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United States General Accounting Office  
Washington, DC 20548

Comptroller General  
of the United States

## Decision

**Matter of:** Telex Communications, Inc.

**File:** B-287146

**Date:** April 25, 2001

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Kristine L. Bruer, Esq., for the protester.

Phillipa L. Anderson, Esq., Philip S. Kauffman, Esq., and Merilee D. Rosenberg, Esq., Department of Veterans Affairs, for the agency.

Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Rejection of protester's proposal is unobjectionable where required product sample was received by contracting agency after the time stated in the solicitation.

Although the protester argues that the agency failed to properly address the sample request so that the request was allegedly misdirected, the offeror generally bears the risk of not receiving solicitation materials, and, in any event, the protester shares the blame for any misdirection that occurred.

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### DECISION

Telex Communications, Inc. protests the elimination of its proposal under request for proposals (RFP) No. 791-03-00, issued by the Department of Veterans Affairs (VA) to obtain hearing aids. The VA rejected Telex's proposal because, although the text of the protester's proposal was received by the proposal due date, the required product sample was not submitted by the time established in the RFP. Telex contends that actions by the agency were the paramount cause for the late delivery of its product sample.

We deny the protest.

The RFP, issued on September 18, 2000, provided for the award of multiple indefinite-delivery/indefinite-quantity contracts for a 2-year period. The successful contractors under the RFP will provide various types of hearing aids for all VA medical facilities and other government agencies worldwide. Technical requirements for the hearing aids were stated in the RFP's commercial item description. As amended, the RFP proposal preparation instructions directed

offerors to submit their technical, pricing, and customer support data by November 15, the extended closing date for receipt of proposals. As part of the technical proposal submissions, offerors were to submit ordering forms for customer in-the-ear hearing aids to the VA's Audiology and Speech Pathology Service. RFP § E.15.10. The RFP also instructed offerors that they would have to submit a sample hearing aid (i.e., a product sample) for testing to the VA's Audiology and Speech Pathology Service in Washington, DC. RFP § E.15.10.

Specifically, the solicitation provided, in relevant part, as follows:

The Audiology and Speech Pathology Service shall provide to the offerors the order forms using the audiological data, shown in Table II, and Knowles Electronics Manikin for Acoustic Research (KEMAR) ear impressions for fabrication of hearing aids.

Offerors shall provide a hearing aid sample as follows:

A low profile [in-the-ear] hearing aid built for the hearing loss provided in Table II.

Offerors shall submit the sample described above with an Attachment A, within 10 days after receipt of the audiological data and KEMAR ear impression.

RFP § E.15.11. The RFP further stated that the product sample would be “ordered by Government sources within 30 calendar days after proposals are due to the Government.” Id. § B.13. The solicitation included the full text of the standard “Late Submissions, Modifications, Revisions, and Withdrawal of Offers” clause, Federal Acquisition Regulation (FAR) § 52.212-1, which provides, in pertinent part, that late offers or submissions generally will not be considered for award. RFP § E.1(f).

The agency received timely proposals from several firms, including Telex, by November 15. As is relevant here, Telex's proposal included an ordering form that contained a preprinted designation as “VA ORDER FORM,” a preprinted contract number representing the protester's existing contract with the VA, and a preprinted address for Telex in Rochester, Minnesota. On November 30, the VA's Audiology and Speech Pathology Service sent the request for a product sample to Telex using the order form provided by the firm via Federal Express (FedEx) for next day delivery; the package was addressed to Telex's designated representative at the Rochester address.<sup>1</sup> The agency reports that the package included a KEMAR ear impression, the Telex order form marked “KEMAR I” as the addressee and “See Prototype Loss,”

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<sup>1</sup> The agency reports that each request for a product sample was sent using the order forms provided by the offerors.

and a copy of a table containing information such as “20 Band Target Frequencies,” “Prototype Loss,” and “Interpolated 20 Band Targets”; in other words, Table II of the solicitation. In addition, the name and phone number for the VA audiologist in Washington, DC was listed on the order form. Agency Report (AR) exhs. 8, 13. Telex received the VA’s request for a product sample on December 1, and according to the terms of the solicitation, which required that an offeror submit the sample with 10 days of its receipt of the request, the product sample was to be submitted to the designated VA office in Washington, DC no later than December 15.

On December 18, after learning that a product sample had not been received from Telex, the contracting officer contacted Telex’s representative and discovered that the agency’s request for a product sample had not been delivered to the named recipient but was processed through Telex’s normal VA order process. In an undated letter sent by facsimile to the contracting officer on December 19, the protester’s representative indicated that the product sample “was completed in a timely fashion, but was sitting in shipping waiting for a purchase order.” He further indicated that “I had not expected to see the KEMAR order until around December 15,” since under the solicitation, the product sample would be ordered within 30 days after proposals were due. AR exh. 6. Telex’s product sample was eventually delivered to the agency on December 20. Because the product sample was received after the December 15 submission due date, Telex’s proposal was eliminated from further consideration by the contracting officer, who determined that none of the exceptions for consideration of late submissions set forth in FAR § 52.212-1(f) was applicable. Telex requested a pre-award debriefing and subsequently filed an agency-level protest on January 3, 2001. The agency denied the protest by letter of January 17, and this protest followed.

