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DECISION



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

[Protest Against Air Force Rejection of Bid Modification]

FILE: B-200721

DATE: February 2, 1981

MATTER OF: United Baeton International

DIGEST:

1. Where only evidence of timely submission of TWX price reduction is conflicting statements from protester and contracting agency, protester has not met its burden of affirmatively proving its case.
2. Late price reduction sent by mailgram may not be considered since only documentary evidence available indicates that it was received by procuring agency after bid opening.
3. Exception in late bid clause which permits consideration of late modification of "otherwise successful bid" is inapplicable to late price modification to bid which is not low responsive bid.

United Baeton International (United) protests the rejection of its bid modification, in the form of a price reduction, as late by the Department of the Air Force, Elmendorf Air Force Base, Alaska (Elmendorf). The bid would be low with the price reduction. The modification was not considered because the mailgram sent by United to reduce the price was not received at Elmendorf until the day after bid opening. United maintains that its price reduction should be considered because it believes that (1) a TWX message which United sent to Elmendorf reducing its price on September 8, 1980, the day before bid opening, in fact was received at the base TWX machine that same date, and (2) Elmendorf's late receipt of the firm's mailgram, which confirmed the TWX price reduction, was due to mishandling by the Anchorage Post Office and/or the Government installation. United contends that as a result it is entitled to bid preparation costs. We deny the protest.

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Invitation for bids (IFB) F65501-80-B-0040 had a scheduled bid opening time of 3:00 p.m., September 9, 1980. At that time, three bids were opened including United's. On September 10, the base procurement office received a mailgram from United substantially reducing the price. The mailgram envelope bears the base procurement office time/date stamp of September 10, 1980, 10:22 a.m. Because the mailgram was received after the exact time and date scheduled for bid opening, the Air Force did not consider United's price reduction.

Regarding the TWX, the Air Force reports that it has no record of its receipt and that efforts to trace the TWX proved unsuccessful. In this regard, United contends that its own copy of the TWX that was transmitted indicates timely receipt at the Elmendorf TWX machine. Despite the Air Force's request, however, United did not send a copy of that TWX to Elmendorf to verify transmission, nor has it furnished a copy to our Office.

Since the only evidence on this issue is the conflicting statements from the protester and the contracting agency, the protester has not met its burden to prove affirmatively that a TWX reducing the bid was timely received. Airwest Helicopters, Inc., B-193277, June 7, 1979, 79-1 CPD 402. Therefore, the alleged TWX transmission is irrelevant to the consideration of United's bid.

With respect to the mailgram, the protester has submitted a copy which shows that Western Union dispatched it from Ohio at 4:59 p.m. (11:59 a.m. Elmendorf time), September 8. According to both Western Union and the Air Force the mailgram was received by the Anchorage Post Office shortly after 12 noon Elmendorf time the same day. Although the record is not clear whether under standard Anchorage Post Office procedures a mailgram received at that time would be delivered one or two days later, the protester argues that the mailgram should have been delivered on September 9; United suggests that the delay in its receipt by procurement personnel was attributable to either the Anchorage Post Office or Elmendorf. As previously stated, the mailgram is stamped as received at Elmendorf at 10:22 a.m. on September 10.

Defense Acquisition Regulation (DAR) § 7-2002.2 (1976 ed.), which delineates the conditions for consideration of late bids, was incorporated into the IFB and provides:

"(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:

* * * * *

(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 condition as in (a) above * * *.

"(c) The only acceptable evidence to establish:

* * * * *

(ii) the time of receipt at the Government installation is the time/date stamp of such installation on the wrapper or other documentary evidence of receipt maintained by the installation."

Accordingly, the only question here is whether the late receipt of United's bid modification was due to Government mishandling after receipt elsewhere at Elmendorf. Z B Precision Products, Inc., B-187985, May 6, 1977, 77-1 CPD 316. Before we can consider the question of mishandling, therefore, pre-bid opening receipt at the Government installation must be established. B.E. Wilson Contracting Corp., 55 Comp. Gen. 220 (1975), 75-2 CPD 145; Astro Development Laboratories, Inc., B-181021, July 17, 1974, 74-2 CPD 36.

As the regulation provides, the only acceptable evidence of receipt at a Government installation is the time/date stamp on the submission's wrapper unless there is other documentary evidence of timely receipt at the installation. Here, the only documentary evidence of receipt of the mailgram at Elmendorf is the installation's time/date stamp showing that Base procurement personnel received it at 10:22 a.m. on September 10,

the day after bid opening, and a handwritten notation on the mailgram itself that it was a "modification of bid received 10 September 1980 * * *." Under the circumstances, we need not reach the issue of Government mishandling at Elmendorf because we have no basis to conclude that the mailgram containing United's price reduction was received before the date and time stamped on it. We therefore agree with Elmendorf that the reduction was late and may not be considered. Z B Precision Products, Inc., supra.

The protester speculates that any delay in receipt at Elmendorf may have been due to the Post Office's handling of the mailgram after transmission to Anchorage. However, the DAR mishandling exception only applies to mishandling by the Government installation conducting the procurement, not the Postal Service. Kessel Kitchen Equipment Co., Inc., B-189447, October 5, 1977, 77-2 CPD 271.

Finally, the protester argues that the price reduction could be considered under paragraph (d) of DAR § 7-2002.2, which provides:

"Notwithstanding the above, a late modification of an otherwise successful bid which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted."

However, United's bid was not the low responsive bid and thus was not the "otherwise successful bid" within the meaning of the clause. Mitchell Brothers General Contractors, B-192428, August 31, 1978, 78-2 CPD 163.

The protest is denied. Since the bid price reduction properly was not considered, the claim for bid preparation costs also is denied. Mark A. Carroll & Son, Inc., B-198295, August 13, 1980, 80-2 CPD 114.



For the Comptroller General
of the United States