

ALAN G. HEVESI
COMPTROLLER



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ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

December 15, 2005

William Dwyer, Account Manager
All Seasons Services, Inc.
One Mt. Pleasant Road
Canastota, New York 13032

Re: Protest Filed With DOCS
SF-20050234

Dear Mr. Dwyer:

This is in response to the issues raised in your protest letter dated March 8, 2005 addressed to Sandra Thackston of Watertown Correctional Facility ("WCF") and your letter dated June 1, 2005 addressed to Russell Keller of the WCF, a copy of which was sent to this Office.

We note that the WCF, the procuring state agency, responded to your original protest by letter dated March 9, 2005. After reviewing the allegations contained in your protest letters, WCF found that your protest was without merit, and that its award to Ace Automatic Company ("Ace") was proper.

While you did not file a protest directly with this Office, we reviewed your protest, and the allegations contained therein, as part of our review of the procurement record submitted to this Office with the WCF/Ace contract. In addition, we reviewed the documentation submitted by WCF in support of its determination to reject your protest. Your allegations, as we understood them, were that Ace's bid did not comply with the delivery date and time set forth in the solicitation issued by WCF, and that the bid submitted by Ace was not in compliance with the solicitation requirements. Specifically, you alleged that Ace submitted a photocopy of its bid and such bid was not in a sealed envelope with proper information affixed thereto.

We are satisfied that the Ace's bid was, in fact, timely submitted by Ace. WCF does not elect to have the post office deliver its mail, but rather has its mail held at the postal facility where it is picked up daily by a WCF motor vehicle operator. Ace correctly forwarded its original bid to 23147 Swan Road, Watertown, New York 13601-9340, the address set forth in the solicitation. However, WCF's driver failed to retrieve Ace's bid with WCF's regular mail, prior to the bid opening. WCF confirmed that Ace's bid was received at the address set forth in the solicitation on March 5, 2005, two days prior to the bid opening. Since Ace's bid was received at the official address for mail delivery prior to the March 7, 2005, 10:00 a.m. bid opening, the bid was timely. WCF's failure to retrieve the bid from the postal facility does not render the Ace bid late.

Furthermore, even if one were to conclude that the Ace bid was late, we are satisfied that WCF could, under the circumstances presented here, determine to accept the photocopy which was timely delivered and could waive any technical defects associated with such filing. An agency may waive non-material and non-substantial variances from bid specifications, where there is no possibility of fraud, corruption or favoritism. See. In re C.K. Rehner, Inc., 106 A.D.2d 268, 483 N.Y.S.2d 1 (1st Dep't. 1984).¹ It is evident that in this circumstance, Ace's submission of a photocopy of its mailed bid and the failure to include certain identifying information on its submission are non-material, non-substantial variances from the bid specification and there was no opportunity for fraud, corruption or favoritism. We note that WCF compared the original bid (collected from the post office) with the copy submitted at the time of bid opening, and determined that the bids were exactly the same. Therefore, WCF properly accepted the bid submitted by Ace.

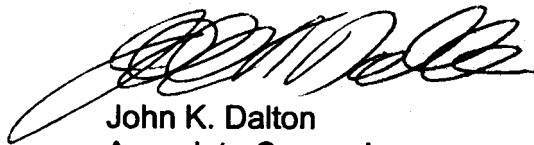
Finally, even if the original bid was late, we are satisfied that the agency could, under the circumstances of this case, waive such late delivery. While agencies have broad discretion to reject late bids, the Courts have upheld waiver where a bid is timely delivered to the common carrier, remained in exclusive possession and control of the common carrier and there was no opportunity to gain a competitive advantage over the other bidders. See. Hamlin Construction Co. v. County of Ulster, 301 A.D.2d 848, 753 N.Y.S.2d 602 (3rd Dep't. 2003)²

¹ See also. Le Cesse Bros. v. Town Board of the Town of Williamson, 62 A.D.2d 28, 403 N.Y.S.2d 950, aff'd 46 NY2d 960, 415 NYS2d 413 [1978].

² In Hamlin, supra, the low bid was delivered after the date of bid opening. The bid had remained in the exclusive possession of Federal Express from the time of pickup, which was two days prior to the scheduled bid opening, to the time of delivery of the bid to the County, two days past the submission date. The County became aware that the bid was in transit after the original bid opening. The Court held that where the bid was timely delivered to Federal Express, remained in the exclusive possession and control of Federal Express and there was no opportunity to gain a competitive advantage over the other bidders, the County properly could elect to waive the late delivery of the bid, and award the contract to the low bidder).

For the reasons stated above, we denied the protest and approved the contract between Ace Automatic Company and Watertown Correctional Facility.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Dalton", with a long, sweeping horizontal stroke extending to the left.

John K. Dalton
Associate Counsel
Legal Division