiation. However, the government must protect the integrity of the procurement process by assuring equality of treatment for all offerors. The late rule prevents one offeror from obtaining an unfair advantage over a competitor that might accrue because that offeror is permitted to submit a proposal later than the deadline established for all competitors. Siemens Hearing Instruments, Inc., B-225548, Dec. 30, 1986, 86-2 CPD ¶ 721.

To the extent that Hausted suggests that the length of time between the initial closing date and decision to cancel the solicitation (approximately 19 months), coupled with the protester's submission of two BAFOs, cures its failure to submit a timely proposal, we disagree. In an analogous situation where an agency had negotiated with an offeror for nearly 1 year, including requesting two BAFOs, we held that the agency correctly rejected the proposed awardee's proposal as late when it ultimately determined that there had not been timely receipt of the initial proposal, because the subsequent BAFOs, even if considered "new offers," were ineffective to cure the problem as they too were submitted after the initial closing date. See G.D. Searle & Co., B-247077, Apr. 30, 1992, 92-1 CPD ¶ 400. In other words, an extended period of negotiation that includes the submission of revised proposals cannot legally cure an initial late submission. With regard to Hausted's challenge to the cancellation of the solicitation, Hausted is not entitled to raise that issue. Under our Bid Protest Regulations, a protester must be an actual prospective supplier whose

direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (1994). A protester is not an interested party where it would not be in line for award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. If we were to determine that the agency's decision to cancel the solicitation was flawed, upon reinstatement of the RFP the protester's proposal would not be eligible for award. Thus, Hausted is not an interested party to protest the agency's decision to cancel the solicitation.

The protest is denied in part and dismissed in part.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel