

01362

Wm. David Hasfurth

Proc. I.

**DECISION**



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

**FILE: 2-187322**

**DATE: December 13, 1976**

**MATTER OF: Surplus Tire Sales**

**DIGEST:**

Where proof submitted by bidder submitting late bid modification is insufficient to show that delay in its receipt was caused by personnel of sales office or their designees, or, assuming for sake of argument negligence of Government personnel, where Government-caused delay was not paramount reason for late receipt, modification was properly not for consideration.

Submission to the contracting officer of bids, bid modifications, and/or bid withdrawals for surplus property sale No. 41-6712, issued by the Defense Property Disposal Region, Ogden, Utah, was required by 9 a.m. on August 13, 1976. The protester, Surplus Tire Sales (Surplus Tire), submitted its bid in a timely and acceptable manner. However, the bid modification that Surplus Tire submitted, thereby making it high bidder on various items, was determined by the contracting officer to have been untimely submitted and was, except as properly concerned one item upon which Surplus Tire was already high bidder, not considered. It is the validity of this determination which Surplus Tire protests.

Surplus Tire forwarded its bid modification for transmission to Western Union on the evening of August 12 at approximately 10:57 p.m. Although the modification incorrectly stated that it "MUST BE DELIVERED PRIOR TO 9AM AUGUST 18, 1976," Western Union did apparently attempt--allegedly four times--to transmit the modification to the telex machines at the contracting activity during the morning of August 13 and the late evening of August 12. The Western Union computer was unable to get the modification through to the telex machines and, consequently, rejected it with the words "continuously busy or inoperable \* \* \* send as a mailgram or telegram." Western Union finally managed to transmit the modification to the telex machines of the activity at 1:16 p.m. on August 13--after bid opening.

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While the contracting officer maintains that the telex machines must have been operable during the night of August 12-13 since no maintenance work was required on them the next morning and since at that time two messages were already on the machines (for logging in at 7:53 a.m. on August 13), Surplus Tire contends that such a statement is a mere speculation and inadmissible as substantive evidence, inasmuch as no personnel of the activity spent the night with the machines. Rather, it is believed by Surplus Tire that the evidence submitted by Western Union, a disinterested third party, must be accepted as definitive evidence regarding the inoperability of the machines. It is finally contended that any doubt in the matter should be resolved in Surplus Tire's favor as it was not negligent and that the modification, submitting as it did high bids, should be accepted as in the best interest of the Government.

As regards the issue here protested, the invitation provided as follows:

"C. CONSIDERATION OF LATE BIDS, MODIFICATIONS, OR WITHDRAWALS.

" \* \* Any bid, modification, or withdrawal received after the time set for bid opening will not be considered unless received by the Contracting Officer prior to award, was mailed (or telegraphed where authorized) and in fact delivered to the address specified in the Invitation for Bids in sufficient time to have been received by the Contracting Officer by the time and date set forth in the Invitation for the bid opening, and, except for delay attributable to personnel of the sales office or their designees, would have been received on time. In no event will hand-carried bids or withdrawals be considered if delivered to the Contracting Officer after the exact time and date set for bid opening. However, a modification which makes the terms of the otherwise successful bid more favorable to the Government will be considered at any time it is received prior to award and may be accepted." (Emphasis supplied.)

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While we have held that where, as here, the modification is never actually received by the contracting installation in any manner prior to bid opening the above-quoted provision is inapplicable since it only contemplates instances where a tangible bid--or modification--was mishandled after its physical receipt by the Government. We have permitted a late modification to be considered where Government mishandling in the process of the receipt of the modification is the paramount reason for the late receipt. Hydro Fitting Mfg. Corp., 54 Comp. Gen. 1000 (1975), 75-1 CPD 331; I&E Construction Company Incorporated, 55 Comp. Gen. 1340 (1976), 76-2 CPD 139; S&Q Corporation, B-186794, November 11, 1976.

However, on the basis of the facts presented we do not believe that Surplus Tire has proven the lateness of its modification to have been attributable to personnel of the sales office, or even if, for the sake of argument, attributable to them that Government-caused delay was the paramount cause of the late receipt. And we must, therefore, agree with the determination made by the contracting officer. First, there is no proof that Western Union was unable to transmit the modification due to the inoperable nature of the telex machines at the contracting activity instead of a malfunction of its own transmitting apparatus. That the transmission was rejected with the above-quoted words does not prove that there was no defect in the Western Union machine which might have caused the same result. Second, while Western Union stopped attempting to transmit the modification at approximately 2:25-3:00 a.m. on August 13, approximately some 6 hours before bid opening, when the activity opened on the morning of August 13 two telex messages were on the machines for logging in at 7:53 a.m. Another message was logged in that morning at 8:50 a.m. All three of these telex messages were submitted on the sale in question. Third, as noted, through some mistake the Surplus Tire modification stated that delivery had to be made prior to "9AM AUGUST 18, 1976." Thus it is possible that had the date stated correctly "August 13" Western Union might have acted with a bit more alacrity, and the modification would have been transmitted prior to bid opening.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States