



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

B-177284

April 19, 1973

30133

McNutt, Dudley, Easterwood &  
Loesch  
Barr Building  
Washington, D. C. 20006  
CNG 00782

Attention: Robert H. Ihmt, Esquire

Gentlemen:

DLG 06390  
DLG 06391

Further reference is made to your telegram of October 18, 1972, and subsequent correspondence, on behalf of the Donovan Construction Company and Incorporated Systems Company, protesting the consideration by the General Services Administration of certain proposals submitted in response to a request for technical proposals (RFTP). The RFTP was issued under two-step formal advertising procedures pursuant to the authority of subpart 1-2.5 of the Federal Procurement Regulations.

Step one of the solicitation, as amended, required that un-priced technical proposals be submitted by 3:00 p.m., October 6, 1972. Seven proposals were timely received. Two proposals; those of CRS/CM of Houston, Texas, and MMT Associates, Incorporated, of Chicago, Illinois, were received late. The record indicates that at 1:35 p.m., on October 6, a representative of CRS/CM informed the contracting officer by telephone that CRS/CM's proposal had been put on an Eastern Airlines plane at Houston on October 5, but that the proposal had been lost by the airline. CRS/CM then hand-carried another copy of the proposal to Washington, D. C., where it was received by the GSA at 10:17 p.m., October 6.

The proposal of MMT Associates, Incorporated, was not received by the GSA until October 10. The insured mail receipts from the Post Office indicate that the proposal was not mailed until 2:40 p.m., October 6, only 20 minutes prior to the deadline for submitting proposals.

The RFTP provides in regard to late technical proposals:

"(a) Proposals received at the issuing office designated above after the close of business on the date set for receipt thereof (or after the

[Protest of GSA Consideration of Certain Technical Proposals]

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time set for receipt, if a particular time is specified) will not be considered unless: (1) they are received before the invitation for Bids in Step Two is issued; and either (2) they are sent by registered mail, or by certified mail for which an official, dated post office stamp (postmark) on the original Receipt for Certified Mail has been obtained, and it is determined by the Government that the late receipt was due solely to delay in the mails for which the Offeror was not responsible; or (3) if submitted by mail, it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; provided that timely receipt at such installation is established upon examination of an appropriate date or time stamp (if any) of such installation, or of other documentary evidence if receipt at such installation (if readily available) within the control of such installation or of the post office serving it.

"(b) Offerors using certified mail are cautioned to obtain a Receipt for Certified Mail showing a legible, dated postmark and to retain such receipt against the chance that it will be required as evidence that a late proposal was timely mailed.

"(c) The time of mailing of late proposals submitted by registered or certified mail shall be deemed to be the last minute of the date shown in the postmark on the registered mail receipt or registered mail wrapper or on the Receipt for Certified Mail unless the Offeror furnishes evidence from the post office station of mailing which establishes an earlier time. In the case of certified mail, the only acceptable evidence is as follows: (1) where the Receipt for Certified Mail identifies the post office station of mailing, evidence furnished by the Offeror which establishes that the business day of that station ended at an earlier time, in which case the time of mailing shall be deemed to be the last minute of the business day of that station; or (2) an

entry in ink on the Receipt for Certified Mail showing the time of mailing; and the initials of the postal employee receiving the item and making the entry, with appropriate written verification of such entry from the post office station of mailing, in which case the time of mailing shall be the time shown in the entry. If the postmark on the original Receipt for Certified Mail does not show a date, the offer shall not be considered."

Applying the above provisions to the facts of the subject case, it is evident that a literal interpretation of the RFP would necessitate rejection of the proposals of CRB/CI and MMT Associates, Incorporated, as untimely. The administrative report states on page 3:

"\* \* \* neither [late proposal] met the second condition to be eligible despite late receipt. Neither had been sent by registered or certified mail and one had not been mailed until twenty minutes prior to the specified time for submission so that late delivery was obviously not due to delay in the mails."

However, the fundamental purpose of two-step procurement procedures is set forth in Subpart 1-2.5 of the Federal Procurement Regulations which provides in pertinent part that:

"1-2.501 General.

"(a) Two-step formal advertising is a method of procurement designed to promote the maximum competition practicable when available specifications are not sufficiently definite to permit a formally advertised procurement in accordance with Subparts 1-2.2, 1-2.3, and 1-2.4. It is a flexible procedure and is especially useful, in procurement of complex and technical items, to prevent the elimination of potentially qualified producers from the competitive base."

