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**DECISION**



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

**FILE:** B-211455

**DATE:** June 28, 1983

**MATTER OF:** Scherr Construction Company, Inc.

**DIGEST:**

Telegraphic bid modification received almost 4 hours after bid opening is properly rejected as late despite submission of modification by protester to Western Union more than 19 hours before bid opening, absent evidence that the late receipt was due to Government mishandling.

Scherr Construction Company, Inc. (Scherr), protests the Department of the Interior, Bureau of Indian Affairs (Interior), rejection of its bid modification as late under a solicitation for project No. W56-139/A31 for the construction of the Little Eagle Day School.

We find the protest to be without merit.

Bid opening occurred as scheduled on March 31, 1983, at 10 a.m. Twin City Construction's bid of \$2,081,000 was low. Shortly after bid opening, Scherr telephoned the contracting activity and stated that it had sent a bid modification by Western Union. At 1:40 p.m. on the same day, a bid modification from Scherr was received by Western Union telex which would have made Scherr the low bidder at \$2,070,000. Interior determined that this bid modification had to be rejected as late. Scherr protested to our Office.

Scherr alleges that it delivered its modification message to Western Union more than 19 hours prior to the scheduled bid opening time and was assured by Western Union that the maximum time for transmission was 5 hours. Scherr further asserts that at 4:39 p.m. and at 5:39 p.m. on March 30, the day before bid opening, Western Union attempted to contact Interior's installation to ascertain the telex number for delivery, but was unable to obtain the number because Interior's facility ceases normal operations at 4:30 p.m. Western Union next attempted to contact the facility (successfully) at 10:15 a.m. the next day, at which time it obtained the telex number. Western Union eventually transmitted the telex at 12:37 p.m.

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Scherr asserts that its modification should be considered because the delay in agency receipt was through no fault of Scherr, which placed the modification in the hands of Western Union in a timely fashion, after which unforeseen delay occurred because of the agency's work hours and Western Union's actions.

It is unquestioned that the modification did not arrive until almost 4 hours after bid opening time. Under these circumstances, the solicitation clause governing late bids and bid modifications provides that telegraphic bid modifications received late may only be considered if it is determined that the late receipt was due solely to mishandling by the Government after receipt at the Government installation. We have also found that a bid or bid modification received after bid opening may be considered where there was Government mishandling in the process of receipt (as opposed to after receipt) that is the paramount cause of the bid or modification being late. Sun International, B-208146, January 24, 1983, 83-1 CPD 78; CWC, Inc., B-204445, December 15, 1981, 81-2 CPD 475.

Here, the protester's argument that the delay was caused by the agency's "unstructured work day schedule other than 9 a.m. to 5 p.m." could conceivably be construed as a contention that the late receipt was due solely to mishandling by the Government. However, in order to consider the question of Government mishandling after receipt, the Government must first be shown to have received physical possession of the bid modification prior to bid opening. Tom Shaw, Inc., B-209018, February 3, 1983, 83-1 CPD 123. In this instance, the Government did not initially receive the bid modification until after bid opening.

Moreover, since Western Union did not contact the contracting agency until after the normal closing time for the agency, we find no mishandling in the agency's failure to have someone available after 4:30 p.m. to provide Western Union with a telex number to process the modification. See Ferrotherm Company, B-203288, September 1, 1981, 81-2 CPD 194. Further, we note that, having failed to ascertain the telex number on March 30, Western Union did not attempt again to obtain it until 10:15 a.m., after bid opening, on March 31. In addition, there is no assurance that the telex would have been communicated at 4:39 p.m. on March 30, since it was more than 2 hours after Western Union learned the above telex number on March 31 before it transmitted the bid modification. In the circumstances, Government mishandling

in the process of the receipt of the bid modification was not the paramount cause for its late receipt.

With regard to Western Union's assurance to Scherr that it would deliver the modification within 5 hours, we have held that a bidder must bear the responsibility for the late arrival of its bid notwithstanding the commercial carrier guaranteed it would be delivered before bid opening. Sigma Treatment Systems, B-207791, June 21, 1982, 82-1 CPD 613.

Regarding Scherr's allegation that the agency should not have awarded the contract during the pendency of the protest because Scherr stood ready, willing and able to complete the construction contract despite any possible seasonal time constraints, we need not address this issue because Scherr's bid modification was properly rejected as late.

We deny the protest.

*for* Shilton J. Fowler  
Comptroller General  
of the United States