

**DECISION**

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

Letter  
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**FILE:** B-213162

**DATE:** March 20, 1984

**MATTER OF:** Qualimetrics, Inc.

**DIGEST:**

A late bid delivered by a commercial carrier may be considered if the lateness is due to the improper action of the government after the bid is received. However, before GAO can consider the question of wrongful government action, the time of the agency's receipt of the bid must be established. GAO finds that records of commercial carrier showing delivery to the agency's installation prior to bid opening are insufficient to establish that the awardee's bid, in fact, was received by the agency prior to bid opening.

Qualimetrics, Inc. (Qualimetrics), the third low bidder, protests the bids of RMS Technology, Inc. (RMS), the low bidder, and Willco Plastics, Inc. (Willco), the second low bidder under invitation for bids (IFB) NOAA34-83 issued by the United States Department of Commerce (Commerce). The IFB was for quantities of temperature systems that electronically record the maximum and minimum temperatures over a given period of time. The IFB also included separate line items for electronic spare parts and for connectors used to connect the temperature systems to government-supplied sensor cables.

Qualimetrics contends that the RMS bid should not have been considered because RMS's bid was received after bid opening. Qualimetrics also contends that the Willco bid was nonresponsive because it was materially unbalanced. Thus, Qualimetrics takes the position that it should have received the award.

For the reasons set forth below, we sustain Qualimetrics' protest.

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Seven bids were received at the September 16, 1983, 11 a.m., bid opening set forth in the IFB. At 1:17 p.m. on the same day, the contract specialist handling the procurement received the RMS bid through the Department of Commerce's internal mail-handling system. RMS's bid had been received prior to bid opening in the Commerce regional administrative support center mailroom via Federal Express' "courier pak" overnight delivery service. However, the mailroom had failed to deliver RMS's bid to the bid room prior to bid opening. The contracting officer determined that RMS's bid was eligible to be considered for award and that the RMS bid was the lowest. An award was made to RMS on September 28, 1983.

Qualimetrics contends that it was unfair to the other bidders for the contracting officer to accept the late bid of RMS. In this regard, Qualimetrics asserts that Commerce has not established that RMS's bid was received in the bid room on time. Qualimetrics alleges that the copy of RMS's shipping label and bid envelope which Qualimetrics received with Commerce's protest report shows no "time stamp" as to when RMS's bid was received by Commerce. Qualimetrics also asserts RMS caused its bid to be late by giving its bid to Federal Express at 5 p.m., on September 15, 1983, only 18 hours before bid opening. Qualimetrics emphasizes that RMS allowed merely 18 hours to move its bid from its corporate office in Newport News, Virginia, to the Commerce procuring activity in Boulder, Colorado (approximately 1,000 miles).

Commerce states that Federal Express delivered RMS's bid to the procuring activity's mailroom receiving department at 9:40 a.m., on the morning of September 16, 1983, even though it was addressed to a specific office designated in the IFB, because an April 18, 1981, departmental policy prohibited overnight delivery carriers from making deliveries to any specifically addressed office within the agency's regional administrative support centers. Commerce further states that under internal standards it established in 1981, mailroom personnel were required to handle any items received from overnight delivery carriers by immediately notifying mail addressees by telephone on receipt of the item and giving the addressee the option of picking up the item or having the item delivered on the next scheduled delivery. Commerce emphasizes that the regional administrative support center's mailroom never called the addressed procurement office to advise that RMS's bid had arrived and could be picked up. Consequently, Commerce takes the

position that RMS's bid was late because of the failure of the mailroom personnel to advise the procurement office by telephone that RMS's bid had arrived.

Late bids delivered by commercial carriers are not for consideration under the standard solicitation late bid provision as specified in Federal Procurement Regulations (FPR) § 1-2.201(a)(31) (1964 ed. amend. 193), which allows consideration of a late bid sent by mail if lateness is due to government mishandling after the bid has been received. See Scot, Incorporated, 57 Comp. Gen. 119 (1977), 77-2 CPD 425. However, we have held that an overly technical application of the late bid regulations should be avoided if such an application would contravene the intent and spirit of the late bid regulation. Southern Oregon Aggregate, Inc., B-190159, December 16, 1977, 77-2 CPD 477. Thus, a late hand-carried bid, or, as here, a late bid delivered by a commercial carrier, may be considered where lateness is due to improper action of the government and where consideration of the late bid would not compromise the competitive procurement system. Nevertheless, such a late bid should not be accepted if the bidder significantly contributed to the late receipt by not acting reasonably in fulfilling its responsibility of delivery of the bid to the proper place by the proper time, even though lateness may be in part caused by erroneous government action or advice. Sound Refining Inc., B-193863, May 3, 1979, 79-1 CPD 308. Essentially, for a late hand-carried bid to be considered, it must be shown that wrongful government action was the sole or paramount cause of late receipt. Empire Mechanical Contractors Inc., B-202141, June 9, 1981, 81-1 CPD 471.

