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DECISION



Report Copy
7/2/77
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-189811

DATE: December 8, 1977

MATTER OF: Sturm Craft Co.

DIGEST:

1. Bid modification was untimely where telegram was received after bid opening, notwithstanding fact that agency had received telephone call from telegraph company prior to bid opening indicating that bidder was modifying its bid.
2. Erroneous information provided by agency and agency's acceptance of telegraph company's delivery by telephone did not constitute Government mishandling solely responsible for or the paramount reason for untimely receipt of telegraphic bid modification where telegram was qualified on its face as official Government business and telegraph company should have been aware of existence of its own tie-in line to Government installation.

The Sturm Craft Co. (Sturm Craft) contends that the modification to its bid submitted in response to invitation for bids (IFB) N62472-77-3-0144 for shore power improvements at the Naval Underwater Systems Center, New London, Connecticut (Navy), was improperly rejected as late. If the modification is considered, Sturm Craft would be the low bidder.

Bid opening was at 2:00 p.m. on July 7, 1977. The IFB contained the clause "Late Bids, Modifications of Bids or Withdrawal of Bids (1974 Sep)" (late bid clause). The record indicates that Western Union received Sturm Craft's telegram addressed to the Resident Officer in Charge of Construction (as required in the IFB), at 6:10 p.m. on July 6. The instructions specified delivery on "AM 07-07." At approximately 10:00 a.m. on July 7, Western Union called the Office of the Resident Officer in Charge of Construction (ROICC) and read the telegram, which referenced the IFB and reduced Sturm Craft's bid price by \$38,000. The individual who received the telephone call responded affirmatively to Western Union's query as to whether a confirmatory copy of the telegram was necessary. He gave no indication that delivery by telephone was unacceptable. The copy was received by the ROICC at 11:34 a.m. on July 8, after bid opening.

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At bid opening, the low bid was submitted by The Thames Electric Company, at \$289,550. Sturm Craft's bid was \$321,000. If the modification is considered, Sturm Craft's bid would have been low at \$283,000.

The Navy states in its report that the late bid clause allows " * * * consideration of late bids only if sent by registered or certified mail not later than the 5th day before opening, or the mail (or telegram if authorized) was late due solely to mishandling at the Government installation. Modifications of bids are expressly subject to the same requirements, and telegraphic bids were not authorized." Further, "[T]elegraphic modifications could be considered only if received before bid opening or excusably late for the same reasons that would justify consideration of a late bid. The Modification was late and was not (i) sent registered or certified mail five days prior to opening or (ii) late due solely to Government mishandling at the Government installation." The Navy cites three cases for the proposition that bidders cannot modify bids on the basis of oral telephonic notifications. 52 Comp. Gen. 281 (1972); 40 Comp. Gen. 279 (1960); B-161595, August 17, 1967.

On the other hand, Sturm Craft finds nothing in the IFB or the authorities cited by the Navy that precludes consideration of the telephonic notice of a telegraphic bid modification. Therefore, Sturm Craft contends that if it is not precluded, telephonic modification is permitted.

The pertinent provisions of the IFB are:

"LATE BIDS, MODIFICATIONS OF BIDS OR WITHDRAWAL OF BIDS (1974 SEP)

"(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either:

"(i) It was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for the receipt of bids (e.g., a bid

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submitted in response to a solicitation requiring receipt of bids by the 20th of the month must have been mailed by the 15th or earlier), or

"(ii) It was 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.

"(b) Any modification or withdrawal of bid is subject to the same conditions as in (a) above except that withdrawal of bids by telegram is authorized. A bid may also be withdrawn in person by a bidder or his authorized representative, provided his identity is made known and he signs a receipt for the bid, but only if the withdrawal is made prior to the exact time set for receipt of bids.

* * * * *

"(d) Modifications of bids already submitted will be considered if received at the office designated in the invitation for bid by the time set for opening of bids. Telegraphic modifications will be considered, but should not reveal the amount of the original or revised bid."

