

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

50925

FILE: B-184248

DATE: September 12, 1975

MATTER OF: B. E. Wilson Contracting Corp.

97541

DIGEST:

1. Telegraphic bid modification, Government time-stamped 3 minutes after time for bid opening in office designated in IFB, which, if for consideration, would make third low bidder low, was properly rejected as late, notwithstanding documentary evidence of Western Union indicating delivery at time for bid opening, since only acceptable evidence to establish timely receipt in IFB is time-date stamp of Government installation on bid wrapper or other documentary evidence of receipt maintained by installation.
2. Allegation that protest was untimely filed is unfounded since protester received formal notification as to reasons telegraphic modification was submitted late and not for award consideration on June 16 and telegram protesting award was received at GAO within 10 working days on June 20. See section 20.2(a) of Bid Protest Procedures, 40 Fed. Reg. 17979 (1975).
3. Recommendation made to ASPR Committee and FPR Division that GAO comments on the possibility that late bid provisions involving acceptable evidence to establish timely receipt of bids may be unnecessarily causing Government to lose benefits of low bids be considered with respect to possible revision of procurement regulations.

This is a protest, filed on June 20, 1975, by counsel on behalf of the B. E. Wilson Contracting Corp. (Wilson) against the award of a contract to Ducon Inc. and Ralph B. Slone (Ducon) as the low bidder under invitation for bids (IFB) No. R5-75-134, issued by the United States Forest Service for the reconstruction of Kitchen Creek Road, Cleveland National Forest. Wilson contends that a telegraphic modification which reduced its bid price below that of Ducon was improperly rejected by the Forest Service as a late modification.

The IFB, as amended, scheduled the bid opening for 2 p.m. on May 29, 1975. Wilson's bid was the third lowest of the five bids received. The evidence indicates that on May 29, 1975, a telegraphic modification of Wilson's bid was received at the location designated by the IFB. The modification, if proper for consideration, would make Wilson's bid the lowest.

By letter dated June 4, 1975, to the contracting officer, counsel for Wilson advised that the telegraphic modification to the Wilson bid was delivered by the time set for bid opening. By letter dated June 10, 1975, received by counsel for Wilson on June 16, 1975, the contracting officer advised Wilson of his decision that the telegraphic modification was received after the exact time for receipt specified in the IFB and could not be considered for award purposes. We note that the protest was filed here within 10 working days of when counsel for Wilson was advised of the contracting officer's decision. Therefore, despite Ducon's argument to the contrary, the protest was timely filed under section 20.2(a) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975).

The IFB included a supplement to instructions to bidders, Standard Form 22 (Clause 7 Late Bids and Modifications or Withdrawals), which contained the following:

"(a) Bids and modifications or withdrawals therefore received at the office designated in the solicitation after the exact time set for receipt will not be considered unless they are received before award is made; and either

* * * * *

"(2) They were sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

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"(c) The only evidence acceptable to establish:

* * * * *

"(2) The time of receipt at the Government installation is the time-date stamp of such installation on

the bid wrapper or other documentary evidence of receipt maintained by the installation."

The modification was dispatched from the Western Union office at Imperial Beach, California, at 11 a.m. on May 29, 1975. The telegram was received at the Western Union office in San Francisco, California, and was released for delivery to the site designated in the IFB for receipt of bids at 1:48 p.m. on May 29, 1975, 12 minutes before bid opening. The circumstances surrounding the receipt of the telegraphic modification are explained by the Government and the protester in the following manner.

The Forest Service report to our Office contains affidavits of personnel at the site which read, in pertinent part, as follows:

"* * * I took the envelope and the receipt. I signed the receipt and handed it back to the man. I did not date or note the time I signed the receipt on it. * * * Since the bids for the Kitchen Creek project were scheduled to be opened at 2:00 p.m. on May 29, 1975, I thought it might be a modification of one of the bids for that project. I immediately took the envelope, walked to the time stamp machine, which was in the same room, and time-stamped the envelope. The time stamped was 2:03 p.m.
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"On May 29, 1975, at approximately 2:00 p.m., I observed a man walk into Room 822 of the Appraiser's Building. He walked to and stood in front of the desk occupied by * * *. I saw him hand her an envelope and a piece of paper. I saw her write on the piece of paper and hand the paper back to the man. The man then left the room. A very short time after the man left the room I saw * * * get up from her desk with the envelope in her hand, go to the time stamp machine, and time stamp the envelope * * *." (Emphasis supplied.)

