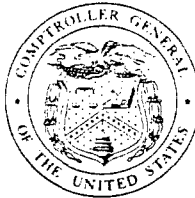


Proc II

DECISION



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

9841

FILE: B-193248; B-193248.2 DATE: April 18, 1979

MATTER OF: Ads Audio Visual Productions, Inc.;
The Public Advertising Council

[Protest of Best and Final Offer Being Rejected For Lateness]
DIGEST:

1. Best and final offer was properly rejected as late where it was delivered to location other than that specified, and in envelope bearing no indication of its contents, where record does not show place of actual delivery has been established by long standing practice as location for delivery of handcarried bids or proposals or where lateness is not due solely to Government mishandling.
2. Protests alleging alleged improprieties in the request for proposal that were apparent prior to closing date for receipt of initial proposals are untimely and not for consideration on the merits.
3. Issue first raised 3 months after protest was filed and almost 4 months after basis of protest became known is not timely and will not be considered on merits.
4. Generalized unsupported allegations of competency of evaluation team do not meet protester's burden of affirmatively proving case, and absent any allegations or showing of fraud, bad faith, or conflict of interest, General Accounting Office will not review qualifications of technical evaluation panel.

DLG 00058

DLG 00059

The Public Advertising Council (PAC) and Ads Audio Visual Productions, Inc. (Ads), protest the award of a contract on September 29, 1978 by the Department of Health, Education and Welfare, Office of Education (OE)

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DLC 00060

to Grey-North, Inc. (Grey-North) under Request for Proposal (RFP) No. 78-117. The contract is for the development of radio public service announcements on consumer education. Inasmuch as the protests are based on disparate grounds, we will consider each separately. However, both protests are denied.

I. The PAC Protest

PAC protests the agency's determination that its best and final offer was late and therefore not for consideration. PAC bases its protest on the grounds that the offer was in the possession of the Government prior to the time set for receipt of best and final offers. There appears to be no dispute over the following facts:

After discussions with the offerors found to be in the competitive range, best and final offers were requested to be submitted to the Office of Education by 4:00 p.m. on September 25, 1978. The location specified for receipt of those offers was room 5915 in the agency's offices in Washington, D.C.

PAC's offer was contained in a sealed envelope bearing the RFP number, but with no indication of its contents, and was hand-delivered to room 5673 approximately 1-1/2 hours prior to the designated deadline. PAC asserts that a secretary in room 5673 orally acknowledged timely receipt of the best and final offer "on behalf" of the contracting officer, and has submitted an affidavit to that effect. PAC also claims that room 5673 is the "Application Control Center" which accepts documents for filing for OE's Grant and Procurement Management Division. Thus PAC asserts that on previous occasions, documents or correspondence intended for the contracting officer in response to questions posed by him, were delivered to room 5673 and promptly forwarded to the contracting officer in room 5915. PAC therefore concludes that the late receipt of its best and final offer was due to Government mishandling and was not due to any fault of its own. We disagree.

With respect to this issue, the RFP provides that:

"A modification resulting from the contracting officer's request for 'best and final' offer received after the time and date specified in the request will not be considered unless received before award and the late receipt is due solely to mishandling by the Government after receipt at the Government installation." (Emphasis added.)

We do not believe that the facts of this case can support a finding that the late receipt of PAC's best and final offer was due solely to Government mishandling. For example, PAC has not shown that room 5673 has been established by long standing practice as the location for the delivery of handcarried bids or proposals for the OE, notwithstanding contrary directions in the solicitations, so that delivery to room 5673 would be tantamount to delivery to the designated locations. See, L.V. Anderson and Sons, Inc., B-189835, September 30, 1977, 77-2 CPD 249. Here the protester has only shown that at most on some prior occasions, materials (not including bids or proposals) destined for the contracting officer in room 5915 were left in room 5673 and subsequently delivered in a reasonably prompt fashion. However, even if such a practice could be established, the lack of any indication of the contents of the envelope left with the secretary in room 5915 would seem to us to preclude a finding that Government mishandling was solely responsible for the lateness of its best and final offer. In a similar vein, we have permitted acceptance of a late handcarried proposal only where it can be shown that improper Government action was the proximate cause of the lateness, but not when actions of the offeror are significant or intervening causes of the delay. Presnell-Kidd Associates, B-191394, April 26, 1978, 78-1 CPD 324.

As a final matter, we do not agree with PAC's suggestion that OE officials acted improperly when they returned PAC's best and final offer unopened after award had occurred. Their actions were consistent with applicable provisions of the Federal Procurement Regulations (FPR) § § 1-3.802-1(b) and 1-2.303-7 (1964 ed.).

We therefore find no merit to this protest.

II. The Ads Protest

Ads' protest is based for the most part on grounds which were not timely raised and thus not for consideration on their merits under our Bid Protest Procedures, 4 C.F.R., Part 20 (1979). Those procedures provide that:

"Protests based upon alleged improprieties in any time of solicitation which are apparent prior to * * * the closing date for receipt of proposals shall be filed prior to * * * the closing date for receipt of initial proposals. * * * 4 C.F.R. § 20.2(b)(1) (1975).

"In cases other than those covered [above] bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier."
4 C.F.R. § 20.2(b)(2) (1978).

The closing date set for receipt of initial proposals was August 28, 1978, while the Ads protest was filed on October 19. Thus questions relating to the lack of a small business set-aside, the alleged poorly organized and confusing nature of the RFP, and the failure of the RFP to require the purchase of manufactured materials from the Federal Supply Schedule were all matters which we believe were apparent prior to the closing date set for receipt of initial proposals. Since Ads filed its protest after that date, these issues are not for consideration on the merits.

In addition, Ads asserts that the award should not have been made to an advertising agency because of its claim that the RFP was clearly designed for a broadcast production company as opposed to an advertising agency. Ads states various reasons for this conclusion. However, this contention was first issued in its comments on the agency report which it filed on January 23, 1979, 3 months after the date of its initial protest and about 4 months after this basis of protest became known. Under these circumstances, that issue has not been timely filed

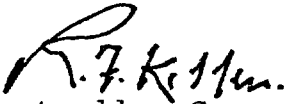
and it will therefore not be considered on the merits. See Bunker Ramo Corporation, 56 Comp. Gen. 712 (1977), 77-1 CPD 427.

Finally, we find no legal merit to the remaining issues in the Ads protest.

Ads maintains that members of the evaluation team assembled for this procurement were not qualified to judge the merits of proposals because of deficiencies in their biographical and work statements. Ads, however, fails to identify which panel members it believes are unqualified and presents no evidence or additional grounds beyond its bare allegations to support its position. Ads' generalized and unsupported allegations only amount to speculation about the competency of the panel members and do not meet the protester's burden of affirmatively proving its case. Nanex Systems Corporation, B-193252, February 14, 1979, 79-1 CPD 105.

Further, in the absence of allegations of fraud, bad faith, or conflict of interest, our Office will not review the qualifications of agency technical evaluation panel members. This is because we consider the composition of a technical evaluation panel to be a matter primarily within the discretion of the contracting agency. University of New Orleans, B-184194, May 26, 1978, 78-1 CPD 401. Here, Ads presents no such allegations. Accordingly, we see no reason to further consider the matter.

The protests are denied.


Deputy Comptroller General
of the United States