



Comptroller General
of the United States

Washington, D.C. 20548

Ruppert

Decision

Matter of: Western Alaska Contractors, J.V.
File: B-241839
Date: March 5, 1991

James F. Nagle, Esq., Oles, Morrison & Rinker, for the protester.
Paul M. Fisher, Esq., Department of the Navy, for the agency.
George Ruppert, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where telegraph company attempting to send telephone notice of telegraphic modification of protester's bid advised agency employee receiving the call that it had a "bid wire," employee reasonably assumed telephonic bid was being attempted and, after correctly advising that such bids were impermissible, terminated the call without asking whether modification, rather than bid, was being attempted; this phone call provided no basis for subsequently considering written modification received after bid opening.

2. Contracting agency properly refused to consider post-bid opening telegraphic modification that would have made protester's bid low where the only evidence of requisite pre-bid opening telephonic notice to agency is Western Union record of call, which shows initials of agency employee who allegedly accepted call, and agency denies ever receiving the call and states that there is no employee in the office with the initials in the Western Union record.

DECISION

Western Alaska Contractors, J.V. protests the Navy's refusal to consider a bid modification that would have made it the low bidder under invitation for bids (IFB) No. N62471-89-B-1305, for replacement of piping and equipment and related work at the Naval Air Facility, Midway Island.

We deny the protest in part and dismiss it in part.

Bid opening was scheduled for 1 p.m., Hawaii Standard time, on September 24, 1990, in the bid room of the Officer in

OSUR04/1433125

Charge of Construction (OICC). Prior to bid opening, between 8 and 9 a.m., the cognizant contracting specialist received a telephone call from an employee of ALASCOM, a telegraph company in Alaska, who asked if the agency would accept a message regarding a "bid wire" from Western Alaska. The contracting specialist told the ALASCOM employee that she could not accept a telephonic bid. The ALASCOM employee did not attempt to read the message or state that she was attempting to deliver by telephone a telegraphic modification, but indicated that OICC would be receiving the message by telegram from Western Union. The call then was terminated.

The protester states that the Reno, Nevada Western Union office then telephoned the contracting office at 11:52 a.m. to telephonically relay its bid modification. However, when bids were opened at 1 p.m., they were as follows: AIC MICON Inc., \$1,223,135; North American Construction, \$2,189,000; Abhe & Svoboda, Inc., \$2,243,100; and Western Alaska Contractors, \$2,500,000. The protester's modification purportedly reduced its price to \$1,169,000, but the agency states that it did not receive any bid modification, telephonic or otherwise, from Western Alaska prior to bid opening. On September 26, Western Alaska filed an agency-level protest challenging the agency's refusal to consider its modification. The Navy denied the protest on October 24, and this protest to our Office followed.

The protester contends that the contracting officer improperly rejected its telephonic bid modification made prior to bid opening, which was confirmed by telegram thereafter. The protester argues that the contract specialist improperly refused to accept the ALASCOM telephonic modification without first advising the contracting officer of the communication, and that the contract specialist's failure in this regard was the cause of the firm's failed modification attempt at this point. The protester also argues that its second attempt at a telephonic modification should be deemed a sufficient pre-bid opening modification, since the records of Western Union, a disinterested third party, show that the call was placed to the correct number and received by the Navy; the company's records show that a call to the installation was placed at 11:52 a.m. on September 24, and received by a person with the initials "I.O."

Under Federal Acquisition Regulation (FAR) § 14.303(a), telegraphic bid modifications are acceptable where received in the office designated in the solicitation not later than the exact time set for opening of bids. Telegraphic bid modifications received in the designated office by telephone before bid opening must be considered where the message subsequently is confirmed by the telegraph company by sending a copy of the written telegram that formed the basis for the telephone

call. FAR § 14.303(a). The "Late Submissions, Modifications, and Withdrawals of Bids" clause (FAR § 52.214-7), incorporated in the IFB here, provides that the only acceptable evidence to establish the time of receipt at the installation is the time/date stamp or other documentary evidence of receipt maintained by the installation.

We find that the agency properly determined that Western Alaska's attempts to give telephone notice of a telegraphic modification were ineffective. With regard to the first attempt through ALASCOM, the Navy contract specialist has furnished a declaration indicating that the ALASCOM employee advised it was transmitting a "bid wire," and there is no indication in the record that ALASCOM indicated it was relaying a bid modification rather than a telegraphic bid which, as the contract specialist advised ALASCOM, was not permitted by the IFB. While it appears that the contract specialist's refusal to accept the telephone call was based on her misunderstanding of the nature of the call, given the events as they transpired her conclusion regarding the call was reasonable and her actions, consistent with that conclusion, therefore were unobjectionable.

We view the circumstances here as falling within the risk inherent in a telephonic/telegraphic modification; there is nothing objectionable in imposing on bidders who choose to relay modifications telephonically the risk that their agent (here Western Union) will not achieve a timely and accurate receipt of the modification. See generally Singleton Contracting Corp., 68 Comp. Gen. 149 (1988), 88-2 CPD ¶ 592. In this vein, by attempting a telephonic modification, Western Alaska, not the government, accepted the risk that its call would be misinterpreted or otherwise would not be received in the form it intended. Whether or not the contracting officer would have better understood that the call concerned a bid modification, there was no requirement that the contracting officer answer all telephone calls to the OICC, or that the contracting specialist refer all calls to the contracting officer; Western Alaska's suggestion to the contrary is, we think, unreasonable.

As for the second attempted telephone notice through Western Union, the proof offered by Western Alaska of the timely receipt of its bid modification is information from Western Union's Reno, Nevada office; a Western Union facsimile telegram indicates that a telephone call was made and accepted by the contracting office by a person with the initials "I.O." Western Union also furnished a call record indicating that the telephonic modification was delivered to a person identified as "O.I." The agency reports, however, and the contract specialist states in her declaration, that, based on an investigation of the matter, no one at OICC in Hawaii received