

15581

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES

WASHINGTON, D.C. 20548

[Protest of Bid Modification Rejection]

FILE: B-196786

DATE: December 2, 1980

MATTER OF: Bill Bouska Construction, Inc.

DIGEST:

1. Where issue involves whether bid modification arrived on time in designated office before bid opening, all evidence in record, aside from that furnished by bidder, may be considered.
2. Where evidence supplied by Western Union regarding arrival time of bid modification mailgram is conflicting, and agency records appear to indicate that arrival occurred after time of bid opening, modification is late.
3. Late modification may not be considered under IFB "Government mishandling" exception where agency time-date stamp indicates that modification was not received at installation until 18 minutes after bid opening.
4. Responsibility for preparation and submission of bid is upon bidder, which includes ascertaining exact cost of any supplies obtained from its supplier; therefore, bid may not be disregarded or corrected on basis that bidder's supplier increased its price after submission of bid.

Bill Bouska Construction, Inc. (Bouska), protests the rejection of a modification to its timely bid under invitation for bids (IFB) No. FWS 6-79-139, by the Department of the Interior, Fish and Wildlife Service (Service).

Bid opening was scheduled for 2 p.m. on September 27, 1979, at the Service's Lakewood, Colorado, location (2nd floor, 134 Union Boulevard), which was also the location designated for receipt of bids. On that date the agency received a mailgram from Bouska stating: "This is for a modification of bid of

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September 27 2pm and the modification would be an add of \$6,000 for item 5." Although the IFB authorized telegraphic modifications, the contracting officer determined that the mailgram could not be considered under applicable rules governing late modifications. The Government estimate was \$50,000-\$65,000, and Bouska's bid of \$60,320 was the only one received. Accordingly, on September 28, 1979, award was made to Bouska for \$60,320 by letter of the same date.

There followed a series of letters and discussions between Bouska and the contracting officer, in which Bouska argued that the modification mailgram, which had been sent at 8:18 a.m. on September 27, 1979, was timely. Interior eventually denied this contention and advised Bouska to execute Standard Form 23 (construction contract), or face possible termination for default proceedings under the terms of the awarded contract. Bouska then executed the form, taking the following exception:

"The contractor executes this [form] with the understanding that the modification was timely and further that the total contract is \$66,320.00 and agrees to be bound by the \$66,320.00 figure only."

In support of this position, Bouska indicated that the modification mailgram had been sent with assurance from the Mailgram Service Center that it would be delivered prior to 2 p.m.

Subsequently, by letter to our Office dated November 10, Bouska asserted that its "modified bid for \$66,320 must be accepted." Additionally, the company alleged that its bid was a "mistaken bid" and requested us to either rescind the contract or reform it to reflect the bid modification.

Under the terms of Standard Form 22 (clause 7, Late Bids and Modifications or Withdrawals) of the IFB a late bid (or modification) is one received in the Office designated in the IFB after the exact time set for opening. The first question to be decided, therefore, is whether Bouska's modification was received late at the Service's designated office. To

answer this question we may consider all of the evidence in the record, aside from that furnished by the bidder, to establish whether the modification was in the designated-office before bid opening. Lockley Manufacturing Co., Inc., B-195589, January 4, 1980, 80-1 CPD 15.

On this score, of record are two communications from Western Union which read:

"WESTERN UNION [Denver, Colorado]	AGENCY DELIVERY RECORD	<u>09/27/79</u> Date	<u>2:00pm</u> Time Out
Time Received from Control OFC	Date of Message	Identifying Number	Signature or Disposition
12:30P	09/27/79	DLA 191	/s/ Christine M. Kasouk red pencil signature will not zerox"

"Western Union [Mailgram Service Center
Middletown, Virginia]"

Your message Number 4-004659S276 Dated 09-27 addressed to Dept. of Interior US Fish and Wildlife Service, 134 Union Blvd. 2nd Flr. Lakewood Co 80228. Your telegram was delivered Sept 27th at 2PM, signed for by Christine Kasouk Per our Lakewood Colorado Agent."

Also of record are two memos prepared by employees of the Service: (1) an October 16, 1979, memo prepared by Christine M. Kassak, procurement clerk, who received the modification in question; and (2) an October 30, 1979, memo prepared by Dianne Bradshaw, Contract Specialist. The memos read:

"To: Contracting Officer
From: Christine M. Kassak, Procurement Clerk, CGS
Subject: Receipt of Telegram on September 27,
1979 Pertaining to IFB FWS-6-79-139

"On September 27, 1979, I accepted delivery of a telegram. I opened it for identification, noted it was for the 2:00 bid opening, which was underway, checked the time on the clock and asked Mr. Chuck Hardin, 'What do we do about telegrams amending a bid after the bid has opened?' He responded, 'Nothing. It was received late and therefore cannot be considered.'"

