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Proc. II

DECISION



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

FILE: B-189357

DATE: October 25, 1977

MATTER OF: American Electronic Laboratories, Inc.

DIGEST:

Where it is impossible to determine with certainty and by independent evidence whether protester's revised proposal was received by the Government (i. e., deposited in the appropriate bid depository) prior to the designated deadline, the integrity of the competitive system precludes its consideration for award purposes.

American Electronic Laboratories, Inc. (AEL) protests the Department of the Navy's failure to consider its best and final offer submitted under Request for Proposals No. N00383-77-R-1677, issued by the Aviation Supply Office (ASO), Philadelphia, Pennsylvania.

Essentially, the protester argues that it is entitled to a contract award because its best and final offer, which was lower than the award price, was timely submitted and should be considered even though the contracting officer may not have received it prior to contract award.

The instant solicitation was issued April 26, 1977 and requested proposals by 2:00 p. m. on May 16, 1977. The solicitation provided that hand-carried proposals would be received in the depository designated in the solicitation. Timely initial proposals were submitted by AEL (\$178.00 per unit) and American Nucleonics Corporation (ANC) (\$149.00 per unit). Following receipt of initial proposals, the Navy increased its requirements from 1406 to 1526 units and changed the packaging specification.

On May 25, 1977, AEL and ANC were notified of these changes by telegrams which also stated, in part:

"1. You are advised that competitive negotiations for articles covered by RFP NOO383-77-R-1677 are still open and will close on 3 June 1977 at 2:00 p. m.
* * *

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"2. You are advised that a revised proposal may be submitted by you if you so desire. It is requested that such proposal be your best and final offer and that it be submitted so as to be received at ASO by the time and date set forth above. A revised proposal received after such date and time will be treated as a late proposal in accordance with and subject to the provisions of the clause hereof entitled late proposals. If you do not elect to submit a revised proposal your existing proposal will be considered to be your best and final proposal. * * *."

The protester contends that it submitted a revised proposal as follows:

"On June 3, 1977 the protestant's Contract Administrator, * * * hand delivered the AEL 'best and final offer' * * * to the procuring activity. * * * [He] arrived at ASO's bid room #203 at about 12:45 P.M., EDT. No Government personnel were present at the receiving counter in the bid room at the time of arrival. The protestant's bid was deposited in the bid box clearly identified as such. The AEL bid was contained within the bidder's large white envelope addressed to the procuring activity exactly as identified on block #8 of the solicitation's Standard Form 33. The bidder's envelope contained, on its face, the solicitation number clearly marked. In accordance with long established practice, no receipt stamp was requested prior to placing the letter in the bid box, nor could one have been obtained in view of the absence of Government personnel as noted above. * * *."

AEL argues that it delivered its revised proposal to the depository designated in the solicitation prior to the specified deadline and, therefore, was entitled to have its revision considered. The Navy states that, while the envelope containing AEL's revised proposal may have been timely placed in the depository, it was not identified as a proposal until it was opened several days later, at which point the Navy could no longer ascertain, with certainty, whether it had been submitted before the designated deadline. Because there was no independent evidence of the actual time of receipt of AEL's offer and, notwithstanding the fact that, if considered, AEL's proposal would have entitled it to award, the Navy concludes that the integrity of the competitive system precluded consideration of AEL's revised proposal.

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Whether the envelope containing AEL's revised proposal was placed in the depository prior to 2:00 p.m. on Friday, June 3, as alleged by AEL, or was placed there at some subsequent time, it was not identified as a response to a solicitation until the afternoon of Tuesday, June 7 when it was delivered by inter-office mail to the office of the ASO buyer, to whose attention the envelope was addressed. By that time, letter notice of award had been made to ANC. The Navy concedes that AEL's revised proposal may have been deposited prior to the designated closing time. However, the Navy points out that the evidence of timely deposit is the self-serving statement of the AEL representative who allegedly deposited the envelope and the sign-in sheet maintained at ASO which indicates that this individual was at ASO at 1:00 p.m. on June 3.

