

Pettit

17789



DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

[Protest Against Proposed Awardee Being Permitted to Modify Bid]

FILE: B-199992

DATE: April 16, 1981

MATTER OF: Kings Point Mfg. Co., Inc.

DIGEST:

1. Telegraphic bid modification telephoned to contract specialist by Western Union prior to bid opening is late bid modification where confirming telegram was not received by Government installation until after bid opening, as indicated by agency time/date stamp.
2. Late telegraphic bid modifications received by contracting officer after date of bid opening may be considered where Government discontinued Western Union terminal prescribed for bidders' use in solicitation before bid opening without so informing prospective bidders, Government action was paramount reason for delay in agency's receipt of modifications and bidders submitting late modifications do not gain unfair advantage if late modifications are considered.
3. Contracting agency may not accept late telegraphic bid modification without providing bidder opportunity to prove existence of mistakes alleged in modification.
4. Agency determination to allow correction of bid modification is reasonable where bidder's worksheets and supplier's quotation present clear and convincing evidence of mistaken omission of cost for required parts of item and of cost of omitted parts, including overhead and profit. Proposed award on basis of corrected bid modification is proper where modified bid as corrected remains low bid.

~~114955~~ 114955

Kings Point Mfg. Co., Inc. (Kings Point), protests the Army's decision to permit Pioneer Recovery Systems, Inc. (Pioneer), to correct a mistake in bid alleged after the opening of bids in response to invitation for bids (IFB) No. DAAJ09-80-B-0464, issued by the Department of the Army, Army Troop Support and Aviation Materiel Readiness Command (Army), St. Louis, Missouri, and the proposed award to Pioneer. For the reasons discussed below, the protest is denied.

The IFB, a qualified products procurement for parachute seat harnesses, sought bids on two bases-- with and without first article approval. Bid opening was held at 1:30 p.m. central daylight savings time on July 1, 1980. The Army reports that Pioneer's original unit bid price of \$500.95 was subsequently reduced by telegram dated July 1, 1980, to \$327.20 (with first article approval) and \$326.15 (without first article approval). The bid abstract indicates that Kings Point originally bid a unit price of \$1,000 which the firm modified by telegram of July 1, 1980, to \$488.90 for items both with and without first article approval.

Pursuant to Defense Acquisition Regulation (DAR) § 2-406.3 (1976 ed.), the Army decided to permit the correction of Pioneer's apparent low unit prices from \$327.20 (with first article approval) and \$326.15 (without first article approval) to \$460.30 and \$459.25, respectively. The Army authorized the correction based on its determination from Pioneer's worksheets, a supplier's quotation, and the firm's notarized statement, that Pioneer failed to include the cost of two release assemblies per harness in its bid price. The intended charge for the omitted assemblies, including general and administrative expenses (G&A) and profit, was also determined from the bidder's worksheets. The Army asserts that Pioneer's bid as corrected remains the low bid and proposes to award the contract to Pioneer. The award has, however, been withheld pending resolution of the protest.

Our review of the record shows that Pioneer's telegraphic bid modification upon which its status as

low bidder is based was not received by the contracting agency until after the time set for bid opening. The telegram in fact bears two time/date stamps, the earlier of which (that of the facility's communications center) shows receipt on "1 JUL 80 2037 z," or 3:37 p.m. central daylight savings time, over 2 hours after the time specified in the IFB for bid opening. During June and July 1980, ZULU time (indicated by the "z" in the time/date stamp) is converted to central daylight savings time by deducting 5 hours. The telegram states that it is a duplicate of a telegram telephoned at 3:53 p.m. on June 30, 1980.

Although Kings Point's telegraphic bid modification which reduced its unit bid price from \$1,000 to \$488.90 is time/date stamped by the Army communications center at "1 JUL 1709 z," or 12:09 p.m. central daylight savings time, the Army states that the contracting officer did not receive it until July 3, 1980. The Army explains that because the protester's telegram identified the mandatory time for receipt by the contracting officer, absent mishandling after its receipt, it should routinely have reached the contracting officer within 2 hours after its arrival at the communications center.

The Army states that the telegraphic bid modifications of both Pioneer and Kings Point were late because the contracting officer did not receive them until after the July 1 bid opening, but asserts that they should be considered for award because the delay in receipt was not the fault of the bidders or Western Union. Although paragraph C.21, Telegraphic Modifications/Withdrawals, of the IFB requires that telegraphic modifications be routed to Western Union number 1-910-761-2149 (AVRADCOM, St. Louis, MO), the Government discontinued that Western Union terminal on June 27, 1980, without so informing prospective bidders.