Telex contends that the agency’s own actions made compliance with the product sample submission date “virtually impossible.” Comments at 2. Specifically, the protester asserts that the VA erroneously sent the request for a product sample to the firm’s Rochester factory address rather than to the Burnsville mailing address listed in its proposal for the Telex representative. According to the protester, this error was compounded by the VA’s failure to reasonably identify the order as a request for a product sample under the RFP by referencing the RFP number on the order form, or deleting the preprinted contract number, or providing a cover letter with the order as had been done previously. As a result, the firm’s Rochester factory personnel manufactured a hearing aid pursuant to the terms of the existing Telex/VA contract, which was placed in stock pending receipt of a VA purchase order. Comments at 2-6.

We see no basis for sustaining the protest. An offeror bears the risk of not receiving solicitation materials unless the record shows that the contracting agency made a deliberate effort to exclude the firm from competing or failed to provide the materials after the firm availed itself of every reasonable opportunity to obtain them. Aluminum Specialties, Inc. t/a Hercules Fence Co., B-281024, Nov. 20, 1998, 98-2 CPD ¶ 116, at 3; North Santiam Paving Co., B-241062, Jan. 8, 1991, 91-1 CPD ¶ 18 at 3.

Here, even accepting the protester's position that the VA misaddressed the request for the product sample, causing the request to be misdirected by Telex mailroom staff, there is no evidence that the agency made any deliberate effort to prevent Telex from competing. While the VA may have been mistaken in using the preprinted address on the offeror-provided order form, which differed from the specified address for Telex's representative, the FedEx mailing label apparently did correctly identify the individual authorized to receive the package.<sup>2</sup>

Telex nonetheless argues that the product sample order was similar to other orders received under its existing VA contract, and believes the agency should have done more to identify the order as a request to manufacture and submit a product sample for testing. To support its position, the protester points to prior solicitations for hearing aids under which the VA sent a cover letter with its request for a product sample. While such a cover letter or other identifying information may have been desirable and was used by the agency in the preceding procurement, we are aware of no requirement that the agency provide such information, and the protester has cited no supporting authority in this regard.

Although the VA's use of the Telex order form with the preprinted contract number may have been confusing to Telex's production staff, we think Telex shares responsibility for any confusion that arose. The protester is correct that the solicitation contains no clear indication that the required order forms for customer in-the-ear hearing aids would be used by the agency as order forms for the product sample; we have no basis, however, to find that the agency was precluded from using the order forms for that purpose. In responding to the RFP at issue here, the protester elected to provide order forms that referenced its existing VA contract. Thus, Telex bears some responsibility for the problem the use of this order form caused. We do not believe the agency had any obligation to delete the preprinted contract number on the Telex order form before using the order form to request a product sample for testing. The VA was simply not responsible for how its sample request would be processed by Telex.<sup>3</sup>

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<sup>2</sup> The protester also contends that the VA failed to use a reasonable method to identify the order form as a request for a product sample under this solicitation, thereby contributing to the late delivery of the product sample. We note that the VA apparently used the same procedure with all other offerors that received a product sample request and received timely submitted samples from these firms.

<sup>3</sup> The record also establishes that the product sample order was unique and different from typical VA orders. For example, as the VA explains, routine VA orders are not issued with an order form identifying KEMAR I as the addressee or with audiological data described as "prototype loss," "20 band target frequencies," and "interpolated 20 band targets," as shown in Table II. The agency reports that this information has no meaning to regular production staff and should have placed Telex's production staff on notice that this was not an order under the existing VA contract. The protester

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Moreover, we believe that Telex did not avail itself of every reasonable opportunity to obtain the materials at issue here (that is, the order form requesting the sample). Telex's designated representative was on notice that under the terms of the solicitation, a product sample would be ordered anytime within 30 calendar days after proposals were submitted on November 15. However, there is no indication in the record that the Telex representative alerted its personnel regarding an expected incoming request from the VA's Audiology and Speech Pathology Service in Washington, DC or had checks made of the Burnsville or Rochester (its production factory) mailrooms for that request. Also, Telex's representative apparently first attempted to contact the contracting officer only on December 11 and did not actually speak to agency representatives until December 18, 3 days after the product sample was due. Further, we see no evidence in the record that the Rochester mailroom personnel made any efforts to contact the recipient listed on the mailing label. As the designated representative who had actual knowledge of the solicitation instructions, the intended recipient could have readily identified the order as a request for a product sample. In short, Telex failed to take reasonable steps to ensure that the sample would be submitted by the date it was due.

Since Telex's product sample was late, Telex's proposal properly was eliminated from further consideration.

The protest is denied.

Anthony H. Gamboa  
General Counsel

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has not provided any persuasive reason why its production staff could reasonably have considered the information on the sample order to be a VA order for a hearing aid under the preprinted contract number listed on the order form.