



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lyttos International Incorporated

File: B-246419

Date: March 6, 1992

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Jeffrey I. Kessler, Esq., Army Materiel Command, and S.S. Goldberg, Esq., and Major John J. Short, Department of the Army, for the agency.

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DIGEST

1. Where the agency has discarded the bid envelope upon receipt of a late bid delivered by Express Mail, but the record clearly establishes that the bid was sent 2 working days prior to bid opening as required by FAR § 14.304-1 (a) (3), the bid may be considered.

2. Where bid is late due to government mishandling--agency's failure to ensure the timely transmission of bid from activity's mailroom to bid opening site--bid should properly have been accepted.

DECISION

Lyttos International Incorporated protests the Army's termination of contract No. DAAD05-91-C-0392, which had been awarded to Lyttos for construction of an addition to a building in the Aberdeen Proving Ground, Maryland. The Army terminated Lyttos's contract when it determined that it had improperly accepted the protester's bid under invitation for bids (IFB) No. DAAD05-91-B-0211, rather than rejecting it as late. We find that the bid should be considered, and sustain the protest.

The IFB was issued on July 16, 1991, with the time for bid opening set for September 27 at 9 a.m. Lyttos prepared its bid and mailed it by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee ("Express Mail") on September 25 at 2:17 p.m. The Postal Service attempted to deliver the bid on September 26 at 6:30 a.m., but the Directorate of Information Management (DOIM), the office

that receives all incoming U.S. Postal Service mail for the contracting activity, was not yet open. The bid was successfully delivered to the DOIM office at 10 a.m. that day. Mail delivered to this office is sorted and then delivered by truck to its particular destination. The agency report explains that while its usual mail delivery procedures provide for two delivery runs per day, one in the morning and one in the afternoon, on September 26, only one delivery was made to the Directorate of Contracting, where the bid had to be delivered in time for bid opening. That delivery had already been made by 10 a.m. Lyttos's bid therefore did not leave the DOIM office until the morning of September 27, and was not delivered to the Directorate of Contracting until 10:23 a.m., 1 full day after it had been delivered at the installation and more than 1 hour after bids had been opened. The contracting officer initially accepted Lyttos's bid, believing that although it was late, it could be considered because the late delivery was caused by government mishandling. Since Lyttos's bid for \$32,765 was low, the contract was awarded to Lyttos on September 30. The next low bidder, J.J. Mundth Construction Company, filed an agency-level protest against the award, contending that its own bid of \$38,717 was the low bid and asking for further facts "regarding the receipt and consideration of [Lyttos's] apparent late bid."

The contracting officer determined, on further reflection, that no government mishandling had occurred, and terminated Lyttos's contract for the convenience of the government. This protest followed.

The Federal Acquisition Regulation (FAR) includes provisions governing the acceptance of a bid received in the office designated in the IFB after the time set for bid opening, specifically addressing Express Mail delivery of such bids, FAR § 14.304-1, and these were incorporated by reference into the IFB. These provisions allow a late bid to be considered if it is received before contract award and, as relevant here, either was sent by Express Mail not later than 5 p.m. at the place of mailing 2 working days prior to the date specified for the receipt of bids, FAR § 14.304-1 (a) (3), or was sent by mail and the late receipt was due to mishandling by the government after receipt at the government installation. FAR § 14.304-1(a) (2). As discussed below, we think the bid should be accepted both because it was mailed 2 working days before bid opening and because its late receipt was due to mishandling by the government.

In order for contracting officials to determine if a late bid was mailed sufficiently early to be considered timely, the FAR includes a mandatory evidentiary requirement that the Army argues Lyttos has not met. FAR § 14.304-1(d) provides that:

"the only acceptable evidence to establish the date of mailing of a late bid . . . sent by [Express Mail] is the date entered by the post office receiving clerk on the [Express Mail] label and the postmark on the envelope or wrapper and on the original receipt from the U.S. Postal Service."

"Postmark" is defined (by reference to a separate FAR section) to exclude a postage-meter machine impression. The provision further states that "bidders should request the postal clerk to place a legible hand cancellation bull's-eye postmark on both the receipt and the envelope or wrapper."

