

DECISION

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

FILE: B-216336.2

DATE: January 28 1985

MATTER OF: T.S. Head & Associates

DIGEST:

Contracting agency need not consider telegraphic bid modification of which it has received notice prior to bid opening from the receiving telegraph office, where the agency has issued regulations prohibiting such consideration.

T.S. Head & Associates (Head) protests the Air Force's refusal to consider telephonic notification from Western Union of a telegram modifying Head's bid under invitation for bids No. F44600-84-B-0073 for floor coating services.

We deny the protest.

The record shows that 50 minutes before the time set for bid opening, the contracting officer received the telephonic notification of Head's telegram reducing its bid price from \$24,200 to \$21,200. Bid opening revealed that one bid--\$22,025 submitted by Rodenberg's Floor Coatings, Inc. (Rodenberg's)--was lower than Head's bid as originally submitted, and that Head's bid as modified would be \$825 lower than Rodenberg's. The next day, the contracting officer received the actual telegram modifying Head's bid.

Rodenberg's then protested with this Office any acceptance of the modification. We summarily denied the protest, without obtaining a report from the Air Force, based on Federal Acquisition Regulation (FAR), § 14.303, 48 Fed. Reg. 42,102, 42,177 (1983) (to be codified at 48 C.F.R. § 14.303), which requires consideration of a telegraphic modification received by telephone from the receiving telegraph office before bid

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opening, "unless proscribed by agency regulations," and provided the telegraph company confirms the message by sending a copy of the telegram that formed the basis for the telephone call. Rodenberg's Floor Coatings, Inc., B-216336, Sept. 18, 1984, 84-1 C.P.D. ¶ 323.

The Air Force, itself, however, sustained Rodenberg's protest based on an Air Force regulation, which this Office was not aware of when resolving the Rodenberg's protest, expressly prohibiting the acceptance of telephonic notice of telegraphic modifications. Air Force FAR Supplement § 14.304-1.^{1/} The Air Force then awarded Rodenberg's the contract, prompting Head to file its protest.

In light of the fact that the Air Force has issued a regulation proscribing telephonically relayed telegraphic modifications, we believe that the Air Force properly refused to consider Head's modification.

The protester complains that the Air Force regulation was not inserted or referenced in the solicitation. We are unaware of any legal requirement that, in addition to issuing regulations proscribing the telephonic receipt of telegraphic modifications, the agency must include the regulation in the solicitation. The general rule is that a telegraphic modification received after bid opening may be accepted only under the circumstances set out in the solicitation, and the bidder must bear the responsibility for an otherwise late modification. E.g., X-Tyal International Corp., B-202434, Jan. 7, 1982, 82-1 C.P.D. ¶ 19. In this regard, the solicitation here contained the standard Late Submissions, Modifications, and Withdrawals of Bids clause, FAR, § 52.214-7, which does not include the telephonic receipt of a telegraphic modification as an acceptable circumstance.

^{1/} The regulation provides:

"Telephonic receipt of telegraphic . . . modifications . . . do [sic] not qualify the telegram as being timely. The telegram itself must be received by the proper official at the government installation by the time specified."

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The only exception to this rule is where the paramount cause for late delivery was mishandling by the contracting agency, e.g., where the agency fails to follow its established procedure of picking up a telegram from the receiving office after being telephonically notified of its arrival. See CWC, Inc., B-204445, Dec. 15, 1981, 81-2 C.P.D. ¶ 475. There is no allegation of government mishandling in this case.

The protest is denied. Consequently, our September 18 conclusion that the Air Force could consider Head's bid price reduction is modified.

for Milton J. Auster
Comptroller General
of the United States