Counsel for Wilson invites our attention to the Western Union Route-Call Record signed by the Government employee which contains a notation "2/00." Counsel states this indicates delivery by Western Union by 2:00 p.m. Further, counsel forwarded a letter from the District Manager of Western Union in San Diego, California, which states that, according to the copy of the delivery record, the telegram was delivered at 2 p.m. on May 29, 1975.

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Our Office has consistently held that the bidder has the responsibility to assure timely arrival of its bid for a scheduled bid opening and must bear the responsibility of the late arrival of a bid or a modification. Late receipt of a bid will result in its rejection unless the specific conditions set forth in the IFB are met. Astro Development Laboratories, Inc., B-181021, July 17, 1974, 74-2 CPD 36; and Solvent Chemical Company, Incorporated, B-181033, June 21, 1974, 74-1 CPD 338. In the instant case, as quoted in part above, the IFB contained the notice prescribed in Federal Procurement Regulations § 1-2.201(a)(31) (1964 ed. amend. 132) governing, among other things, the acceptability from a timely submission standpoint of telegraphic modifications.

Under the above IFB provision, it is clear that the Wilson telegraphic modification was not timely received at the contracting agency. This is because the only cognizable evidence of timely receipt is the time-date stamp of 2:03 p.m. on the bid envelope.

Further, there is no other documentary evidence of receipt maintained at the installation to establish timely receipt. In this regard, the following documentation, not maintained by the installation, submitted by counsel to support timely receipt is not for consideration: (1) handwritten telegram showing modification was placed into transmission at 11 a.m. on May 29, 1975; (2) Western Union Route-Call Record showing handwritten time of "2/00"; and (3) letter from Western Union District Manager indicating delivery at 2 p.m.

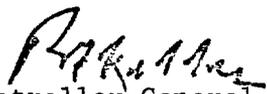
Since the evidence submitted fails to establish timely receipt according to the provisions of the IFB under which Wilson and all bidders competed, the Wilson bid was properly rejected as late. See Lambert Construction Company, B-181794, August 29, 1974, 74-2 CPD 131.

We find it necessary to comment on what we believe to be a situation highlighted by this case where the Government may be unnecessarily losing the benefit of low bids. As we have recognized in prior decisions, valid policy reasons require the strict application of the rules governing late bids and modifications even though in certain instances a strict application might operate harshly. The late bid rules are applied strictly despite the possibility that a late bidder might lack knowledge of other bids or act in good faith. This view has, for example, been evidenced by decisions of our Office approving the rejection of bids submitted only one or a few minutes late.

The current standard IFB provisions prescribed by the FPR (and the Armed Services Procurement Regulation (ASPR)) governing late bids permit the timely submission up until a specific time for receipt. Late bids may be considered if received before award is made and late receipt is due solely to Government mishandling at the Government installation. On the other hand, the only evidence acceptable to establish the time of receipt at the Government installation is its time-date stamp on the bid wrapper or other documentary evidence maintained by the installation. The other documentary evidence appears to mean contemporaneous evidence rather than after-the-fact affidavits, for example.

The provisions appear to be silent on mishandling in the process of as opposed to after receipt at the Government installation. What occurred in this case highlights the distinct possibility that bids timely received in the physical sense at or just before a scheduled bid opening would be considered late due to an unreasonable period of time necessary for Government personnel at the proper bid receiving site to effect "the only evidence acceptable to establish" time of receipt under the standard IFB provisions. And, a bid physically received timely at or just before bid opening would be considered late even if Government personnel exercised all due diligence in time-date stamping or otherwise documenting receipt under the late bid provisions. We note here that we did not decide whether the evidence in this case established timely receipt in the physical sense of the Wilson bid.

In view of the above, we are recommending, by letters of today, to the Federal Procurement Regulations Division of the General Services Administration and the ASPR Committee of the Department of Defense that our comments be considered with respect to possible revisions of the appropriate procurement regulations.


Acting Comptroller General
of the United States