



Comptroller General  
of the United States

32512

Washington, D.C. 20548

## Decision

**Matter of:** Butt Construction Co., Inc.

**File:** B-258507

**Date:** January 30, 1995

Robert Martin, Esq., Simon, Turnbull & Martin, for the protester.  
Lester Edelman, Esq., and Hal Perloff, Esq., Department of the Army, for the agency.  
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest challenging agency's rejection of facsimile bid modification as late is sustained on grounds that government mishandling was paramount cause of modification's late receipt where: (1) facsimile bid modification was received at least 7 minutes prior to bid opening time; (2) the facsimile machine was located a short distance from both the room designated in the solicitation for receipt of bids and the bid opening room; (3) the protester properly identified the bid modification as directed by the solicitation and provided timely telephone notice to the agency of its facsimile transmission; and (4) record establishes that mail room clerks unreasonably delayed promptly delivering the modification.

### DECISION

Butt Construction Co., Inc. protests the Army Corps of Engineers' rejection of its bid modification as late under invitation for bids (IFB) No. DACA27-94-B-0090, issued for renovations at Page Manor School, located at Wright Patterson Air Force Base, Ohio. Butt contends that government mishandling improperly prevented the agency from considering its timely submitted facsimile bid modification.

We sustain the protest.

The IFB was issued on August 5, 1994. The required renovations consisted of demolition work, plumbing and electrical system upgrades, the installation of new mechanical equipment, and some site work. Of significance

here, section L of the IFB set forth the following "MODIFICATION OF BIDS BY TELETYPE OR FACSIMILE" provision which stated that:

"Bidders may modify their bids at any time by facsimile or teletype prior to the time set for opening bids. For the convenience of bidders desiring to modify their bids prior to bid opening, bidders may transmit their modification to Louisville District by Facsimile on (502) 582-5281 or (502) 582-5697.

"Bidders doing so are still responsible that the modification is dispatched in sufficient time to reach the destination prior to time set for opening of bids."<sup>1</sup>

In this regard, the IFB identified the "destination" as room 821 at the facility, and listed the facility's full street address.

On the morning of September 15, Butt submitted its bid; however, shortly thereafter, Butt received several revised estimates from some of its prospective subcontractors for this project which offered to perform the required work at lower prices. As a result, Butt recalculated its bid to a substantially lower price. Approximately 30 minutes prior to the scheduled 2:00 p.m. bid opening time, Butt attempted to send a facsimile transmission of its bid price modification to the facsimile telephone number set forth in the IFB, as permitted by the solicitation.

Because the transmission was not proceeding, Butt telephoned the facsimile machine site where a mail room clerk reported that because of a paper jam in the agency's facsimile machine, no facsimile transmissions--including Butt's bid modification--had been received. The clerk advised Butt to resend the facsimile modification, which the protester did. However, the facsimile machine paper feeder mechanism again malfunctioned, and, consequently, Butt's second facsimile transmission attempt was unsuccessful.

Following correction of the second paper jam by the clerk, Butt sent a third facsimile transmission of its 1-page bid modification, which was successful. The time legend printed at the top of the third facsimile transmission indicates that it arrived at the agency facsimile machine at 1:52 p.m.

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<sup>1</sup>Although this IFB authorized facsimile bid modifications, it did not, as envisioned by regulations, authorize facsimile bids. See American Eagle Industries, Inc., B-256907, Aug. 8, 1994, 94-2 CPD ¶ 156, n.1.

According to the clerk, because Butt had repeatedly emphasized that this facsimile transmission had to be submitted by 2:00 p.m. for the Page Manor school bid opening, the clerk placed the facsimile transmission in an envelope--time-stamped 1:52 p.m.--for delivery to the bid opening room--which was located approximately 150 feet around the corner from the mail room. A fourth transmission of the same 1-page Butt bid modification arrived--according to the transmission's time legend--at 1:54 p.m.

Shortly thereafter, the mail room clerk (hereinafter clerk No. 1) handed the time stamped envelope containing the bid modification to another mail room clerk (clerk No. 2) and instructed him to deliver the envelope "to the bid opening right away." Upon receiving the envelope, instead of delivering the bid modification to the bid opening room, clerk No. 2 delivered the envelope to room 821--the contracting division office--located 65 feet down the hall from the mail room.

Although bids and related documents are typically delivered to the contracting division receptionist, located at the Room 821 doorway, in this case, clerk No. 2 took the bid modification envelope to the contracting division secretary's office--located in the back of room 821. When the clerk discovered that the secretary was not at her desk, the clerk returned to the receptionist's desk and was told to deliver the bid modification envelope to the bid opening room, which is directly adjacent to room 821. The clerk then proceeded to the bid opening room and attempted to hand the envelope to the bid opening officer, who refused to accept it because bids had already been opened.<sup>2</sup>

As a general rule, 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 R. C. Construction Co., Inc. and Charles M. Powers and John H. Powers, a Joint Venture, B-250037.2, Feb. 24, 1993. An exception is made for mailed or facsimile bids (or modifications) if they do not arrive at the office designated in the IFB by the time set for bid opening solely because of government mishandling at the contracting installation. Federal Acquisition Regulation (FAR) § 14.304-1. Where, however, a bidder chooses to submit a facsimile bid or modification, the government is not responsible for transmission or related problems that result in a late bid. FAR § 52.214-31. On this record, we

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<sup>2</sup>In its modification, Butt deducted \$1.7 million from its bid. As modified, Butt's bid (\$3,575,000) is \$22,000 lower than the next low bid (\$3,597,000).

conclude that Butt's bid modification was presented to contracting officials after bid opening solely because of government mishandling.

