



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Environmental Control Division, Inc.
File: B-255181
Date: February 16, 1994

Gary W. Hurst and John A. Haney, Jr., for the protester, Lee Ann Holt, Esq., General Services Administration, for the agency. Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly rejected best and final offer (BAFO) transmitted by facsimile in response to agency's facsimile transmitted BAFO request where the solicitation did not allow for offers or modifications thereto to be so transmitted.
2. Protester was not misled, so as to excuse the protester's late best and final offers (BAFO), by the agency's failure to designate in a request for BAFO the room number where hand-delivered BAFOs were to be delivered, as shown by the fact that the envelope in which the protester's BAFO was contained was pre-addressed with the correct room number--the same room where the protester's initial proposal was delivered.
3. Agency properly rejected hand-carried best and final offer (BAFO) submitted 4 minutes after the designated 3:00 p.m. closing time, notwithstanding that the BAFO request stated that the closing time was 3:00 p.m. standard time and the agency decided the timeliness of the delivery using local time which was daylight savings time, because the Uniform Time Act of 1966, 15 U.S.C. § 260a (1988), provides for only one standard time for governmental purposes, that is, the applicable local time, regardless of whether it is referenced as standard time or daylight savings time in the solicitation.

4. Agency may not accept a late best and final offer as a modification to an "otherwise acceptable" initial proposal that was more advantageous to the government where the initial offer cannot be accepted because it does not commit the offeror to comply with a material provision added after initial proposals were submitted.

DECISION

Environmental Control Division, Inc. (ECD) protests the rejection of its best and final offer (BAFO) as late under request for proposals (RFP) No. GS-08P-93-JXC-0124, issued by the General Services Administration (GSA). The RFP contemplated the award of a fixed price construction contract for lead abatement at the Federal Building/Post Office, Denver, Colorado. ECD contends that it delivered its BAFO on time, and that even if its BAFO was late, the agency must consider its initial proposal to be an otherwise successful offer which its BAFO made more advantageous to the government.

We deny the protest.

On September 20, 1993, GSA solicited competitive proposals from four local firms, including ECD, that were satisfactorily performing, or had recently performed, similar work for GSA. GSA urgently required the specified work because the presence of lead debris and paint was delaying an on-going renovation project in the same building. That 75 percent complete contract did not call for lead abatement and GSA was unable to reach an agreement with the renovation contractor to perform this work. Thus, the contractor under this RFP has to perform the work outside of regular working hours after the renovation contractor has left the site; however, the RFP did not mention this restriction on the time of performance.

GSA received proposals from all four of the solicited potential contractors by the September 23 closing date for receipt of proposals. While there was some confusion in the RFP as to which room the proposals were to be delivered, Room 145 or Room 272, the RFP, read as a whole, clearly indicated that Room 272 was the designated place and all offerors, in fact, timely delivered their initial proposals to Room 272.

On September 24--apparently having realized that, as issued, the RFP required performance while the renovation contractor was still on-site¹--GSA opened telephonic discussions with the four offerors to obtain their commitment that the work would be done outside normal working hours. GSA concluded the discussions by 9:30 a.m. with oral requests to each offeror for a BAFO to be submitted by 3:00 p.m. that afternoon. GSA followed the oral BAFO request with a facsimile message to each offeror stating:

"[a]ll offerors are asked to confirm in writing that no work on this project shall be performed during the hours of 6:00 am - 4:00 pm, Monday through Friday.

"Your written response to this letter is required by 3:00 PM MST [mountain standard time] on September 24, 1993. Any revisions received after such time and date will be treated as a late offer in accordance with the provision in the solicitation entitled, FAR [Federal Acquisition Regulation §] 52.215-10, Late Submissions, Modifications and Withdrawal of Proposals [that was included in the RFP]."

The facsimile's letterhead gave the same building number as the RFP, but did not repeat that BAFOs were to be submitted to Room 272.

ECD submitted its BAFO via two facsimile transmissions and by hand delivery. GSA received one of the facsimile transmitted BAFOs by 3:00 p.m. local time and received the hand-carried BAFO at 3:04 p.m. local time. GSA rejected ECD's BAFO as late and made award to the offeror with the low priced timely BAFO. This protest followed.

