Protest of	)	Date: September 18, 1987
	)	
SPAW-GLASS CONSTRUCTION, INC.	)	
	)	
Solicitation No. 479980-87-A-0003	)	P.S. Protest No.87-46

DECISION

Spaw-Glass Construction, Inc., (Spaw-Glass) timely protests the contracting officer's determination that its bid on Solicitation No. 479980-87-A-0003 was untimely submitted.

Background

On April 15, 1987, the Norman, OK, Technical Training Center is-sued Solicitation No. 479980-87-A-0003 for the construction of a new technical training center in Norman, OK. Bids were solicited for either one or both of two, alternative completion periods: 450 or 630 calendar days. The instructions to the bidders stated, on page 00020-1 of the Solicitation:

> SEALED PROPOSALS will be received by the United States Postal Service at the office of the United States Postal Service, Technical Training Center, Field Director, 12th Floor, Room East 1227, 1524 Asp Ave., Norman Oklahoma 73072-6403 until May 20, 1987, local time 2:00 P.M.... Bids received after time set for opening bids, will not be considered and will be re-
> turned unopened.

The contracting officer, Harry Pennington, made Maria Lechtenberger, a postal employee at the Norman facility, responsible for receiving and recording the bids, and stationed her in room E-1228.[1/] Mr. Pennington also stationed Mr. Roger McFarland in room E-1228 to declare the arrival of the time set for bid opening. Mr. McFarland is an employee of the joint venture of Sverdrup Corporation and Gilbane Construction

[1/]A large sign in the lobby area of the first floor informed bidders that bids would be received in room E-1227. On the twelfth floor a sign visible when exiting the elevators, directed bidders to room E-1227, which is the Field Director's office. Bids were not actually received in room E-1227, but were instead received in room E-1228, the secretarial area which served as an entry to room E-1227. Signs posted on the twelfth floor also informed bidders that bid opening would occur down the hall from room E-1227, in room W-1242.

Company, which had the contract to provide construction management services for the training center project.

Upon arriving at work on the day of bid opening, Ms. Lechtenberger set the clock in room E-1228 to the time she received from calling the Oklahoma City time telephone number. Later that morning, Mr. Charles Pugsley, the protestor's representative, entered room E-1228 and confirmed with Ms. Lechtenberger that it was the location at which to submit Spaw-Glass' bid. Mr. Pugsley states that at 11:00 he sought out the pay phone closest to the bid opening room, from which to receive Spaw-Glass' final bid. That phone was on the 10th floor. At 1:45 p.m., Mr. Pugsley received a call from his office, and at 1:58 was told Spaw-Glass' final bid. Upon receiving the bid, he wrote it in numbers and words on the bid form, stuffed the form into the bid envelope, set the brads on the envelope, and ran up the stairs to the twelfth floor.[1/]

Mr. McFarland states that at 2:00 p.m. he looked down the empty hall from the doorway of room E-1228 in both directions, declared that bidding was officially closed, and closed and locked the door to room E-1228. Thereafter, Mr. Pugsley arrived at the room and knocked on the door until it was opened by Mr. McFarland.[1/] Mr. Pugsley entered the room and tried to submit his bid to Mr. McFarland, who refused to accept it, stating that bids would no longer be received.[1/] Ms. Lechtenberger also refused to accept the bid. Ms. Lechtenberger then telephoned Oklahoma City time. The time was announced as 2:01.[1/] At some point during or after these refusals, the contracting officer entered the room and re-
iterated that Mr. Pugsley's bid would not be accepted since it was late. Mr. Pugsley then stated that he was going to protest the refusal of Spaw-Glass' bid. He then went down the hall to room W-1242, the bid opening room, and attempted to hand the bid to Mr. Robert Gardner, who was in charge of opening and reading the bids. Mr. Gardner also refused to accept the bid. Mr. Pugsley remained in the room during bid opening. After the bids had been read, Mr. Pugsley showed Spaw-Glass' bid to Mr. Fritz Saltz of the Manhattan Construction Co. Mr. Saltz has stated that Spaw-Glass' bid for fifteen months was $22,469,000, and $22,619,000 for twenty-one months. The lowest bid submitted for 450 day completion was Flintco's bid of $22,797,000; the lowest bid for 630 day completion was Manhattan Construction Co.'s bid of $22,690,000. After Mr.

[2/]Mr. Pugsley has stated that he subsequently reenacted this sequence of events, finding it took one minute and forty seconds to complete.

[3/] The protester states that this occurred somewhere between 1:58:00 and 1:59:40. Mr. McFarland states that the knocking began at 2:01:35, with Mr. Pugsley entering the room at 2:01:50. Ms. Lechtenberger states the knocking began at 2:00:40.

[4/]Mr. Pugsley states that while this was going on, his watch showed that the time was still 2:00, but that the clock in the bid opening room stated that it was 2:01:30.

[5/]Ms. Lechtenberger and Ms. Charlton (another Postal Service employee) state the call was at Mr. Pugsley's direction. Mr. McFarland states that Ms. Lechtenberger made the call pursuant to his instruction. Mr. Pugsley states that time was not called until after Mr. Pennington entered the room and that Ms. Lechtenberger called the number pursuant to Mr. Pennington's request. Mr. Pugsley states that when the time was announced as 2:01, the clock on the wall read 2:03:30.

