

PROTEST OF:

## SUMMARY OF DECISION

4. Where protester failed to arrive at the Department's bid opening room with its hand-carried bid before bid opening time and received answers from the procurement official which were responsive to the protester's questions

and were not inaccurate or misleading, the protester's failure to arrive timely at the bid opening room and to ask the proper questions of the procurement officials was the principal cause for its bid being submitted late.

5. Procurement officials lacked authority to accept late hand-carried bid where protester's actions were the principal cause of the late submission, and no action by the procurement officials could negate the rule that a late hand-carried bid must be rejected.

6. Rule regarding late hand-carried bids must be strictly enforced in order to be fair to other bidders who submitted timely bids and to maintain public confidence in the integrity of the District's competitive bidding system.

#### DECISION

A Better Alternative, Inc. (Better Alternative) protests the rejection of its hand-carried bid as late under IFB/CF 012-86 (IFB), issued by the Department of Employment Services for the procurement of recording and transcription services.

According to the (IFB), bid opening was scheduled for 2:00 p.m. on September 22, 1986. Better Alternative's president stated in her protest letter of September 23, 1986, that because the IFB did not state where the bid opening would take place, or that the bid opening would be public, she called the contact person named in the IFB on the date of bid opening but prior to the time set for the opening of bids and was informed by the person she was referred to that the bid opening was public and would be held in Room 216B. Better

Alternative's president, therefore, hand-carried Better Alternative's bid to Room 216B. The president states that she arrived at the Department of Employment Services at 1:54 p.m. and went directly to Room 216B where she attempted to place her bid in the basket with the other bids. Because the president did not have a time-stamped slip for the bid, the bid opening officials refused to accept the bid and instructed her to go to Room 417 to obtain one. After a brief conversation with the bid opening officials and not wanting to delay further, the president proceeded to Room 417, repeated her story and obtained a slip time-stamped at 2:04 p.m. See Exhibit A (time-stamped [sic] 2:04 a.m.) to counsel for Better Alternative's letter to the Board dated November 24, 1986. She then walked back to Room 216B and was informed that Better Alternatives bid still would not be accepted.

Better Alternative contends that its bid should have been accepted because the IFB did not state where the bid opening would be held and because the president was given incomplete information when she called to find out where the bid opening would be held. Better Alternative also contends that but for the incomplete information the president says she received from the procurement contact person, Better Alternative's bid would have been timely stamped. Moreover, Better Alternative asserts that the bid opening officer had the discretion to accept the bid but failed to do so because he was influenced by the unfavorable remarks of another bidder. Better Alternative further argues that the IFB does not state where

hand-carried bids are to be delivered. Finally, Better Alternative contends that the time the president arrived in Room 216B was 1:58 p.m. See Better Alternative's protest letter and letter of counsel for Better Alternative to the Board dated November 21, 1986.

The Department contends that it acted properly in rejecting Better Alternative's bid and responds to Better Alternative's contentions by stating that:

1. The bid opening officer confirmed with the C&P Telephone Co. time service the time on the wall clock in Room 417 and on his watch, and this confirmation was witnessed by two other contract specialists;

2. The bid opening officer, accompanied by another contract specialist, arrived in Room 216B several minutes before the scheduled bid opening time;

3. The contract specialist in Room 417 advised the bid opening officer and the contract specialist accompanying him that he would bring to Room 216B any bids received by 2:00 p.m. in Room 417;

4. The bid opening was announced and initiated at exactly 2:00 p.m. by the bid opening officer;

5. The bid opening officer had announced the name of the bidder of the first bid opened, verified the completeness of the bid, announced the bid prices, recorded this information on the Bid Tabulation Sheet and had opened a second bid after having announced the bidder's name when

Better Alternative's president arrived and stated she had come to submit her bid;

6. The bid opening officer and contract specialist informed Better Alternative's president that since it was after 2:00 p.m., her bid would not be accepted and that bids were to have been submitted to and time-stamped in Room 417.

7. The contract specialist responsible for time-stamping bids in Room 417 asked the bid opening officer the time Better Alternative's president arrived in Room 216B and was told she had first arrived there after 2:00 p.m.;

8. The location for receiving bids (Room 417) was never changed;

9. The location for bid delivery/receipt and bid opening were in two separate rooms, Room 417 and Room 216B, respectively;

10. The delivery/receipt of bids and bid opening are not synonymous; and

11. The president of Better Alternative arrived in Room 417 at approximately 2:04 p.m. on the date of bid opening. See Department's Report of Facts, memorandum of Franklin Austin, Contract Specialist to Melford G. Brown dated September 22, 1986, Memorandum of Sharon Ogunfiditimi, Contract Specialist to Melford Brown dated September 22, 1986, and memorandum of James Jenkins, Contract Specialist to Melford Brown dated September 22, 1986.