The Army argues that this provision requires three items of evidence to demonstrate the time of mailing: the date entered by the post office receiving clerk on the Express Mail label, the postmark on the envelope or wrapper, and the postmark on the original receipt from the U.S. Postal Service. The agency states that the envelope it received had a postage-meter machine impression instead of a bull's-eye postmark, and that "in the absence of an appropriate bull's-eye postmark on the envelope," the evidentiary test has not been met.

The provision of a 2-day late bid rule for bids mailed by Express Mail was added to the FAR in 1989 based on recommendations made by the Office of Federal Procurement Policy (OFPP) and the General Accounting Office (GAO) that consideration be given to include Express Mail in the late bids/offers provisions, along with registered and certified mail. 53 Fed. Reg. 30,818 (1988). It is apparent from the background information published in the Federal Register that the wording of the Express Mail regulation was intended to closely follow that of FAR § 14.304-1(b), governing the acceptability of evidence to establish the date of mailing of a late bid sent by registered or certified mail. See 53 Fed. Reg. 30,818 (1988); 54 Fed. Reg. 48,980 (1989). In 1985, that FAR provision was revised to require, as proof of time of mailing, a bull's-eye postmark on both the envelope or wrapper and on the postal receipt. The "double bull's-eye" late bid rule was the result of concern expressed by both GAO and OFPP that if the postmark were only required on one, the potential would exist for bidders to manipulate the bidding system to their own advantage. See 50 Fed. Reg. 11,522 (1985). N.Y. Enter. Capital Corp., 60 Comp. Gen. 79 (1980), 80-2 CPD ¶ 392 in which we stated that:

"because the U.S. Postal Service cannot substantiate that the certified bid envelope was actually deposited in the mail on the date shown on the postmarked receipt, it is questionable that the postmarked certified mail receipt under these circumstances is a reliable indication of the actual date of mailing."

See also Rainbow Roofing, Inc., B-213515, June 27, 1984, 84-1 CPD ¶ 676 (bid should have been rejected as late in accordance with late bid provisions because only receipt, not envelope, had hand-cancellation bull's-eye and thus mailing time could not be reliably established).

The Express Mail regulation includes the same provision contained in the certified mail regulation that bidders should request a bull's-eye both on the receipt and on the envelope or wrapper. The concern that the bidder could manipulate the bidding system as to mailing time appears to be the same with respect to both Express Mail and certified/registered mail (which requires a bull's-eye on both the customer receipt and envelope).¹ We agree with the Army that the Express Mail provision incorporates the same double bull's-eye requirement contained in the certified mail provisions.

In this case, one of the three enumerated items in the regulation that are the only acceptable means for proof of the date of mailing is absent from the record. The absence of the missing item of evidence--the envelope or wrapper--is attributable to the agency's policy of preserving only a portion of the envelope with the bid package. Under the Directorate of Contracting's normal procedures, only the label portion, showing the metered mail postmark and address label, is preserved in the contract file. Because the agency has discarded this evidence, it is impossible for us to ascertain whether or not the envelope had the requisite postmark, or to determine whether the bid was mailed in time without considering evidence in addition to the items specified in FAR § 14.304-1(d). Because the evidence necessary for the protester's case was not retained by the

¹Although the certified mail provision provides that the only acceptable evidence of mailing is a postmark "both" on the envelope and on the receipt, and the Express Mail provision omits the word "both," the Express Mail regulation lists three pieces of evidence, connecting them with the word "and." In a grammatical sense, the use of the word "both" would not be appropriate for a list of three items, so we do not believe that the omission of "both" in FAR § 14.304-1(d) means that only one bull's-eye postmark is acceptable evidence of the date of mailing.

agency, in order to fairly consider the protest we will examine other evidence in the record. As discussed below, we are recommending to the agency that its policy be changed so that the entire bid envelope is retained when a late bid is sent by registered, certified, or Express Mail.