However, where a bid arrives after bid opening in the office designated in the IFB for receipt, the time of receipt at the installation must be established before we can consider the question of wrongful government action. Lockley Manufacturing Co., Inc., B-195589, January 4, 1980, 80-1 CPD 15. Here, Commerce states that it has no record of its own as to the precise time Federal Express delivered RMS's bid to the regional administrative support center's mailroom. Commerce has furnished us with a copy of Federal Express' records which show that the delivery time was 9:40 a.m. Moreover, Commerce states that Federal Express normally makes deliveries to the mailroom between 9 and 10 a.m.

The FPR late bid clause specifically provides that the only evidence acceptable to establish the time of receipt at a government installation is the time/date stamp on the bid wrapper or "other documentary evidence maintained by the

installation." Skip Kirchdorfer, Inc., B-199628, November 28, 1980, 80-2 CPD 401. However, in the situation presented here, where the FPR late bid clause does not encompass hand-delivered late bids, the strict evidentiary requirements of the clause are technically inapplicable. See Larry Carlson & Associates, Inc., B-211918, November 21, 1983, 83-2 CPD 599. Nevertheless, the requirements of the late bid clause for establishing bid receipt, in our opinion, should also apply to a bid such as the one here that is hand-delivered by a commercial carrier that is the delivery agent of the bidder. Therefore, in the absence of any date/time stamp or other contemporaneous documentary evidence showing that RMS's bid was received prior to bid opening at Commerce's regional administrative support center, we find that records of the delivery agent, Federal Express, are insufficient to establish timely receipt of RMS's bid. See Tom Shaw, Inc., B-209018, February 3, 1983, 83-1 CPD 123; United Terex, Inc., B-209462, February 28, 1983, 83-1 CPD 198.

Since there is insufficient evidence to establish that RMS's bid was received at the agency's installation prior to bid opening, we need not consider whether the actions of the installation's mailroom in delivering RMS's bid to the bid room constituted wrongful government action.

We sustain Qualimetrics' protest as to the bid of RMS.

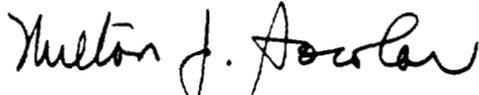
With respect to the second low bid of Willco, we find that it is unnecessary to discuss Qualimetrics' contention that it was nonresponsive because of considerations involved in terminating for the convenience of the government the contract awarded to RMS. In deciding whether to recommend action which may lead to a possible termination of a contract, we consider the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and other appropriate noncost effects to the government, apart from the procurement deficiency involved and its effect on the integrity of the procurement system. System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159.

Although we find Federal Express' record insufficient to establish receipt of RMS's bid prior to bid opening at the agency's installation, there is nothing in the record to indicate that the decision of the contracting officer to award to RMS was not made in good faith. With regard to the effect of the contracting officer's consideration of RMS's late bid on the integrity of the procurement system, our primary objective is to prevent opportunities for fraud

or undue advantage which might be obtained if bidders could submit their bids after bid opening. Lockley Manufacturing Co., Inc., supra. In our opinion, there was no compromise on the integrity of the procurement system by the acceptance of RMS's bid because the bid had been sealed and out of RMS's hands the evening before bid opening. Further, the record shows that RMS's bid was delivered in an unopened condition by the installation's mailroom to the contract specialist handling the procurement.

Finally, Commerce informs us that if RMS's contract for approximately \$1,300,000 was terminated, the cost to the government would exceed \$250,000. More specifically, Commerce states that RMS has made \$127,778 in payments to vendors and subcontractors for contract materials and that RMS has entered into \$544,486 in subcontracts, \$145,000 of which are noncancelable because subcontractors have purchased "non-standard" materials. Commerce further states with respect to RMS's cancelable subcontracts, industry standards for vendor "re-stocking charges" due to cancellation run from 15 to 25 percent of the value of the subcontract.

In view of the foregoing, we cannot recommend that RMS's contract be terminated.

*for*   
Comptroller General  
of the United States

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