



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: R.C. Construction Co., Inc. and Charles M. Powers and John H. Powers, a Joint Venture

File: B-250037.2

Date: February 24, 1993

Charles M. Powers, Esq., for the protester.
Denis L. Durkin, Esq., Durkin & Morlan, for David Beland, Inc., an interested party.
Lester Edelman, Esq., Department of the Army, for the agency.
Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where a telecopied bid modification was received at the contracting agency's facsimile machine at 1:57 p.m., and bid opening was scheduled for 2 p.m. on the same day in a different room, late receipt of the modification was due primarily to the bidder's "last minute" transmission of the modification and to the bidder's addressing the modification to an engineer designated in the IFB as a technical adviser rather than to the exact address specified in the IFB.

DECISION

R.C. Construction Co., Inc. and Charles M. Powers and John H. Powers, a joint venture (R.C. Construction), protests the Army Corps of Engineers's rejection of its bid modification as late under invitation for bids (IFB) No. DACA01-92-B0082. R.C. Construction contends that the agency improperly refused to consider a telecopied modification R.C. Construction submitted that would have reduced its bid price and made its bid the lowest priced bid. We deny the protest.

The IFB was issued on April 15, 1992, for construction of a maintenance hangar at Fort Rucker, Alabama. The IFB included the standard "Late Submissions, Modifications, and Withdrawal of Bids" clause, Federal Acquisition Regulation

(FAR) § 52.214-7, warning bidders that any bid received at the designated office after the exact time specified for receipt would not be considered unless it was determined by the government that late receipt was "due solely to mishandling by the government after receipt at the government installation. The IFB also contained the standard "Submission of Bids" clause, FAR § 52.214-5, which states that bids and bid modifications shall be addressed to the office specified in the IFB and shall show the bid opening time, the IFB number, and the bidder's name and address. The IFB specifically authorized the use of facsimile or telecopier transmission for submission of bid modifications. The IFB set out the exact mailing address, including the bid opening room number, as well as the phone number of the Corps's two telecopy machines used for receiving bid modifications.

Bid opening was held as scheduled on June 30, at 2 p.m. When bids were opened, David Boland, Inc.'s (Boland) bid in the total amount of \$11,373,000 was the apparent lowest of the 17 bids received. R.C. Construction's bid in the total amount of \$11,910,000 was the apparent ninth lowest bid. However, R.C. Construction had attempted to submit a bid modification reducing its total bid price by \$702,250 by facsimile transmission just minutes before the scheduled bid opening. Sometime after bid opening, R.C. Construction's bid modification was delivered to the contracting officer who accepted the bid modification and indicated that he would have to consider what action to take. If the reduction were accepted as timely, R.C. Construction's new bid total of \$11,207,750 would have displaced Boland's bid as the lowest priced bid.

By letter of July 24, R.C. Construction filed a protest with the contracting officer asserting that its bid modification was timely and that award to any bidder other than itself would be improper. Boland also sent several letters to the contracting officer stating its view that R.C. Construction's attempted bid modification was late and should not be considered for award. By letter of August 24, the contracting officer notified Boland that he had determined the bid modification to be timely and intended to award the contract to R.C. Construction. Boland immediately protested to our Office. We dismissed Boland's protest when the Corps of Engineers notified our Office that, after legal review by its Chief Counsel, the Corps had determined that R.C. Construction's bid modification was received late; therefore, Boland had submitted the lowest priced bid and would be awarded the contract. Award has been held in abeyance pending our resolution of the protest.

R.C. Construction argues that its telefaxed bid modification was received by the Corps of Engineers several minutes before 2 p.m. and, but for mishandling by a government employee, should have been delivered to the contracting officer in the bid opening room before the bid opening time. R.C. Construction also argues that the contracting officer's initial determination that the bid modification was timely should be considered final and that the Corps's Chief Counsel had no authority to overrule the contracting officer.