"MEMO FOR RECORD:

"After reviewing papers received from Western Union, Christin M. Kassak suggested that Western Union be contacted to determine what the 'Time Out' block was used for.

"I called the Denver Western Union and talked to Operator 6, Edna E. She stated the 'Time Out' block was the time the messenger left the Western Union Office to make deliveries.

Diane Bradshaw
Contract Specialist"

Based on our review of the above evidence, we must conclude that there is no direct or documentary evidence showing conclusively that the bid was received at the designated office by 2 p.m. on the bid opening date. Specifically, as to the Western Union evidence, there is a conflict as to whether the modification was transmitted by a messenger who left Western Union's office at 2 p.m., or whether the modification was actually received by Ms. Kassak at 2 p.m. In any event, the inference to be drawn from Ms. Kassak's memo is that the modification was received after 2 p.m., since she recites that the scheduled opening was "underway" at the time of receipt. Therefore, we must conclude that the modification was "late" under the above definition of a late modification.

The late modification therefore may be considered only under the rules for consideration of late modifications which were set forth in the IFB, as follows:

"(a) Any [telegraphic modification] 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:

"(2) * * * it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

* * * * *

"(c) The only acceptable evidence to establish:

* * * * *

"(2) The time of receipt at the Government installation is the time-date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation."
(Emphasis supplied.)

As to the precise time the modification was received for the purpose of applying these rules, the only evidence of record which may be recognized is the Service's time-date stamp entry ("P 2:18") on the modification. Under these rules, therefore, the time of receipt of the modification at the designated office must be considered to be 18 minutes after the stated time. Consequently, although Bouska asserts the cause of the delayed receipt was mishandling by the Government, it is obvious that under a 2:18 receipt time the modification was already late at that time and the question of mishandling by the Government thereafter is, therefore, irrelevant. See Federal Contracting Corporation, B-188665, June 22, 1977, 77-1 CPD 444.

Bouska contends that its original bid must be considered to have been mistaken because one of its suppliers increased its original supply quotation on the day before bid opening by \$6,000--or the amount of Bouska's late modification. On this point, Bouska has furnished us with a copy of the original price

quotation from the supplier in question. That quotation clearly stated that the original price quotation was subject to change. As stated by the supplier: "We may have to change the base bid but this will give you some idea * * * in preparing your bid." In these circumstances, we have previously concluded that no relief may be allowed. As we said in 31 Comp. Gen. 323 (1952):

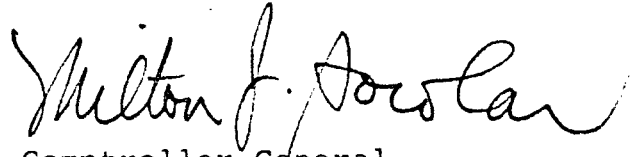
"* * * It appears that [the] company has not at any time alleged that an error was made in its bid, rather the increase in the bid prices is requested on the basis that its supplier increased its prices after the company submitted its bid. In that connection it may be stated that the responsibility for the preparation and submission of a bid is upon the bidder. See Frazier-Davis Construction Company v. United States, 100 C.Cls. 120, 123. Such responsibility includes ascertaining the exact cost of any supplies to be obtained from its supplier. If the company did not obtain a firm price from its supplier on which to compute its bid and the supplier increased its price subsequent to the date on which the company submitted its bid, that is a matter with which the Government is not concerned and does not afford any basis for authorizing an increase in the prices bid by the company. * * *"

Although Bouska has formally claimed a "mistake" contrary to the circumstances in the cited case, we see no reason why the quoted rationale should not apply here. Therefore, the facts of Bouska's mistake claim do not afford a basis for relief under the cited case.

Accordingly, the protest and claim are denied.

Finally, Interior questions our consideration of the claim because it believes that the claim is subject to the provisions of the Contract Disputes Act, Pub. L. 95-563, November 1, 1978, and, accordingly, it has remanded the matter to the contracting officer for consideration. We understand that the contracting

officer has not yet issued a final decision on the remanded claim. In view of our conclusion on the claim, we see no need to decide the question of the applicability of the Contract Disputes Act to the claim here. Cf. Malott & Peterson-Grundy, Contractors, et al., B-191887, January 2, 1979, 79-1 CPD 3, where we declined to decide whether a claim for bid preparation expenses arising out of a procurement conducted by a grantee of Federal funds could properly be heard by our Office since the claim was for denial on the merits.



For the Comptroller General
of the United States