Under this provision, although the second step is conducted in accordance with the strict rules of a formal advertising procedure, the first step is intended to be a more flexible process whereby the

goal of maximized competition will be accomplished. Thus, we have held that under certain circumstances during the first step, the request of and acceptance by the contracting officer of a new or amended technical proposal from a proposer after the expiration of the date for submission of proposals " " " was proper and consistent with the philosophy of the two-step procurement procedures." 51 Comp. Gen. 372, 377 (1971). See also 45 Comp. Gen. 24 (1965) and B-160324, April 5 and February 16, 1967. As we stated in the latter case, "The purpose of placing a limitation on the time for submitting proposals is primarily for the Government's benefit."

In your letter of December 21, 1972, you assert that the GSA Administrative Report's reliance on B-163898, February 10, 1969, as authority for this position that the time limitation in the present RFP need not be strictly enforced, is misplaced. It is your contention that "the RFP therein did not contain the strict language found in the instant RFP which states that 'Proposals received . . . after the time set for receipt . . . will not be considered . . .'. In that case, the contracting agency proposed to reject a proposal under step one as late but we concluded that the late bid regulations need not be followed to the letter on the first step of a two-step procurement. In our opinion, GSA's reliance on our prior decisions as authority for the proposition that the time limitation need not be strictly enforced under step one was reasonable. Therefore, we cannot object to the General Services Administration's consideration of the late proposals of CRS/CIS and LEMT Associates.

However, we also believe that step one solicitations should appropriately advise offerors of the consequences of failing to submit timely proposals. While we have consistently sustained agency determinations to consider late proposals under step one proceedings for the reasons stated above, we believe such administrative actions should be consistent with the provisions of the solicitation. Therefore, we are advising the General Services Administration by letter of today, copy enclosed, that late technical proposal clauses used in future step one solicitations should appropriately advise offerors of the rules to be applied with respect to such proposals. Further, we are advising the Administrator that in our view late proposals under step one should be treated in strict accordance with the terms of the solicitation, and that any decisions of our Office to the contrary are hereby modified accordingly.

You also object to the consideration of certain proposals because of the failure of the offerors involved to acknowledge receipt of certain

amendments as required by the RFP. The RFP provides in this regard that the "Prospective Offerors are required to acknowledge receipt of all amendments to this Request for Technical Proposals, giving the number and date of each." The record indicates that the protesting firm and Clapp & Holmes fully complied with this requirement. Two other firms (L Group and NMT) acknowledged receipt of the amendments, but after the time for submission of proposals. Inter Built Systems Company's proposal included the statement "Amendments to Items 1 thru 8 respectively, prebid dated and acknowledged." Owens-Corning Corporation advised, after submission of its proposal that "Eight Addendum \* \* \* have been received and all changes have been made as directed." Total Integrated Systems, Incorporated, after the deadline for submission of technical proposals, advised that "We acknowledge receipt of all amendments through Amendment 8 issued on the above project." CFB/CM's late proposal acknowledged that "The Proposal was prepared in response to \* \* \* Volumes 1 and 2 and subsequent amendments." Finally, Consultant Networks, Incorporated, stated in a letter of October 25 that "We acknowledge receipt of all amendments."

It is our view that any defects in the acknowledgement of amendments in the first step of a two-step procurement may be waived by the Government in an attempt to achieve the maximum competition which is the fundamental purpose of the two-step advertising procedure. The reasoning which requires the rejection of a bid for failure to acknowledge an amendment in a formally advertised procurement is not applicable here. To consider a bid in that situation "is prejudicial to other bidders and leaves an option to the nonacknowledging bidder to decide after bid opening whether to make himself eligible for award by producing evidence to show that he considered the unacknowledged amendment or to avoid the award by remaining silent." D-165150, September 16, 1968. However, in the first step of two-step formal advertising, the legal implications are entirely different. There is no public opening of bids, prices are not submitted, and no binding contract arises from the acceptance and evaluation of a technical proposal.

It should be noted that the RFP does not state that failure to conform with this requirement will render the technical proposal ineligible for consideration. What is desired, as the GSA report states, is "conformity to the substantive content of the amendments, rather than conformity with a requirement to acknowledge their receipt \* \* \* And evaluation of the technical proposals will disclose conformity or nonconformity to the performance requirements expressed in the amendments." Since we fail

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to find any prejudice which would result from consideration of the proposals of the offerors who failed to acknowledge amendments properly, we have no objection to consideration of those proposals.

For the reasons set forth above, we must sustain the administrative conclusion to evaluate all of the proposals submitted to determine their acceptability for participation in the second stage of the two-step formally advertised procurement.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General  
of the United States

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