Generally, a bid received in the office designated for the receipt of bids after the time set for bid opening is a late bid and cannot be considered for award. See Bay Shipbuilding Corp., B-240301, Oct. 30, 1991, 91-1 CPD ¶ 161. A facsimile bid or bid modification must arrive at the Office designated in the IFB by the time set for bid opening unless it is determined that late receipt was due to government mishandling at the contracting installation. FAR § 14.304-1. Where a bidder chooses to transmit a facsimile bid or modification, the government is not responsible for any failure attributable to transmission or receipt of the facsimile bid or modification, including delay in receipt or the failure of the bidder to properly identify the bid. FAR § 52.214-31. However, as stated above, the IFB permitted consideration of a late bid or modification where it is determined by the government that late receipt was due solely to mishandling by the government after receipt at the government installation.

The record shows that R.C. Construction began transmitting its three page bid modification at 1:52 p.m. and that the Corps's telecopy machine began receiving the facsimile at 1:55 p.m. The telecopy room clerk stated that the telefaxed bid modification was completed at 1:57 p.m. The two facsimile machines are in the room adjacent to the bid opening room, and the two rooms are connected by a door. Accordingly, the record shows that if the clerk had delivered the telecopied modification to the bid opening room quickly, the modification could have been submitted on time.

The telecopy room clerk did not immediately recognize that R.C. Construction's telefax was a bid modification, however, because the cover sheet of the transmission stated "ATTN: Contracts - Karen Williams" near the top of the page, even though further down the cover page identified the transmission as a bid modification and set out the bidder's name, the IFB number, and the bid opening time as required. The clerk, recognizing the name Karen Williams as that of a civil engineer employed in the engineering division, set the transmission aside, for delivery to the engineering division after she had delivered bid modifications, without reading

the remainder of R.C. Construction's cover sheet. The clerk subsequently time/date stamped the transmission at 2:04 p.m. While R.C. Construction's telecopy modification was not delivered to the bid opening room, eventually it was delivered to the contracting officer.

It is clear that R.C. Construction's attempted bid price reduction did not arrive at the designated bid opening room by the 2 p.m. bid opening. However, the record does not support R.C. Construction's assertion that the telecopied modification was late solely because of mishandling by the telecopy room clerk after the facsimile was received on the Corps's machine. In our view, R.C. Construction contributed to the late delivery of the bid modification.

R.C. Construction erroneously addressed the modification to the attention of an engineer, identified in the IFB as someone of whom technical questions should be asked, rather than to the exact address specified for submission of bids and modifications. While it is unfortunate, we can understand how the telecopy room clerk could misread the cover page and thus misinterpret the transmission as not being a bid modification in the few minutes remaining before bid opening. By attempting a "last minute" facsimile modification and not addressing the transmission in the exact manner specified, we think R.C. Construction significantly contributed to the mishandling of its bid modification and that the Corps reasonably concluded that government mishandling was not the sole reason for late delivery of the modification. See Western Alaska Contractors, J.V., B-241839, Mar. 5, 1991, 91-1 CPD ¶ 248.

We also disagree with R.C. Construction's argument that the contracting officer's initial determination about timeliness was final. The protester cites a decision of the United States Court of Claims, Southern, Waldrip, and Harvick Co. v. United States, 334 F.2d 245 (1964), as standing for the proposition that the contracting officer's decision is final with regard to determining whether a modification is timely. However, the facts of the cited case are distinguishable from these circumstances. In Southern, the court's holding was based upon an IFB clause that stated that determinations as to timeliness of telegraphic bid modifications would rest with the contracting officer. The clause included in this IFB provides for a determination by

the government (not specifically the contracting officer) that late receipt was due solely to mishandling by the government. The Chief Counsel is the legal adviser to the Chief of Engineers, and has been designated with decisionmaking authority within the Corps for bid protests. The record shows that the contracting officer, rather than being overruled by the Chief Counsel, changed his determination after receiving the Chief Counsel's advice. Whether the last judgment about timeliness of the protester's modification was actually that of the Chief Counsel or of the contracting officer is not material. It was the final determination of the agency and we find it to have been correct.

Accordingly, we deny the protest.


for James F. Hinchman
General Counsel