

UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, DC

ORDER AND DECISION

FAA Order

Number: ODR-96-2

Matter: Protest by JACO Electric, Inc. pursuant to FAA DTFA09-96-B-26026

Docket: 96-ODR-0002(b)

Date Served: November 6, 1996

ORDER AND DECISION

JACO Electric, Inc. (JACO), submitted a protest on June 6, 1996, concerning solicitation DTFA09-96-B-26026. This solicitation related to modernization and runway improvements at Eppley Airfield, Omaha, Nebraska. JACO has protested the contracting officer's rejection of JACO's bid on the grounds that the bid was not timely. JACO argues that its bid was timely deposited with the US Postal Service for next day delivery, and that it was the Postal Service's fault that the bid failed to reach the contracting office by the appointed time. The contracting office concluded that JACO's bid was late, and that it failed to meet any of the exceptions which would permit acceptance of late bids. Accordingly, the contracting office maintains that it properly refused to accept JACO's bid. For the reasons below, I hereby dismiss JACO's protest.

The following facts, which derive from JACO's protest and from the several conversations conducted thus far between JACO and the agency, are undisputed:

1. The underlying solicitation was issued on March 29, 1996, as an *Invitation for Bid* (IFB), under the Federal Acquisition Regulation (FAR). Page 26 of the IFB incorporated a number of clauses by reference, including FAR 52.214-7, *Late Submissions, Modifications, and Withdrawals of Bids*, which provides, in pertinent part:
 - (a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made, and it-
2. Was sent by U.S. Postal Service Express Mail Next Day Service - Post Office to Addressee, not later than 5:00 PM at the place of mailing two working days prior to the date specified for receipt of bids. The term "working days" excludes weekends and U.S. Federal holidays.
3. On April 1, 1996, the FAA's new Acquisition Management System, (AMS), became effective, and on April 18, Amendment A001 to the solicitation was issued to provide guidance under the new system. This amendment

notified bidders that the FAA was not exempt from many procurement laws and regulations, but that for purposes of completing the subject acquisition, the text of the existing IFB clauses would remain in effect. Accordingly, the pertinent text of FAR 52.214-7, cited above, continued to govern the receipt and acceptance of late bids.

4. The solicitation closed on Thursday, May 2, 1996, at 2:00 PM, local time, at the FAA's Central Region office in Kansas City, Missouri.

5. JACO has stated that its bid was mailed after 5:00 PM on Wednesday, May 1. The postal receipt attached to the bid showed that it was mailed at 7:15 PM on May 1, although JACO has stated that its representative actually mailed the bid at its local Post Office between 5:00 and 5:30 PM on that day. JACO asserts that Post Office employee assured its representative of next day delivery, by 10:00 AM.

6. The bid was not received at the bid office until the morning of May 3, 1996.

7. The contracting officer refused to consider JACO's bid because it was not timely received.

This procurement was initiated under the old FAR system, and award was made under the provisions of the FAA's new Acquisition Management System. When the AMS came into effect, however, the text of the existing FAR clauses was specifically retained to provide a continuity in the basis for award. Because the existing FAR clauses, including 52.214-7, retained, I believe that it is appropriate to resolve this protest solely by reference to the terms of the solicitation under which it arose, and under which all of the bidders competed.

Under the language of the *Late Bids* clause, incorporated into this solicitation, submissions were required to be mailed *two working days* prior to the date specified for receipt of bids, in order to be accepted if received after bid closing. In this case, the bid was required to have been mailed by 5:00 PM on Tuesday, April 30, 1996 in order to be protected under the *Late Bids* clause. By JACO's own admission, its bid was not mailed until May 1, 1996. This fact is confirmed by the US Postal Service receipt attached to the bid. Thus, there is a clear and undisputed failure to comply with the FAR provision which remained a part of this solicitation. Even if I were to accept that the Postal Service promised JACO next day delivery, it would not constitute compliance with the rules of competition set forth in the IFB for one bidder. The rule applicable to late submissions [FAR 52.214-7] was clearly incorporated into this solicitation and remained in effect throughout the bid process. In summary, because the essential facts are undisputed, and the rules set forth in the solicitation were clearly stated, I have determined that this protest should be dismissed without further consideration.

Accordingly, pursuant to section 3.9 of the AMS this protest is DISMISSED.

This is the final agency order in this matter. To the extent that this decision is subject to review, such review shall be in accordance with 49 U.S.C. §46110. A petition for review must be filed with the United States Court of Appeals for the District of Columbia Circuit, or in the court of appeals of the United States for the circuit in which the persons resides or has its principal place of business. The petition must be filed not later than 60 days after the date that this order is issued.

_____/S/_____

DAVID R. HINSON, ADMINISTRATOR

Issued this 31st day of October 1996