ECD contends that GSA should have considered the timely facsimile transmission of its BAFO that GSA received before the closing time, urging that GSA's use of a facsimile confirmation of the BAFO request in effect invited a facsimile response. However, the solicitation warned that "[f]acsimile offers, modifications or withdrawals will not be considered unless authorized by the solicitation."

¹The RFP contained a clause entitled "Working Hours," which requires the contractor to perform "during the customary working hours of the trades involved unless otherwise specified" and provides "[w]ork performed by the contractor at his own volition outside such customary working hours shall be at no additional expense to the government."

The RFP did not provide the required authorization to submit facsimile offers or modifications thereto. Therefore, ECD's facsimile BAFO could not be accepted. G.D. Searle & Co., B-247077, April 30, 1992, 92-1 CPD ¶ 406.

ECD also suggests that its hand-delivered BAFO would have arrived earlier had GSA's BAFO request included a room number. ECD observes that bid documents are normally delivered to Room 145, not Room 272, as GSA required here, which ECD suggests may have been the reason its BAFO was late. It is clear here that the government's failure to identify the room number for receipt of BAFOs in the BAFO request played no part in the late delivery of ECD's BAFO since the envelope containing the BAFO was pre-addressed with the correct room number (i.e., Room 272)--the same place ECD's initial proposal was delivered.

ECD alternatively claims that its BAFO was not 4 minutes late because GSA designated the deadline for receipt of BAFOs in terms of mountain standard time (i.e., "3:00 PM MST"), even though the current local time was mountain daylight savings time. Thus, ECD reasons that 3:00 p.m. mountain standard time is actually 4:00 p.m. local time when, as here, daylight savings time is in effect, and that under the specified time designation (MST) in the RFP, GSA actually received ECD's hand-delivered BAFO 56 minutes before the deadline, at 2:04 p.m. mountain standard time, and not 4 minutes late.

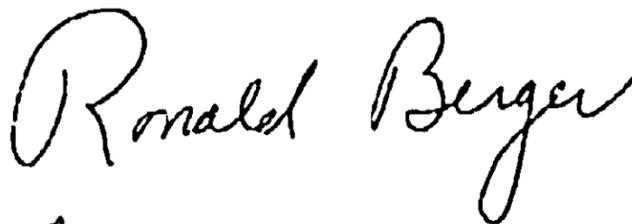
Since the passage of the Uniform Time Act of 1966, 15 U.S.C. § 260a (1988), there is one standard time for most governmental purposes, including the time designated for receipt of proposals or opening bids, and that time is the local time, regardless of whether it is referred to as standard time or as daylight savings time in the solicitation. 49 Comp. Gen. 164 (1969) (standard time and daylight savings time are one and the same for purposes of designating a bid opening time). Thus, a proposal received after the local time designated in the solicitation is late, even if it is misdesignated as standard time when daylight savings time is in effect. Id.

Finally, ECD contends that even if its BAFO was late, GSA could still consider its initial offer for award, such that its BAFO can be considered as only making its initial offer more advantageous to the government. We disagree. A late proposal modification resulting from an agency's BAFO request may be accepted only if the late receipt is due solely to government mishandling or if the late modification makes the terms of an otherwise successful proposal more

favorable to the government.² Environmental Tectonics Corp., B-225474, Feb. 17, 1987, 87-1 CPD ¶ 175. The term "otherwise successful" means that the government may accept a favorable late modification only from the offeror already in line for the contract award. Id.; Tyler Constr. Corp., B-221337, Mar. 19, 1986, 86-1 CPD ¶ 271. ECD's initial proposal cannot be considered the "otherwise successful" proposal at the time of GSA's receipt of ECD's late BAFO because ECD's initial proposal could not be accepted as it did not commit ECD to work during other than regular working hours, a requirement which was added to the solicitation after receipt of initial proposals. Id.; Wopora, Inc., B-190045, Feb. 1, 1978, 78-1 CPD ¶ 94; LaBarge, Inc., B-190051, Jan. 5, 1978, 78-1 CPD ¶ 7.

Thus, ECD's proposal was properly rejected because its BAFO was submitted late.

The protest is denied.



for

Robert P. Murphy
Acting General Counsel

²There is no allegation or evidence of government mishandling.