The record establishes that Butt's modification was received at least 7 minutes prior to the bid opening time. The agency's own evidence--the time/date stamp on the envelope and the time legend on the facsimile transmission--shows that the modification was received at 1:52 p.m.<sup>3</sup> Next, the telephone records provided by Butt show that the first facsimile transmission ended at 1:53 p.m. Additionally, the time log for the facsimile machine from which Butt's bid modification was sent shows that the transmission started at 1:51 p.m. and lasted for 43 seconds. In sum, we find that Butt's first facsimile bid modification was received at least 7 minutes prior to the 2:00 p.m. bid opening--or at 1:53 p.m.

Under the circumstances here, the modification arrived in sufficient time to be delivered to the proper location. Bidders, of course, must allow a reasonable time for bids to be delivered from the point of receipt to the proper location, see Bay Shipbuilding Corp., B-240301, Oct. 30, 1990, 91-1 CPD ¶ 161; Silvics, Inc., B-225299, Feb. 24, 1987, 87-1 CPD ¶ 204. When a bid is sent by mail, the bid typically will be received in an agency mail room or similar facility and will be routed from there to the procurement office, the usual location designated in IFBs for delivery of bids. A bidder who does not mail a bid sufficiently in advance of bid opening, e.g., mails the bid only one government working day prior to bid opening, runs the risk that the agency's reasonable internal delivery procedures will not get the bid to the proper location by the scheduled bid opening. Bay Shipbuilding Corp., supra. When facsimile transmission is authorized, however, it is not unreasonable for bidders to expect that they can take advantage of that technology shortly before the bid opening--the transmission normally consumes very little time (here less than a minute), and agencies, before authorizing facsimile bids, are expected to have in place adequate procedures for ensuring timely delivery of such bids upon receipt. See FAR § 14.202-7(a)(5).

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<sup>3</sup>While the agency claims that the mail clerk allegedly pre-time stamped the envelope with 1:52 p.m., and suggests that the time/date stamp clock was several minutes slow--and on this ground argues that the first bid modification was received at a later time than 1:52 p.m.--we find this evidence unpersuasive in light of the legend printed on the first bid modification facsimile.

The Corps did have appropriate procedures in place for delivery of facsimile bid modifications to the bid room. Specifically, a mail clerk is available to monitor, record, and deliver incoming facsimile transmissions to the receptionist located at the entrance of room 821. Apparently, where--as here--potential bidders notify the mail clerk of an imminent bid opening, the agency's practice is to deliver the facsimile bid document immediately to the bid opening room officer instead of to the room 821 receptionist.

Here, Butt's modification was delivered late because these procedures were not followed. The mail room clerk who received Butt's bid modification and who was on notice of the urgency of the situation did not immediately seek to effect delivery.<sup>4</sup> Instead, delivery was delayed when the second mail room clerk failed to ascertain where the bid modification was to be delivered and searched the contracting division office for the division secretary, rather than proceeding directly to the adjacent bid opening room or delivering the modification to the receptionist at room 821.

But for the clerks' delay, Butt's bid modification would have been timely delivered. The record shows that 7 minutes is sufficient time for walking directly to the bid opening room (approximately 150 feet away), or to first the receptionist in room 821 (approximately 65 feet away), and then to the bid opening room next door. Since it was only the delay by the mail clerks that prevented the timely receipt of Butt's bid modification, we conclude that government mishandling was the paramount cause of the late receipt.

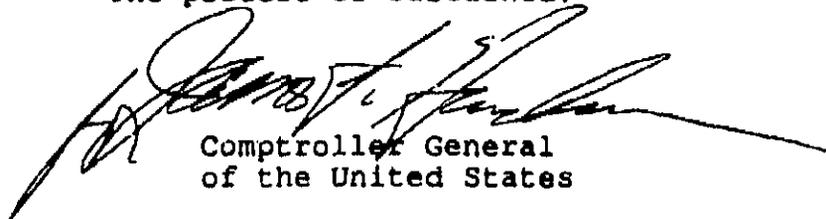
We sustain the protest and recommend that, if otherwise appropriate, award be made to Butt at its modified price. We also find Butt entitled to the costs of filing and pursuing its bid protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). In accordance with 4 C.F.R. § 21.6(f)(1), Butt's certified claim for costs,

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<sup>4</sup>In fact, the mail room clerk did not deliver the modification until after a second transmission was received from Butt; no explanation is offered by the agency for this delay.

detailing the time expended and the costs incurred, must be submitted to the Army within 60 days after receipt of this decision.

The protest is sustained.



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