

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Lieberman
24358

FILE: B-209462

DATE: February 28, 1983

MATTER OF: United Terex, Inc.

DIGEST:

1. Practice of procuring agency communications center of monitoring commercial TWX machine on an "as time permitted" basis does not constitute Government mishandling of bid modification in the process of receipt where effort was made by contracting officer immediately prior to bid opening to determine if protester's bid modification had been received.
2. Telegraphic bid modification time/date stamped by agency 1 hour and 27 minutes after bid opening, which, if considered, would make protester low bidder on certain items, was properly rejected as late despite information from bidder's employee and from Western Union purporting to establish that it was delivered prior to bid opening.
3. Protester was not prejudiced by agency failure to promptly notify protester that its bid modification was considered late, as required by DAR § 2-303.2, where protester's late bid was properly rejected.

United Terex, Inc. (UTI), protests the rejection of a telegraphic bid modification as late under invitation for bids (IFB) No. DAAJ09-82-B-B033, issued by the United States Army Troop Support and Aviation Materiel Readiness Command, St. Louis, Missouri (Army), for aerial cargo slings. UTI asserts that the modification, which made its bid low for items 1AA and 2AA, was timely received by the Army communications center at the procuring activity prior to bid opening and that agency mishandling caused the modification to be time/date stamped after bid opening. UTI also objects that it was not notified of the rejection prior to the contract award to another bidder.

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We find the protest to be without merit.

Bid opening was scheduled for August 6, 1983, at 1 p.m. central time. At 11 a.m. on the bid opening date, the president of UTI telephoned an Army contracting official to advise that a TWX message revising UTI's bid was being sent prior to bid opening. UTI states that the TWX was then transmitted at 12:13 p.m. At 12:50 p.m., just prior to bid opening, the Army contracting officer sent a clerk to the installation communications center, where a TWX machine is maintained, to pick up the UTI bid modification. The clerk was informed by personnel at the communication center who checked the TWX machine and area that the TWX had not been received. The communications center at 1:35 p.m., after bid opening, advised the contracting officer that no TWX had been received from UTI. At 2:30 p.m., the communications center advised the contracting officer that the TWX from UTI had been received. The TWX, which contains a 12 p.m. transmission time in the body of the message, but otherwise provides no indication of time of transmission or receipt, was time/date stamped by the communications center at 2:27 p.m.

UTI submitted evidence to the Army regarding the timely submission of the TWX, consisting of an affidavit from UTI's Secretary/Controller, stating that she had transcribed the TWX via UTI's machine on August 6, 1982, at approximately 12 p.m., that she dialed the number for the appropriate Army TWX machine, received verification of the connection, transmitted the message and then received automatic verification that the TWX message had been received. In addition, UTI submitted a Western Union bill which indicates that UTI had sent a TWX to St. Louis at 12:13 p.m. on the date in question via "direct" service.

The Army determined that UTI's modification was received too late to be considered under the late bid clause of the IFB prescribed by Defense Acquisition Regulation (DAR) § 7-20002.2 (Defense Acquisition Circular No. 76-18, March 12, 1979). Award was made to Presco International, Inc., the low bidder, for the two items in question, on September 17, 1982, at which time a letter was sent to UTI advising it of the award and of the Army determination not to consider the UTI bid modification.

The IFB's late bid clause permits a telegraphic bid modification received after bid opening to be considered if it is received prior to award and the Government determines that late receipt was due solely to Government mishandling after receipt at the Government installation. As provided in the clause and in our decisions, the only acceptable evidence of receipt at the Government installation is the time/date stamp or other documentary evidence of receipt maintained by the installation. Keco Industries, Inc., B-204869, April 7, 1982, 82-1 CPD 324.

