

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES

WASHINGTON, D. C. 20548

*Distinguished by 56 Comp. Gen. —
(B-186848, Oct. 6, 1976).*

FILE: B-186766

DATE: August 9, 1976

MATTER OF: I&E Construction Company Incorporated

Distinguished by B-186794, Nov. 11, 1976

DIGEST:

Telegraphic bid modification, Government time-stamped as received day after bid opening due to inability of Western Union to timely deliver since building designated in IFB for receipt of bids was locked was properly accepted even though clause in IFB implementing ASPR § 7-2002 appears to indicate opposite result since to do so would contravene intent and spirit of late bid regulations, which do not appear to have contemplated instant situation.

This is a protest by I&E Construction Company Incorporated (I&E) against the proposed award of a contract to Conrad Weihnacht Construction, Inc. (Weihnacht), under invitation for bids (IFB) No. DAHA09-76-B-0023, issued by the United States Property and Fiscal Office, Atlanta, Georgia, for repairs to apron concrete slab sections at the Savannah Municipal Airport, Savannah, Georgia. I&E contends that a telegraphic modification sent by Weihnacht which reduced its bid below that of the protester was improperly accepted by the contracting officer as a timely modification.

The IFB scheduled the bid opening for 2 p.m. on May 27, 1976. I&E was the low bidder of the seven bids received. The telegraphic modification, if proper for consideration, would make Weihnacht's bid the lowest.

The IFB included a clause entitled "Late Bids, Modifications of Bids or Withdrawal of Bids (1974 Sep)," which contained the following:

"(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either:

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"(ii) it was sent by mail (or telegram if authorized) 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.

"(b) Any modification or withdrawal of bid is subject to the same conditions as in (a) above * * *

"(c) The only acceptable evidence to establish:

* * * * *

"(ii) the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or the documentary evidence of receipt maintained by the installation."

The modification was accepted by Western Union for transmission at approximately 10:11 a.m. on May 27, 1976, and was received by the Western Union office in Atlanta, Georgia, at 12:24 p.m. on the same day. The evidence indicates that Western Union tried to deliver the telegraphic modification at the building designated for receipt of bids in the IFB, but the building was locked due to a retirement luncheon for an employee of the installation. The circumstances surrounding the receipt of the telegraphic modification are explained by the Government in the following manner:

"At approximately 7:30 AM on Friday, 28 May 1976, Western Union Form 66 * * * was found on a desk immediately inside the front entrance to this office. This form indicated that an attempt had been made to deliver a telegram at a previous time. Telephone contact was made with Western Union and the message was read and recorded at 8:13 AM, Friday, 28 May 1976. This message indicated a reduction in the original bid of the Conrad Weihnacht Company which, if allowed, would result in a new apparent low bidder. The telegram itself was received on Friday, 28 May 1976, at 11:00 AM. An inquiry was made in an effort to determine when and how the Western Union Form 66 was placed on the desk at the front entrance. It was determined that custodial personnel found the form beneath the left front door of the building while cleaning on the night of Thursday, 27 May 1976. The front entrance to

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the building has double doors with the left door remaining locked at all times except when necessary to move heavy equipment in or out of the building.

"All personnel of this office attended a retirement luncheon for an employee during the noon hour on Thursday, 27 May 1976. The office was locked and secured during this time. Personnel returned to the office at 1:45 PM on Thursday, 27 May 1976, at which time the right front door was opened. It appears that the telegram from Conrad Weihnacht Company was brought to the office by the Western Union messenger during the lunch hour but could not be delivered and the notice was placed under the locked door."

By letter dated June 2, 1976, the customer service manager of Western Union in Atlanta, Georgia, states that a messenger tried to deliver the modification at "approximately between 130PM and 145PM" and found the building locked. There is no indication that the messenger was directed elsewhere to deliver the modification or that there was notification that the building would reopen at a later time. Further, it appears that the telegram remained in Western Union's custody until delivered to the agency.

I&E argues that the modification should not be accepted since it was not delivered prior to the time specified in the IFB as the time/date stamp shows delivery on May 28, 1976, this being the only acceptable evidence to show timely receipt. The protester further argues that this is not a case of mishandling by the Government after timely receipt at the Government installation.

Armed Services Procurement Regulation (ASPR) § 2-303.1¹(1975 ed.) states:

"Bids received in the office designated in the Invitation for Bids after the exact time set for opening are 'late bids.' A late bid * * * shall be considered only if the circumstances outlined in the provision in 7-2002.2 are applicable."

ASPR § 7-2002.2¹(1975 ed.) prescribes the use of the clause cited above entitled "Late Bids, Modifications of Bids or Withdrawal of Bids (1974 Sep)."

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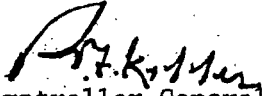
In the past, our Office has construed ASPR § 7-2002.2 as authorizing the consideration of a late bid which arrived at a Government installation in sufficient time prior to bid opening to have been timely delivered to the place designated in the invitation. However, in the cases considered, bids did not reach the designated bid opening office until after bid opening due to mishandling on the part of the installation. See 46 Comp. Gen. 771 (1967); 43 *id.* 317 (1963); B-165474, January 8, 1969; B-163760, May 16, 1968; and B-148264, April 10, 1962. In these cases, the time/date stamp on each bid wrapper was used to establish timely receipt at the Government installation. In the instant situation, the time/date stamp indicates that the modification was received the day after bid opening. Since receipt did not occur until 11 a.m. on May 28, 1976, mishandling after receipt did not contribute to the lateness, and consideration of the modification under the cited regulation would not be appropriate.

We believe, however, that strict and literal application of the regulation should not be utilized to reject a bid where to do so would contravene the intent and spirit of the late bid regulations. The regulations are intended to insure that late bids will not be considered if there exists any possibility that the late bidder would gain an unfair advantage over other bidders. In Hydro Fitting Mfg. Corp., 54 Comp. Gen. 999 (1975), 75-1 CPD 331, which involved the failure of the Government installation to receive a telegram because of a malfunction in its telex equipment, we stated: "The purpose of the rules governing consideration of late bids is to insure for the Government the benefits of the maximum of legitimate competition, not to give one bidder a wholly unmerited advantage over another by over-technical application of the rules." In the Hydro case, *supra*, we concluded that a late telegraphic bid was for consideration, notwithstanding the lack of the requisite acceptable evidence of timely receipt, since the circumstances resulting in the failure of the Government installation to have actual control over the bid or evidence of timely receipt were not contemplated by ASPR § 7-2002.2, and because there was no basis for concluding that consideration of the bid would impugn the integrity of the competitive bid system. We believe that that rationale is applicable here since the closing of the building until just shortly before bid opening, preventing timely receipt, is a circumstance not contemplated by the regulation, and the telegraphic modification was in the custody of Western Union during the period from its transmission until received by the agency.

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Based on the foregoing, the bid, as modified, of Weihnacht
may be considered and the protest is denied.

Deputy


Comptroller General
of the United States