Pugsley left room E-1228, Oklahoma City time was called by Ms.Charlton, and it was determined that the official clock was 8-10 seconds fast.
The protest was received by this office on May 22. Spaw-Glass requests that the contract be awarded to it. Alternatively, Spaw-Glass requests the solicitation be readvertised, due to the involvement of Mr. McFarland, which Spaw-Glass contends fatally tainted the bid opening. On June 8, this office was notified that the contract had been awarded, pursuant to PCM 2-407.8 g, to Flintco after it had been determined that a delay in awarding the contract would seriously harm the Postal Service financially, and that training would be interrupted.

Discussion

The protester contends that its bid was tendered before 2:00 p.m., was timely, and was the low responsive bid.

PCM Section 2, Part 3, deals with the submission of bids, including the following provisions:

> 2-302 Time of Bid Submission. Bids shall be submitted so as to be received in the office designated in the invitation for bids not later than the exact time set for opening of bids....
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> 2-303. Late Bids
>
> 2-303.1 General. Bids which are received in the office designated in the invitation for bids after the exact time set for opening are late bids, even though received only one minute late. Late bids shall not be considered for award except as authorized in this 2-303.
>
> 2-303.2 Consideration for Award. A late bid shall be considered for award only in the circumstances set forth in the following clause:
>
>> LATE OFFERS, MODIFICATIONS, AND WITHDRAWALS (JUNE 1981)
>>
>> (a) Offers and modifications of offers or withdrawals thereof received at the office designated in the solicitation after the exact hour and date specified for receipt will not be considered unless they are received before award is made and, except for withdrawals under negotiated solicitations, either:
>>
>>> (i) they were sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt,
>>>
>>> (ii) they were sent by Express Mail service (post office to addressee) not later that the second calendar day (excluding Saturdays, Sundays, and Federal Holidays) prior to the date specified for receipt, or

> (iii) they were sent by mail (or telegram if authorized), or delivered by other means to the precise depository prescribed in the solicitation, and it is determined by the Head of Procuring Activity that the late receipt was due solely to mishandling after receipt by the office designated to receive offers.
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> * * *

This late bid clause was included in the solicitation.

PCM Chapter 2, Part 4, deals with the procedure for opening bids:

> 2-402.1 Unclassified Bids. (a) The official designated as the bid opening official shall decide when the time set for bid opening has arrived, and so shall declare to those pre-sent. He shall then personally and publicly open all bids received prior to that time, and when practicable shall read them aloud....
>
> (b) Performance of the procedure in (a) above may be delegated to an assistant, but the bid opening officer re-mains fully responsible for the actions of such assistant. In any event, a second Postal Service employee shall be present to witness the bid opening and reading.

The protester, through counsel, has woven an intricate analysis intended to establish why its bid is entitled to consideration. As we understand its submission, however, the protester does not contest Mr. McFarland's assertion that he closed the door when the "official clock" showed 2:00 p.m., and the protester concedes that Mr. Pugsley did not arrive at the door until some 40 seconds thereafter.[1/] It contends, however, that the bid was timely tendered because the official clock was fast.

Further, the protester contends that there were various irregularities in the manner in which the bid opening was conducted. First, that it was improper for the contracting officer to designate a non-postal employee as his assistant to determine when the time for bid opening had arrived. Although Spaw-Glass does not allege that Mr. McFarland acted with actual bias or prejudice against it, it contends that his involvement taints the bid opening process sufficiently that his determination of bid opening time is not entitled to any weight. Alternatively, it contends that Mr. McFarland's determination is not entitled to any weight, because Mr. Gardner was the designated bid opening officer, and there is no evidence that Mr. Gardner designated Mr. McFarland to make the determination of bid opening time.

Unfortunately for the protester, the undisputed fact that its bid arrived subsequent to the time designated for the receipt of bids, that is, after Mr. McFarland declared the time set for the receipt of bids closed at 2:00.[1/]

[6/]Because the handcarried bid arrived late, it could be considered only if the condition in paragraph (a)(iii) of the late bid clause were met. There is no evidence here of that condition, lateness due to mishandling after receipt by the office designated to receive offers.

[7/]The protester suggests that the phrase "even though received only one minute late" at PCM 2-303.1 allows up to one minute's leeway in the receipt of bids. This analysis overlooks the plain meaning of

The following extracts from Larry Carlson & Associates, Inc., Comp. Gen. Dec. B-211918, November 21, 1983, 83-2 CPD & 599, set out the general rule concerning the time of receipt of late bids:

> The relevant time for determining whether a bid was timely received by the government installation is that time when the bidder relinquishes possession of his bid to the government.
>
> * * *
>
> The bid opening officer is authorized to declare bid opening time has arrived by DAR ' 2-402(a)....
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> In accordance with DAR ' 2-402(a) this Office has found that the bid opening officer's declaration that the time for bid opening has arrived is the criterion for determining if a bid is late unless there is evidence which clearly indicates that the time was incorrect.

