

DECISION

27452
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-211128

DATE: February 15, 1984

MATTER OF: Leland and Melvin Hopp, Partners

DIGEST:

Agency's rejection of a bid which, due to the bidder's use of an envelope stamped with an incorrect bid opening date was discovered 15 days after bid opening, was improper since: (1) the bid was received in the designated bid opening room prior to bid opening; (2) the bid was in the agency's possession and control until discovered; and (3) the bid was discovered prior to award.

Leland and Melvin Hopp, Partners, protest the rejection of their bid as late and the award of contracts for certain leases under invitation for bids (IFB) No. DACA41-83-B-0041, issued by the U.S. Army Corps of Engineers. We sustain the protest.

On January 5, 1983 the Army Corps of Engineers invited bids for the leasing of property to be used for agricultural, grazing and/or hay production at the Smoky Hill Weapons Range, Saline County, Kansas. The solicitation provided for a February 2 bid opening date. On January 17, the Corps issued another solicitation for similar leases at Kanopolis Lake, with a bid opening date of February 17. The Hopps reportedly were sent both solicitations. Enclosed with each bid package were identically preaddressed envelopes stamped with the date and time of the respective bid openings.

The Hopps mailed their bid for items 14 and 15 of the Smoky Hill property on January 26 using a preaddressed envelope stamped with the Kanopolis Lake bid opening date--February 17. It is undisputed that the bid was received at the correct address prior to February 2; the Hopps state they were told it was received January 27. Since the envelope did not indicate a solicitation number, however, Corps contracting personnel assumed it contained a bid on the Kanopolis Lake property and placed it unopened in a locked safe with the other Kanopolis Lake bids.

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Consequently, the Hopps' bid was not opened with the other Smoky Hill bids on February 2.

The Hopps made numerous inquiries in trying to locate their bid after bid opening, and finally submitted a purported duplicate bid on February 15. The Corps returned this bid to the Hopps unopened. On February 17, the Kanopolis Lake bids were opened and the Hopps' Smoky Hill bid was discovered in the preaddressed envelope stamped with a February 17 bid opening date and postmarked January 26. The Corps states that the Hopps would have been the high bidders on items 14 and 15 had their bid been timely received. Since it deemed the bid late, however, the Corps awarded the items to the high timely bidder on March 3.

It is impossible to determine from the record whether the Hopps or the Corps were responsible for the mailing envelope mix-up. This fact, however, is not determinative of the merits. We find that the Corps improperly rejected the Hopps' bid.

The solicitation provided that bids received after the bid opening time specified in the solicitation would not be considered unless received before award and evidence from the postmaster established that the bid was delayed in the mails due to no fault of the bidder. Since the Corps did not locate the Hopps' bid until after bid opening and because the bid was not delayed in the mails, the Corps determined that it was a late bid falling outside the stated exception and thus could not be considered. It is undisputed, however, that the Hopps' bid was received prior to February 2 in the room designated for the Smoky Hill opening. In fact, the contracting officer specifically states in his report that "the Corps takes no issue with the fact that Mr. Hopp's Smoky Hill bid was received prior to the bid opening date for that project." Thus, although the Hopps' bid was not discovered until after bid opening, it was timely received and therefore was not a late bid. Consequently, it could not be rejected for falling outside the stated exception for considering late bids.

We agree with an argument made by the Corps that the Hopps should have assured that they were sending their bid in a properly marked envelope and agree that had they done so their bid likely would have been opened with the other bids on February 2. We do not agree, on the other hand, that rejection of the bid was required merely because it was not opened on February 2. The record clearly establishes that the bid was received in the proper office prior

to bid opening and then immediately placed in a locked safe where it remained until finally opened on February 17. Since the bid was in the Corps' possession and control for this period and was discovered prior to award, acceptance of the bid would in no way have compromised the competitive system. It thus should have been accepted for award.

Our conclusion is consistent with prior decisions involving similar facts. In Robbins Fence Company, B-200987, April 6, 1981, 81-1 CPD 259, for instance, a bid received in the designated bid opening room prior to bid opening then was misrouted and ultimately delivered to the contracting officer after the hour set for bid opening due to the bidder's failure to affix an identifying sticker to the envelope. Noting that the bid was mailed to the proper address and received at that address by the government several hours prior to bid opening, we held that the bid was not late and thus properly was accepted for award.

In another case, 46 Comp. Gen. 859 (1967) (cited in Robbins), we held that an agency properly considered a bid received by the government prior to bid opening even though, due to an erroneously marked bid envelope, it was not discovered and opened until the day after bid opening. Although, unlike the relatively brief delays in these cases, the Hopps' bid was not discovered for 15 days after bid opening, we see no reason why the identical principles should not be controlling.

The Corps maintains that our decision Dima Contracting Corporation, B-186487, August 31, 1976, 76-2 CPD 208, supports its rejection of the Hopps' bid. We disagree. The circumstances of that case, while similar to those here, differed in the significant respect that the agency, upon discovering the bid in a mislabeled envelope after bid opening, returned it to the bidder. We concluded only that the returning of the bid precluded its consideration. We were not called upon to, and thus did not, rule on whether the bid could have been accepted had it not been returned, the situation in the instant case.

The Corps expresses concern that a bidder under these circumstances could purposely mislabel a bid envelope and, when the bid is discovered after bid opening, choose to either accept or reject the award. As is implicit in our decision here, however, it is our view that the bidder would not have the option of refusing the award; if the bid was eligible for award, the agency would be obligated

to consider it and the bidder would be obligated to perform.

In view of our conclusion, we recommend that the Army determine whether the Hopps remain interested in the awards. If so, the Army should terminate for convenience the leases awarded under items 14 and 15 of the Smoky Hill solicitation and award these items to the Hopps. We note that the solicitation indicates these leases run through December 31, 1987. By letter of today we are advising the Secretary of the Army of our decision and recommendation.

The protest is sustained.

This decision contains a recommendation that corrective action be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations, and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720, as adopted by Public Law 97-258 (formerly 31 U.S.C. § 1176 (1976)), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendation.


for Comptroller General
of the United States