Western Union called the contract specialist at 11:31 a.m. on June 30, 1980, and told him that the company was unable to transceive the Pioneer message into the Army's receiver due to existing machine problems. The contract specialist decided to

accept Western Union's telephone message reducing Pioneer's unit bid prices to \$327.20 and \$325.15, asked Western Union to send confirmation, and modified the firm's original bid to that effect. We note that the bid abstract lists only Pioneer's modified bid prices.

The IFB contains the "Late Bids, Modifications of Bids or Withdrawal of Bids" clause prescribed by DAR § 7-2002.2, Defense Acquisition Circular (DAC) No. 76-18, March 12, 1979, which permits telegraphic bids and modifications, and provides instructions for their submission. Neither the regulation nor the clause permits the acceptance of a bid modification made by telephone before bid opening and confirmed by subsequent telegram received after bid opening. Consequently, we have held that oral notice of the contents of a telegram received under these circumstances may not properly be considered as modifying the bid. Sturm Craft Company, 57 Comp. Gen. 127 (1977), 77-2 CPD 444; Armed Services Procurement Regulation § 2-304 (1973 ed.), Defense Procurement Circular No. 110, May 30, 1973. Neither the contract specialist nor the contracting officer, however, notified Western Union that telephone delivery of the modification was unacceptable or that timely delivery of the written telegram was mandatory.

The Army now concedes that the contracting personnel's decision to accept telephone delivery of Pioneer's telegraphic bid modification was incorrect in light of our decision in Sturm Craft Company, supra, but takes the position that the confirmation copy may be considered late due solely to Government mishandling where Government action or inaction causes the telegram to be delivered late to the installation, citing our decision in Hydro Fitting Manufacturing Corporation, 54 Comp. Gen. 999 (1975), 75-1 CPD 331.

We agree with the Army. We have recognized that Government mishandling in the process of receipt of a telegraphic bid or modification may provide a

basis for consideration of an otherwise late bid or modification where Government mishandling is paramount in the failure of the telegram to be received at the Government installation prior to bid opening. Hydro Fitting Manufacturing Corporation, supra; I&E Construction Company, Inc., 55 Comp. Gen. 1340 (1976), 76-2 CPD 139. Here, the Government discontinued the Western Union terminal which bidders were required to use, failed to amend the IFB or otherwise advise prospective bidders that it could not be used, apparently did not inform Western Union that the terminal could no longer be used when the company attempted to deliver Pioneer's modification by telephone on the day before bid opening, and did not tell Western Union that telephone delivery was unacceptable. We believe these facts clearly show that the Government's actions were the paramount reason that both bid modifications were not received in the office designated in the IFB until after the date specified for bid opening.

In Hydro Fitting, we held that a strict, literal application of the late bid regulation should not be used to reject a bid when doing so would contravene the intent and spirit of the regulation, which is to insure that late bids or modifications will not be considered if there is any possibility that a late bidder would gain an unfair advantage over other bidders. Id. at 1003. Here, however, the contracting officer received both modifications after bid opening, no other bidders responded to the IFB and neither bidder would gain an unfair advantage if their late modifications are considered. Moreover, because the purpose of the rules governing consideration of late bids and modifications is to afford the Government the benefit of the maximum legitimate competition, ibid, consideration of both late telegraphic bid modifications is consistent with the intent of the regulation.

We do not feel that the circumstances peculiar to the Kings Point modification remove it from consideration under our decision in Hydro Fitting. While the protester's telegram did arrive at the Government installation prior to the time set for bid opening, even the routine 2-hour delivery schedule would not have allowed sufficient time for it

to be delivered to the contracting officer before bid opening. The Government's discontinuance of the prescribed terminal without notice to prospective bidders, however, prevented the telegram from reaching the communications center earlier.

We therefore conclude that both the Pioneer and Kings Point telegraphic bid modifications may properly be considered by the Army. Pioneer is the low bidder at its modified unit bid prices of \$327.20 and \$326.15. We have, however, held that the contracting agency may not accept such a modification without providing the bidder an opportunity pursuant to the pertinent regulations to prove the existence of mistakes alleged in the modification. Jaybil Industries, Inc., 58 Comp. Gen. 337 (1979), 79-1 CPD 198.