The record so clearly establishes that Lyttos's bid was sent by Express Mail prior to 5 p.m., 2 working days prior to the bid opening date, that the question is not in dispute. Lyttos has provided the "Customer Receipt" copy of the Express Mail label that was affixed to the bid package, which includes both a "bull's-eye" postmark showing the time of mailing as 2:17 p.m. on September 25 and a consistent time and date entry by the post office receiving clerk, and a copy of a receipt from the originating post office for \$9.95 (the Express Mail fee) imprinted with the time of 2:19 p.m. on September 25. The agency report includes a copy of the "addressee's copy" of the Express Mail label, which is a carbon copy (or pressure-sensitive copy) of the protester's copy of the label, and is identical in all respects (except that it does not have the hand-stamped bull's-eye postmark); the serial number or identification number matches the one on the protester's copy. The agency has not alleged that the two labels do not match, do not show a legible date, or do not provide an accurate record of the time and place of mailing, nor has the agency challenged in any way the protester's assertion that the bid package was mailed at 2:17 p.m. on September 25 from Baltimore. In addition, it is clear that the bid had to have been mailed on September 25 at the latest as it was available in Aberdeen for delivery by 6:30 a.m. on September 26. Consequently, we find that Lyttos's bid was mailed by Express Mail 2 working days prior to bid opening as required by FAR § 14.304-1 (a) (3).

Since the agency's records show that the bid arrived 1 day prior to bid opening and remained in the agency's possession until it was finally opened, acceptance of Lyttos's bid would not compromise the integrity of the competitive system. It was out of the bidder's hand and in the agency's custody at the time of bid opening and thus the protester had no opportunity to alter its contents.

We also think the bid is acceptable under the government mishandling provision of the FAR. Late mailed bids received before award are proper for consideration where it can be determined that the late receipt was due solely to mishandling by the government after receipt at the government installation. FAR § 14.304-1(a) (2); see Bay Shipbuilding Corp., B-240301, Oct. 30, 1990, 91-1 CPD ¶ 161. Mishandling typically occurs when the agency does not have reasonable internal delivery procedures or does not adhere to such procedures. See, e.g., Watson Agency, Inc.,

B-241072, Dec. 19, 1990, 90-2 CPD ¶ 506. The contracting officer concluded here that Lyttos's bid was handled in accordance with the normal procedures so that there was no government mishandling. We disagree.

The bid was delivered to the installation early in the morning on the day before the scheduled bid opening. Under the installation's normal mail delivery procedures, the Directorate of Contracting receives both a morning and an afternoon delivery from the DOIM office. On September 26 and 27, however, only the morning mail delivery was made because of a shortage of available drivers at that time. The agency report states that two of the drivers assigned to mail delivery duties were absent due to long-term illnesses. Of the remaining two available drivers, one was attending a training class on the afternoon of September 26. The one remaining driver could not make all of the deliveries (for which the Administrative Services Branch is authorized to employ five drivers), and thus the branch's chief clerk reduced the deliveries to the contracting office to one (morning) delivery per day. The record shows that "Normal Procedures" constitute two deliveries per day. Although the personnel shortage apparently had existed for some time, since it was caused in part by "long-term" illnesses, there is no showing in the report that any action was taken to make temporary arrangements or otherwise compensate for these drivers' absences. The record does not disclose why only four drivers are accounted for, even though the activity is authorized to employ five drivers.

Thus, while appropriate procedures had been established for the delivery of mail from the DOIM office to the contracting office, they were not implemented on September 26. Although the agency suggests that it acted reasonably here in light of the driver shortage, we find that the agency had a duty to do something more than merely discontinue a normal delivery. In this respect, we have recognized an agency's duty to establish procedures to ensure that the physical transmission of bids to the bid opening site is accomplished within a reasonable time of their arrival at the place designated for receipt of bids. See Microlect, 66 Comp. Gen. 269 (1987), 87-1 CPD ¶ 173 (where agency's mailing address was listed in IFB as post office caller number, agency had a duty to check with post office for bids to permit timely transmission to the bid opening site); Federal Contracting Corp., 56 Comp. Gen. 735 (1977), 77-1 CPD ¶ 444 (recognizing the obligation of the government to establish and implement procedures to insure that the transmission of bids from one place to another will not be unreasonably delayed). While these cases concern delivery to an independent bid depository, we think the situation here was not meaningfully different. Thus, we believe that the agency did not fulfill its duty to ensure the timely

transmission of bids to the bid opening site. In short, we see this as government mishandling.

We sustain the protest, and by letter of today, we are recommending to the Secretary of the Army that the contract be awarded to Lyttos, and that the entire mailing envelope for a bid be retained in the file where it is received after the time set for bid opening and was sent by registered, certified, or Express Mail. In addition, Lyttos is entitled to recover its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d) (1991). The protester should submit its claim for its costs directly to the agency.

for Milton J. Aocolar
Comptroller General
of the United States