It is a basic tenet of government procurement law that bidders are responsible for the timely delivery of their bids



to the proper place at the proper time, and the late delivery of a bid generally requires its rejection. Nanco Labs Inc., B-220663; B-220664, November 27, 1985, 85-2 C.P.D. ¶613 at 2. See also Material Management Manual (MMM), §§2620.8A.1 and 2620.9E.

The record indicates that Better Alternative and the Department disagree as to the time Better Alternative's president arrived at Room 216B (the bid opening room). Under the MMM, §2620.11B, the official designated as the bid opening officer decides when the time set for bid opening has arrived and shall so declare to those present. The MMM also states that:

"[t]he official clock which determines when the time for opening bids has arrived shall be that which is located and so identified in the room containing the bid deposit safe. The official designated as bid opening officer shall be responsible for determining the accuracy of the clock not less often than once per week by utilizing the 'time' service provided by the telephone company."

MMM, §2620.11B.2. Here, the bid opening officer, before going to the bid opening room, states that he confirmed the time of the wall clock in the room where bids were to be received and kept and the time on his watch by a telephonic time report and that this confirmation was witnessed by two other contract specialists. The bid opening officer also states that at 2:00 p.m. (the time set for bid opening), he announced bid opening in the accompaniment of one other contract specialist and two vendors in the bid opening room and commenced the bid opening procedure. The bid opening officer further states that the Better Alternative's president first arrived with her bid in

the bid opening room while he was opening the second bid after having announced the name of the bidder.

There is nothing in the record contradicting these statements other than the representation of Better Alternative's president and its argument that logic dictates that the alleged arrival time of the president at the bid opening room (1:58 p.m.) must be accurate in view of (1) the fact that the bid was stamped at 2:04 p.m. in Room 417 following a short verbal exchange between the president and the bid opening officials in Room 216B and (2) the short distance between Room 216B and Room 417. See Better Alternative's protest letter and counsel for Better Alternative's letter dated November 21, 1986, to the Board.

In view of the statements of the bid opening officer and the other two contract specialists and the undisputed time Better Alternative's bid was stamped, the Board concludes that the preponderance of the evidence in the record indicates that Better Alternative's bid was first submitted to the Department after the time for bid opening. Stated differently, the Board finds that the record does not corroborate the statement of Better Alternative's president that she arrived at Room 216B a few minutes before 2:00 p.m. Therefore, although Better Alternative contends that its president arrived at the bid opening room prior to the scheduled bid opening time, the Board is constrained to accept the statements of the Department's two contract specialists that the president first arrived at the bid opening room after the time for bid opening

had been declared and the commencement of the bid opening procedure. The Board, therefore, concludes that the bid opening officer's declaration of bid opening time, in this case, is determinative of the lateness of Better Alternative's bid. Even assuming that the preponderance of the evidence does not favor the District on the issue of lateness, the Board concludes that when the only evidence on an issue of fact consists of conflicting statements between the protester and the procuring agency, the protester has not satisfied its burden of proof.

The Board recognizes that there may be situations where a protester's late hand-carried bid should nonetheless be considered for award, for example, where the principal cause of delay is wrongful government action and consideration of the bid would not compromise the integrity of the District's competitive procurement system. Under these circumstances, "wrongful government action" would be some affirmative action on the Department's part, such as improper or conflicting bid delivery instructions, which would have made timely delivery of Better Alternative's hand-carried bid impossible. See Nanco Labs Inc., supra at 2 and 3.

Better Alternative argues that "[i]nformation regarding hand-carried bids in response to IFB/CF 012-86 [the IFB in question] is not addressed anywhere in Instructions to Bidders in said IFB." See counsel for Better Alternative's letter dated November 21, 1986. See also Better Alternative's protest letter where the president states:



I agree that the instructions for mailing in proposals was printed on the first page of the IFB, however, the IFB did not at all address the issue of where bid opening would be held, so I had no recourse but to call and find out. (Underlining original.)

The Board also was unable to find any expressed provisions in the IFB stating where hand-carried bids could be delivered or where bid opening would be and feels that the inclusion of such information in IFBs would be beneficial to the bidders. The Board, however, is of the view that Better Alternative's concern about the lack of information in the IFB is untimely. The IFB was issued on August 20, 1986, and clearly indicates where bids were to be mailed, and, if Better Alternative objected to the absence of other information, it should have protested much earlier than it did. See D.C. Code 1981, §1-1189.8(b) (1986 Supp.), which requires a protest to be filed with the Board within ten working days after the person knew or should have known of the facts and circumstances upon which the protest is based. See also CAB Proposed Rule 300.4.