UTI asserts that the case should be controlled by the principle that this evidentiary restriction will be relaxed where Government mishandling in the process of receipt was the paramount cause for late receipt or nonreceipt at the installation, in which case timely receipt may be established by reference to other reliable evidence not under the bidder's control. X-Tyal International Corporation, B-202434, January 7, 1982, 82-1 CPD 19; Lockley Manufacturing Co., Inc., B-195589, January 4, 1980, 80-1 CPD 15; Hydro Fitting Manufacturing, Corporation, 54 Comp. Gen. 999 (1975), 75-1 CPD 331. UTI's evidence of Government mishandling consists primarily of the communications center TWX-Telex log for the bid opening day which allegedly establishes that the TWX machine on which UTI's modification was received was unattended at various times during that day. UTI points out that the last TWX received prior to UTI's was logged in at 11:54 a.m., more than 2 1/2 hours earlier. UTI's TWX and the other TWX's were logged in at 2:27 p.m. Moreover, the log shows other periods of relatively long gaps without entries, followed by multiple entries at identical times.

UTI also points out that the log shows that the modification was mishandled during receipt because the log is inherently inaccurate. While four messages numbered 109-112 (including UTI's bid modification--109) were logged in at 2:27 p.m., TWX's numbered 110 and 111 were time/date stamped 2:28 p.m., while numbers 109 and 112 were time/date stamped 2:27 p.m. UTI further suggests that it would be extremely difficult for a machine operator to physically manage the Army's procedure for TWX receipt and logging in for the four TWX's within the 1-minute period shown by the log record.

An affidavit from an Army official with responsibilities over the communications center indicates the TWX machine is maintained by Army personnel as a convenience to contractors and contracting officers, although it is not a part of the communications center's mission. Accordingly, while an operator was on duty continuously in the room in which the TWX machine is located during the bid opening day, the operator's primary responsibility is dealing with internal Army communications; the commercial TWX machine is monitored as time permits. While the protester objects that an affidavit should have been obtained from the machine operator, we find the Army explanation that such an affidavit could not be obtained because the operator did not have good recall of the events to be reasonable in view of the passage of time and the volume of communications handled.

We find that the evidence is insufficient to establish that the bid modification was mishandled in the process of receipt by the Government. Even if the commercial TWX machine is not monitored constantly prior to bid opening, the contracting officer's inquiry concerning any bid modification from UTI immediately prior to bid opening was a reasonable procedure in the circumstances. See Stack-On Products Company, et al., B-181862, October 22, 1974, 74-2 CPD 220.

Furthermore, the evidence provided by UTI is unacceptable to establish that the bid was actually received in the communications center prior to the 1 p.m. bid opening time. Lockley Manufacturing Co., Inc., supra; Hydro Fitting Manufacturing Corporation, supra. The statement of the UTI transmitting employee is self-serving and is strictly within the control of the bidder. The TWX itself contains no time of receipt. The stated time of transmission of 12 p.m. contained in the body of UTI's message is conceded by UTI not to be the exact time of transmission and has no probative value. The Western Union bill indicates only transmission from UTI to St. Louis at 12:13 p.m. on the date in question, not the time of receipt. While there is a notation of "direct" under the heading "service," this same notation appears next to every item on the UTI bill and may simply indicate that the TWX was sent "direct" from the UTI TWX machine, rather than through a Western Union operator.

In any event, it is insufficient to establish the time of receipt at the communications center. In this regard, we have stated that records maintained by Western Union which are submitted as proof of the inaccuracy of a time/date stamp are unacceptable. Cecile Industries, Inc., B-206796, July 7, 1982, 82-2 CPD 29. Moreover, since we find that procedure utilized by the Army in this instance to be reasonable, the evidence other than the time/date stamp is not for consideration because mishandling in the receipt has not been established.

The Army concedes that it erred in not notifying UTI that its bid modification was being rejected prior to award, as required by DAR § 2-303.2 (1976 ed.). However, while the Army's conduct was procedurally deficient, since the Army properly refused to consider UTI's late bid modification, UTI was not prejudiced by this failure even though it was precluded from filing a preaward protest. Keco Industries, Inc., supra.

We deny the protest.

for Milton J. Fowler
Comptroller General
of the United States