(citations omitted). See also Hyster Company, 55 Comp. Gen. 269 (1975).

The record before us offers contradictory evidence of the variance between the clock in room E-1228 and the time offered by Oklahoma City's telephone time service. We need not resolve those contradictions (or the question of the relevance of the telephone time service's time, see Peter Kiewit Sons' Company, Comp. Gen. Dec. B-189022, July 20, 1977, 77-2 CPD & 41) except to note that the protester has not carried its burden of providing clear evidence of error in the clock. Blount Brothers Corporation, Comp. Gen. Dec. B-212788, October 31, 1983, 83-2 CPD & 521.[7/]

both the remainder of that provision and of 2-302, that bids which are received after the exact time set for opening are late.

[8/]More recent GAO decisions have cited a more stringent test:

> The bid opening officer used the clock in the bid opening room to determine the time set for bid opening. The bid opening officer's declaration of bid opening time is determinative of lateness unless it is shown to be unreasonable under the circumstances. See B-164625, July 11, 1968 (a bid opening officer did not abuse his authority whether he declared bid opening based on the clock in the bid opening room, later shown to be two minutes faster than a telephonic time report); see also Blount Brothers Corp. [supra].
>
> Aside from the telephonic report [to the effect that when the bid opening clock read 10:32, the telephone reported 10:29], the record contains no evidence, and [the protester] does not allege, that the bid opening officer acted unreasonably in declaring bid opening based on the bid opening room's clock. The difference of a very few minutes between that clock and telephonic report is not sufficient in itself to render the declaration unreasonable.

E.L. Conwell Corporation, Comp. Gen. Dec. B-220561, January 23, 1986, 86-1 CPD & 79. Accord, Hi-Grade Logging, Inc., Comp. Gen. Dec. B-222230; B-222231, June 3, 1986, 86-1 CPD & 514. The protester's proof has failed to meet this standard.

Nor do we find on this record any taint arising out of the involvement of Mr. McFarland in the bid opening process. While we agree with the protester that the bid opening procedures set out above contemplate the conduct of the bid opening by postal employees, in the absence of evidence of actual bias or prejudice (which, as noted above, Spaw-Glass does not allege), the variance does not warrant corrective action. (It is doubtful that Mr. McFarland's involvement created an appearance of impropriety. Sverdrup-Gilbane was not competing against any of the bidders for award of the contract, and had nothing to gain by having Spaw-Glass or any other bidder excluded from the competition.)

Mr. McFarland's activity here was pursuant to the specific direc-tion of the contracting officer, occurred in the presence of other postal employees also involved in the bid receiving process, such as Ms. Lechtenberger, and was limited to closing the receipt of bids before another postal employee, Mr. Gardner, was to open them in another room. Further, the contracting officer was present shortly after Mr. McFarland declined to accept the late bid and ratified the action.

Similarly, the involvement of Mr. Gardner as the individual responsible for the opening and recording of bids does not affect the propriety of the bid opening. Contrary to protester's conclusions that Mr. Gardner must have been the bid opening officer,[1/] the record here indicates that the contracting officer was charged with responsibility for conducting the bid opening, and that he had designated both Mr. McFarland and Mr. Gardner to serve as his assistants with respect to different aspects of the bid opening. PCM 2-304.1 clearly allows the bid opening officer to so delegate.

We find in that action nothing which would support the protester's assertions that the integrity of the bidding process had been violated. To the contrary, maintenance of that integrity precludes consideration of this late bid:

> The bidding rules and regulations are clear that it is the bidder's responsibility to assure timely arrival of its bid at the place of bid opening, and a bid that is late because the bidder failed to allow sufficient time to deliver the bid may not be considered for award. We consistently have taken the position that these guidelines must be enforced strictly, since maintaining confidence in the integrity of the competitive bidding system outweighs any monetary savings that might be obtained by consideration of late bids.

Arnold Rooter, Inc., 65 Comp. Gen. 71 (1985), citations omitted.

The contracting officer and the others involved in the bid opening process erred in this instance with respect to the way in which the late-tendered bid was handled. Rather than refusing to accept the bid, they should have accepted the bid, marked it as late, and retained it unopened. Such treatment, consistent with the requirements of PCM 2-303.4, precludes any question with regard to the subsequent history of the bid if it is

[9/]Some of protester's argument devolves from the mistaken understanding that Mr. Gardner is an employee of the Postal Service's Inspection Service. While Mr. Gardner once worked for that organization, he is currently a procurement specialist in the Facilities Contracting Division of the Facilities Department, at Postal Service headquarters.

later deter-mined to be eligible for consideration. See, e.g., Luis R. Sanchez, P.S. Protest No. 84-20, April 10, 1984; Jameson & Gibson Construction Co., Inc., P.S. Protest No. 85-54, September 17, 1985. However, since there is no remedial action to take in this case, no harm was done by the error.

The protester has raised a number of subsidiary contentions which, although they are not discussed here, we have fully considered.

The protest is denied.

William J. Jones
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Office of Contracts and Property Law

[Compared to original 3/4/93 WJJ]