

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20546**

**FILE:** B-221979

**DATE:** May 6, 1986

**MATTER OF:** Hargis Construction, Inc.

**DIGEST:**

1. Protest need not be dismissed for failure to furnish the contracting officer a copy of the protest within 1 day after filing with the General Accounting Office (GAO) as required by GAO's Bid Protest Regulations, where the agency had knowledge of the grounds that formed the basis for protest and was able to submit a report within the time required.
2. Telegraphic bid modification which was not received by bid opening because transmission was prevented by malfunction in telephone lines utilized by Western Union (protester's agent) is properly rejected as late, even assuming some negligence on the part of the agency telex operator, where the failure of the protester's agent to transmit and the protester's waiting until just more than one hour before opening to send the modification significantly contributed to the nonreceipt.

Hargis Construction, Inc. protests the award of a contract to any other firm under invitation for bids No. DACA21-86-B-0031, issued by the United States Army Corps of Engineers (Corps), Savannah District. The solicitation sought bids for the construction of two general purpose magazines (for ammunition storage) at Fort Bragg, North Carolina. Hargis contends that it was the low bidder by virtue of a telegraphic bid modification sent to the Corps via Western Union on January 7, 1986, the day of bid opening. The Corps claims that it did not receive the telegraphic modification and had no notice of the modification until after bid opening when Hargis called the agency.

The protest is denied.

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Prior to the the 3:00 p.m bid opening, Hargis attempted to send a telegraphic bid modification through Western Union to the Savannah District's telex machine, deducting \$600,010 from its \$1,000,000 bid. (This modification, had it been received on time, would have made Hargis the low bidder.) The modification was accepted by Western Union at 1:56 p.m. After several attempts to deliver the message from 1:56 until 2:42 p.m. Western Union canceled the transmission. Hargis apparently became aware of the nonreceipt of the modification upon calling the Corps' office at approximately 3:20 p.m. to inquire as to the low bidder. At that time, the Corps official informed Hargis that its bid was \$1,000,000, and no modification had been received. Three other bids were timely received.

Initially, the Corps argues that the protest should be dismissed because of Hargis' failure to furnish a copy of the protest to the contracting officer no later than 1 day after the protest was filed with our Office, as required by section 21.1(d) of our Bid Protest Regulations, 4 C.F.R. part 21 (1985).

The purpose of section 21.1(d) is to prevent any delay that would hamper the ability of the contracting agencies to meet the 25 working day statutory deadline for filing protest reports with our Office. Dismissal is not required in all circumstances, Rosemount, Inc., B-218121, May 16, 1985, 85-1 CPD ¶ 556, and we do not believe it would be appropriate to dismiss the protest here. We base this determination on the fact that Hargis filed essentially the same protest initially with the Corps' contracting officer, who, in light of the relatively simple nature of the protest, should have been reasonably aware of the basis for the protest filed with us. Furthermore, the agency report was filed in a timely manner. It is clear that the failure to furnish a copy of the protest resulted in no real prejudice to the agency, and a strict application of section 21.1(d) would serve no useful purpose. Boston Intertech Group, Ltd., B-220045, Dec. 13, 1985, 85-2 CPD ¶ 657. Therefore, we will consider the protest on the merits.

With respect to the merits of the protest, the Corps argues that Hargis' bid as modified is not properly for consideration because the nonreceipt of the modification was due not to any government mishandling, but rather to a malfunction in the telephone lines that the protester's agent, Western Union, utilized in transmitting messages.

Hargis claims the cause of the nonreceipt was government mishandling because the Corps failed to diligently monitor its telex machine for service interruption and as a result the problem was not corrected to ensure receipt of modifications under this solicitation. Hargis asserts that had the contracting officer been promptly notified of the telex machine problem the bidders could have been notified and bid opening could have been delayed to allow for telegraphic modifications. Hargis therefore argues and points out that the government will save several thousand dollars if the modification is considered.

A bidder has the ultimate responsibility of assuring the timely arrival of its bid and any modifications at the place designated in the solicitation. Specifically, any 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. See Delta Lightning Corp., B-219649, Oct. 30, 1985, 85-2 CPD ¶ 491, and Nanco Labs Inc., B-220663, et al., Nov. 26, 1985, 85-2 CPD ¶ 613.

Here, the solicitation's late bid clause, which is the standard one set out in the Federal Acquisition Regulation, 48 C.F.R. § 52.214-7 (1984), permits consideration of a modification received after bid opening but before award, if the award was made 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. For mishandling after receipt to occur the government must first have physical possession of the modification prior to bid opening. See The Standard Products Co., B-215832, Jan. 23, 1985, 85-1 CPD ¶ 86. That was not the case here.

Nevertheless, we have recognized that there may be situations not covered under the late bid clause that justify clarification of a late bid or modification. We have established the narrow exception whereby a bid or modification received after opening may be considered where there was government mishandling in the process of receipt (as distinguished from mishandling after receipt) that was the paramount cause of the bid or modification being late. See E.M. Brown, Inc., B-218375, June 17, 1985, 85-1 CPD ¶ 691. For example, we have found government mishandling in the process of receipt when an agency permitted a telex machine to run out of paper in Hydro Fitting Mfg. Corp., 54 Comp. Gen. 999 (1975), 75-1 CPD ¶ 331. A similar

determination was made when an agency failed to exercise due care in ensuring the telex machine use was not suspended for failure to pay Western Union the service fee in The Standard Products Co., B-215832, supra.

Under the above standard, we find government mishandling was not the sole cause of the Corps' failure to receive the modification prior to bid opening. The Corps' protest report indicates that the telex machine operates automatically to receive and acknowledge incoming messages. The report also states that around 2:00 p.m. on the day of the bid opening the telex machine operator was unable to transmit a message and attempted to resolve the problem. By 3:20 p.m. the operator, still unable to transmit, reported the problem to Western Union. The record indicates it was later determined by Western Union that the Corps' telex machine was operating properly, but found the transmission problem existed in the telephone line which was cleared up by the telephone company on the next day.

Since the Corps' telex machine was not malfunctioning, this distinguishes the protester's situation from the above cited cases where government mishandling was determined to exist. Here, the protester's agent, Western Union, failed to transmit successfully the bid modification. A protester must bear the responsibility for its agent's failure to complete telegraphic transmissions. Delta Lighting, Inc., B-219649, supra.

Furthermore, the protester has failed to prove that the Corps' telex machine operator exercised anything less than due care in finding the transmission failure and promptly notifying Western Union. In any event, even assuming some negligence on the part of the telex operator, the failure of the protester's agent to transmit the modification and the protester's waiting until just more than 1 hour before opening to send the modification significantly contributed to the nonreceipt. Delta Lightning Corp., B-219649, supra. Consequently, we conclude that the protester's bid was properly evaluated without considering the modification.

Even though the protester's ultimate bid may be more economically advantageous than those timely received, since the maintenance of confidence in the integrity of the government procurement system is of greater importance than the possible monetary advantage to be gained by considering a late modification in a particular procurement. Discovery Int'l., Inc., B-219664.2, Nov. 19, 1985, 85-2 CPD § 565.

Accordingly, the protest is denied.

*for Seymour Efros*  
Harry R. Van Cleve  
General Counsel