Kings Point protests the correction and proposed award on the basis that Pioneer allegedly did not submit clear and convincing evidence of its intended bid based on objective data as required by DAR § 2-406.3(a)(3) (1976 ed.), citing our decision in Kings Point Mfg. Co., Inc., September 14, 1979, 79-2 CPD 196. There, we denied Kings Point's protest against the Navy's proposed decision to allow Pioneer to correct a similar mistake. Using the G&A and profit ratios applied by Pioneer in that case, Kings Point calculates the additional cost of the two assemblies here at \$135.22 rather than \$133.10 asserted by Pioneer, and takes the position that Pioneer's evidence of its intended bid is, therefore, not convincing. Kings Point also argues that based on Pioneer's annual report for 1979 and the firm's sales figures for the first three quarters of 1980, Pioneer's actual sales G&A and profit ratios considerably exceed those applied in seeking correction of its bid prices. The protester concludes that award should be made on the basis of Pioneer's bid as originally submitted or that Pioneer should be permitted, at most, to withdraw its bid. See DAR § 2-406.3(a)(1) and (4) (1976 ed.).

Pioneer, however, states that because overhead and G&A rates represent a ratio of direct labor and inventory input respectively, they must change as basic workloads change to reflect actual conditions in order to conform with Cost Accounting Standards. Thus, Kings Point's reliance on the cost breakdown for the bid in question in the Kings Point case cited above is inapposite to the instant bid because the direct labor hours and applicable overhead rate have increased during the intervening 15-month period. The financial data upon which Kings Point based its calculations, Pioneer explains, pertain to Pioneer International Corporation of which Pioneer Recovery Systems, Inc., is only one of several subsidiaries. Similarly, the Pioneer profit figures used by the protester reflect overall profit on sales to foreign governments and private industry, not sales exclusively to the Federal Government. Pioneer explains that the small difference noted by the protester between its bid prices for items with and without first article approval represents the premium paid for material and additional labor for the small production quantity of first articles required by the IFB.

Kings Point further objects to the deletion of Pioneer's cost breakdown from the agency report furnished to it by the Army pursuant to our Bid Protest Procedures, 4 C.F.R. § 20.3 (1980), contending that the omission places the protester at an unfair disadvantage in assessing the adequacy of Pioneer's claim of mistake in bid.

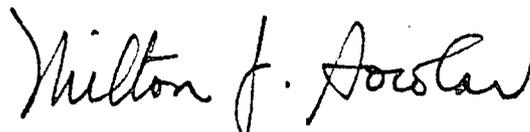
It is our practice to honor agency-imposed restrictions on documents; the decision to release them to the protester is a matter for the contracting agency, not GAO, to resolve. We will therefore consider a bid protest against a bid correction notwithstanding the fact that the protester has not been provided the worksheets or pricing information upon which the agency's determination to allow correction was based. Kings Point Mfg. Co., Inc., supra; RCI Microfilm, B-182169, April 10, 1975, 75-1 CPD 220; see DAR §§ 1-329.2(c)(4) and 2-407.8(a)(4) (1976 ed.). Our review in cases where the contracting agency is

authorized to correct mistakes alleged after bid opening is restricted to determining whether the agency had a reasonable basis for its decision. John Amentas Decorators, Inc., B-190691, April 17, 1978, 78-1 CPD 294; 53 Comp. Gen. 232, 235 (1973).

Contrary to the protester's contentions, the worksheets submitted by Pioneer show that the firm prepared its bid without including the cost of the two release assemblies required by the IFB specification and the material cost for each assembly (as supported by a supplier's quotation which predated the bid opening date and bears the number of the solicitation in question), that it did apply sales and administrative expenses to the material costs in preparing the bid originally submitted, and that those ratios were the ones used to calculate the corrected bid prices. United Ammunition Container, Inc., B-198822, August 8, 1980, 80-2 CPD 105.

Where, as here, clear and convincing evidence of the mistake and the intended bid price exists as required, we have held that the closeness of the intended bid price and the next low bid does not, by itself, preclude bid correction. Servidone Construction Corp.; Midwest Construction Company, B-198711, August 12, 1980, 80-2 CPD 109.

Therefore, we conclude that the Army's determination to permit correction of Pioneer's bid modification is reasonable and the proposed award based on the modified bid as corrected is proper.



Acting Comptroller General
of the United States