In its initial report on this protest, the Navy took the position that all relevant evidence should be used to establish the time of receipt of the hand-carried proposal. See Fire Trucks, Inc., B-185743, May 12, 1976, 76-1 CPD 316. In that case, we held that the strict evidentiary standard of receipt of bids in formally advertised procurements (see ASPR § 7-2002.2(c)(1)) was applicable solely to mailed and telegraphic bids and not to hand-carried bids. The same rationale appears to be appropriate in negotiated procurements. See ASPR § 7-2002.24. We shall consider all relevant evidence in determining whether AEL's hand-carried proposal was received by the Government prior to 2:00 p.m. on June 3.

The Navy has taken the position that the available evidence is either self-serving (AEL's Contract Administrator's affidavit) or merely consistent with the possibility of timely submission (ASO's sign-in sheet), and has concluded, on the basis of our decision in Free State Builders, Inc., B-184155, February 26, 1976, 76-1 CPD 153, that, since the integrity of the competitive system demands more than the mere possibility of timely submission, the revised proposal of AEL must be rejected.

In Free State we denied a similar protest essentially because there was no independent evidence to establish that the bid was out of the protester's control and in the bid box prior to bid opening. The protester attempts to distinguish Free State Builders, Inc. by showing that, whereas in that case the failure of anyone to hear a bid box alarm prior to the time set for bid opening was circumstantial evidence of late submission, here all available evidence is consistent with timely receipt of the late-discovered proposal. The protester relies on the affidavit of its employee, the sign-in sheet at ASO, and the fact that, for the revised proposal to have reached the buyer's desk by 4:28 p.m. on Tuesday, June 7 through

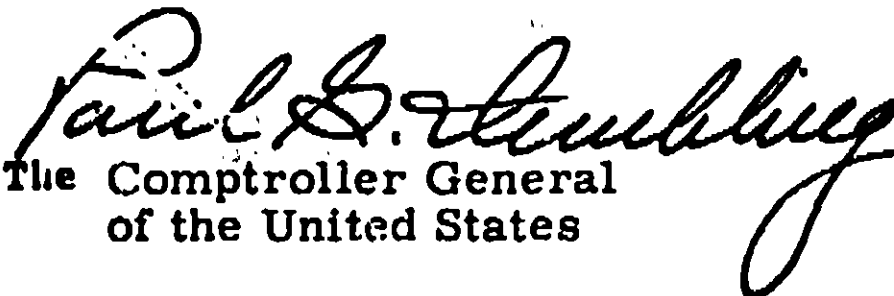
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the inter-office mail system, it had to have been received in the bid box at least 24 hours earlier. The protester contends that the party who submitted the revised proposal was not at ASO on Monday, June 6, and that, therefore, it is only reasonable to conclude that the proposal was submitted prior to 2:00 p.m. on June 3, as stated by his affidavit.

Though probative of timely receipt, the evidence relied upon by the protester is far from independent or conclusive as to the actual time at which the revised proposal of AEL was placed in the depository. We are advised by the Navy that the time for delivery through inter-office mail at the installation involved is ordinarily one or two days. The Navy also indicates that, while the ASO bid box was opened each business day at 2:00 p.m., it may also have been opened after 2:00 p.m. Consequently, a letter delivered to the addressee at 4:28 on June 7 could have been removed from the depository sometime on or after 2:00 p.m. on either Friday, June 3 or Monday, June 6. Since there is no independent evidence that the revised proposal was in the depository prior to the 2:00 p.m. deadline, we agree with the Navy that the revised proposal properly was not considered for award purposes. S. Puma and Company, Incorporated, B-182936, April 17, 1975, 75-1 CPD 230.

The Navy has indicated that, as a result of the problems encountered in this case, it has instituted a procedure by which all envelopes removed from the ASO depository at 2:00 p.m. --and not merely those recognizable as containing offers--are marked as having been removed at that time. Although it is speculative whether this action would have benefited the protester because there is no independent evidence that the final offer was in the depository prior to the closing time, we nevertheless endorse the procedure implemented.

Accordingly, the protest is denied.


For The Comptroller General
of the United States