In any event, the Board will examine the question of whether any District government personnel engaged in any wrongful action which principally caused Better Alternative's bid to be delivered late as the Board has previously determined. The president states in her protest letter:

The bid opening information printed on the face of the IFB did not include the location in which the bid opening would take place, nor did it indicate whether or not the bid opening was public. I, consequently, called Mr. Melford Brown's office (the contact indicated on the face of the IFB) for the purpose of finding these things out and was referred to a Mr. Austin who informed me that the bid opening was public and would be held in room 216B.

See also letter of counsel for Better Alternative dated November 24, 1986. The president also stated in her protest letter that, "[b]ut for the incomplete information I received from Mr. Austin, our proposal [bid] would have been timely stamped." Counsel for Better Alternative argues in his correspondence to the Board that "Mr. Austin acted improperly in incorrectly advising Bidder to proceed to room 216B and as a result of his misfeasance, Bidder has suffered adversely." The Board disagrees.

Irrespective of the efficacy of the instructions given by Mr. Austin to Better Alternative's president, the president states she understood his instructions to mean that she should come to room 216B to deliver or submit her bid. Proceeding with this understanding, the president nevertheless arrived at room 216B after the bid opening time as previously determined by the Board. So by any construction given to the instructions of Mr. Austin, he did not principally cause Better Alternative's bid to be late. Moreover, the Board does not find that Mr. Austin gave the president misleading or incorrect instructions. The president simply asked Mr. Austin where bid opening would be and whether it would be public. She did not ask where a hand-carried bid could be submitted or whether her hand-carried bid could be submitted at the place where bid opening would occur. Mr. Austin accurately answered the questions presented to him. The Board finds nothing in the record that leads it to believe that Mr. Austin said anything which would cause the president to reasonably think

that hand-carried bids should be submitted in Room 216B. Under the circumstances, Mr. Austin would have had to be clairvoyant to perceive that the president may have been unfamiliar (as she apparently was) with the fact that bid opening and bid submission normally occurred at separate locations, and, therefore, she really may have been intending to ask, among other things, where a hand-carried bid could be submitted. In other words, Better Alternative bears the risk and the attendant consequences for failing to form and present the proper question to the Department's procurement officials. For these reasons the Board cannot conclude that improper government or department action was the principal reason that Better Alternative was unable to submit its bid on time. Rather, the Board concludes that Better Alternative's failure to arrive timely at the Department's facilities and to ask the proper questions was the principal cause for its bid being submitted late. The Board thinks it would have been prudent for the president, who was apparently unfamiliar with the usual procedure for the submission and opening of bids, either to have called the appropriate procurement official and asked more pointed questions or to have arrived in sufficient time to allow for unpredicted situations she might encounter. If the president had followed either of these alternatives, Better Alternative's bid may not have been submitted late.

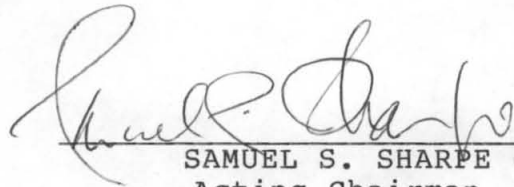
Finally, Better Alternative asserts in its protest letter that "[Mr. Austin's] decision not to accept the proposal [bid] was discretionary on its face, based upon what ultimately

transpired, and influenced by the remarks of the other bidder." (Underlining original.) There is no evidence in the record that Mr. Austin's decision to reject Better Alternative's bid was influenced by the comments of the other bidders' representatives. In any event, the Board has previously concluded that Better Alternative's bid was late. Thus, none of the officials of the Department had authority, discretionary or otherwise, to accept Better Alternative's bid for the Department, and no action by the procurement officials involved could negate the rule that a late hand-carried bid must be rejected. See MMM, §2620.9E. In this connection, the Board notes that nine firms submitted timely bids under the requirements and circumstances presented by the IFB. See the Department's Report of Facts. The Board is of the view that the rule regarding late bids must be strictly enforced in order to be fair to other bidders who submitted their bids timely and to maintain public confidence in the integrity of the competitive bidding system. See D.C. Code 1981, §1-1181.1(b) (1986 Supp.).

The protest is denied.

Date:

March 6, 1987

  
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SAMUEL S. SHARPE  
Acting Chairman

Copies to: Alexis H. Roberson, Director, DOES  
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