The initial controversy is whether the oral notice of the contents of the telegram received prior to bid opening and confirmed after bid opening may properly be considered as modifying the bid.

There is no provision in either the present regulation or the clause which permits the acceptance of a bid modification made by telephone prior to bid opening and confirmed by subsequent telegram received after opening. While prior to July 31, 1973, Armed Services Procurement Regulation (ASPR) § 2-304 (1973 ed.) permitted the consideration of bid modifications under these circumstances, Defense Procurement Circular No. 110, issued on May 30, 1973, effective July 31, deleted the provisions of ASPR allowing such modifications and stated:

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"Telephonic receipt of telegraphic bids/proposals, modifications or withdrawals no longer qualifies the telegram as being timely. The telegram itself must be received by the proper official at the Government installation by the time specified."

Since the telegram from Sturm Craft was not received until after the opening of the bids, the agency acted properly in determining that the telegraphic modification was untimely. Cf. James Luterbach Construction Company, B-190012, October 4, 1977, 77-2 CPD 265.

Sturm Craft argues alternatively that even if its modification is untimely, its late delivery was due solely to mishandling by the Government and that it should have been considered under subparagraph (a)(ii) of the late bid clause (ASPR § 7-2002.2 (1976 ed.)). Traditionally, we have construed this provision to authorize consideration of late bids or modifications where a bid or modification was mishandled after physical receipt at the Government installation but prior to delivery at the place designated in the IFB. See 46 Comp. Gen. 771 (1967); 43 *id.* 317 (1963); B-165474, January 8, 1969; B-163760, May 16, 1968; and B-148264, April 10, 1962.

However, in Hydro Fitting Mfg. Corp., 54 Comp. Gen. 999 (1975), 75-1 CPD 331, we found that if Government mishandling is the paramount reason the Government installation fails to obtain actual control over the tangible bid or evidence of the time of its receipt, and there exists no possibility that the late bidder would gain an unfair advantage over other bidders and thereby undermine the integrity of the competitive bid system, his late telegraphic bid or modification should be considered.

In Record Electric, Inc., 56 Comp. Gen. 4 (1976), 76-2 CPD 315, we found the Navy properly refused to consider a telegraphic bid modification not received prior to bid opening where Western Union notified the procuring activity by telephone of the modification after being informed that the procuring activity was out of forms for receiving messages on its telex receiver and was therefore unable to transcribe the incoming telegram. Because Western Union had failed to respond to the Navy's timely order requesting a new

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supply of forms, and because the modification was not received after Western Union was advised that the modification could not be accepted by telephone and must be physically delivered prior to bid opening, we found the substantial cause for nonreceipt to have been Western Union rather than Government mishandling.

We believe that the facts in the present record are substantially similar to those involved in Record Electric and that the late delivery of Sturm Craft's modification cannot be said to have been due solely to Government mishandling or that Government mishandling was the paramount reason for the lateness. The record indicates that on the day prior to bid opening, Sturm Craft called the ROICC to ascertain whether there was a TWX machine on the installation to receive telegrams. The contract specialist erroneously advised that the machines on base were only for intragovernmental use. Sturm Craft contends that had it been properly advised that there was a tie-in line from Western Union to the Sub Base, the telegraphic modification would have been received the evening prior to bid opening. While the ROICC may be criticized for failing to indicate that telephonic delivery was unacceptable and that a tangible copy of the telegram must be received prior to bid opening, we believe Western Union should have been aware of the existence of its tie-in line to the base and, inasmuch as the telegram was clearly qualified on its face as "official Government business," should have made some attempt to transmit the message directly to the Government installation. Accordingly, we find no basis to conclude that Government mishandling was the paramount or sole cause of the modification's late receipt. Therefore, the award made to Thames Electric Company was proper and Sturm Craft's protest is denied.

Deputy  Comptroller General
of the United States