

DECISION



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

FILE: B-220757

DATE: January 13, 1986

MATTER OF: International Association of Fire
Fighters

DIGEST:

1. Where full and open competition and reasonable prices are obtained by the government and record does not show a deliberate attempt by the agency to exclude offeror from the competition, an offeror's nonreceipt of a solicitation amendment establishing an earlier due date does not entitle the offeror to have its late proposal, which was submitted after the original due date, considered for award.
2. Solicitation clause that allows consideration of a late modification of an otherwise successful proposal that presents more favorable terms does not permit government to accept late initial proposal.

The International Association of Fire Fighters (IAFF) protests the Federal Emergency Management Agency's (FEMA) refusal to consider its proposal under request for proposals (RFP) No. EMW-85-R-2130, for field testing and sizing of fire fighters' protective equipment. FEMA rejected IAFF's proposal because it was submitted after the closing date for receipt of proposals.

We deny the protest.

FEMA published notice of the procurement in the Commerce Business Daily (CBD) on July 18, 1985. When the RFP was issued on August 14, copies were sent to 29 firms that responded to the CBD announcement and to 69 other firms that were on FEMA's mailing list for fire prevention and control solicitations. A solicitation was not mailed to IAFF because it was not on the mailing list and did not request a copy in response to the CBD announcement. IAFF, however, received a copy of the solicitation from a FEMA employee not associated with FEMA's procurement Office.

034244

The RFP stated that all proposals must be submitted to the contracting office by 3:00 p.m. September 14, a Saturday. Amendment No. 001, issued on August 20, changed the closing date to Friday, September 13. IAFF was not sent a copy of the amendment because it was not on the mailing list and the procurement office was not aware of IAFF's interest in the procurement.

FEMA received four proposals by the September 13 closing date for receipt of proposals. IAFF's proposal was delivered to FEMA on September 16. By letter dated September 17, FEMA informed IAFF that its proposal was submitted late and would not be considered.

IAFF contends that it should have been informed of the change in the closing date and concludes that but for the agency's failure to provide it with a copy of the amendment, its proposal would have been timely submitted. IAFF says that it should have been informed of the change in the due date because FEMA was aware of its interest in the procurement since IAFF had recently done similar work for FEMA under a grant and IAFF had applied to FEMA for a grant to do the very work that is now to be done under this solicitation. IAFF also argues that FEMA was or should have been aware of its interest in the procurement since it was given a copy of the solicitation by a FEMA employee. Consequently, the protester argues that it was not bound to the amended closing date and could submit its proposal within the time set by the solicitation as originally issued. In this regard, the protester reasons that the original RFP closing date of Saturday, September 14, should be interpreted as allowing submission of proposals on Monday, September 16, since Saturday generally is not considered a business day. Since its proposal was submitted on Monday, September 16, IAFF concludes that it was timely submitted.

We find that the proposal was late, and that for the reasons set forth below, IAFF's failure to receive the amendment changing the date for receipt of proposals does not provide a basis for requiring the agency to accept the proposal.

Generally, the risk of nonreceipt of a solicitation amendment rests with the offeror. Maryland Computer Services, Inc., B-216990, Feb. 12, 1985, 85-1 CPD ¶ 187. The propriety of a particular procurement is determined on the basis of whether full and open competition was achieved and reasonable prices were obtained, Metro Medical Downtown, B-220399, Dec. 5, 1985, 85-2 CPD ¶ _____, and whether the agency made a conscious and deliberate effort to exclude an offeror from competing for the contract. Reliable Service Technology, B-217152, Feb. 25, 1985, 85-1 CPD ¶ 234.

Here, FEMA explains that it did not intentionally avoid sending the amendment to IAFF; its contracting personnel simply were not aware of IAFF's desire to participate in the procurement. While it appears that the FEMA program personnel who provided IAFF with a copy of the solicitation and may have known of IAFF's intent to submit a proposal did not so inform FEMA procurement officials, there is nothing in the record to indicate that this omission was deliberate. Further, the record shows that FEMA sent out 98 solicitations (in addition to the one provided to IAFF) and received four proposals with cost estimates ranging from \$488,640 to \$165,313. FEMA made award to the low offeror, Biotherm, Inc. In view of the number of firms solicited, the responses received and the award made, we think full and open competition was achieved.

Moreover, in view of IAFF's concern about the unusual Saturday date for receipt of initial proposals in the original solicitation, we think the protester should have contacted FEMA before it took upon itself to change the due date to the following Monday. Since it did not do so, it must share in the responsibility for what happened here. See Avantek, Inc., 55 Comp. Gen. 735 (1976), 76-1 CPD ¶ 75.

IAFF also argues that under paragraph (f) of the solicitation's late proposal clause, the protester's proposal should be considered acceptable as a late modification of an otherwise successful proposal that presents more favorable terms to the government. We do not agree. The clause allows the government to accept more favorable terms only from an offeror that would receive the contract

anyway. Woodward Associates, Inc., et al., B-216714, et al., Mar. 5, 1985, 85-1 CPD ¶ 274. Clearly IAFF's late proposal could not be considered under this clause, which applies only to late modifications to timely submitted proposals.

Finally, the protester argues that its proposal should be considered by FEMA in the interest of equity and fairness. Although it is unfortunate that IAFF was not informed of the change in the date for receipt of proposals, as indicated, the protester is not totally blameless, and we think that under the circumstances here it would be inappropriate to disturb an award made pursuant to full and open competition.

The protest is denied.

for Seymour E. Gross
Harry R. Van Cleve
General Counsel