

**DECISION**



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

**FILE:** B-215832 **DATE:** January 23, 1985  
**MATTER OF:** The Standard Products Company

**DIGEST:**

Agency may consider telegraphic bid modification which was received late because agency's failure to pay Western Union for its telex service resulted in the suspension of the service which was the paramount cause of the late receipt of the bid modification.

The Standard Products Company protests the award of a contract to any other firm under invitation for bids (IFB) No. DAAE07-84-B-A561, issued by the United States Army Tank-Automotive Command (TACOM). The solicitation sought bids to supply a quantity of 148,890 track-shoe assemblies for the M1-Tank. Standard contends that it was the low bidder by virtue of a telegraphic bid modification sent to TACOM via Western Union on July 12, 1984, the day of bid opening. TACOM claims that it did not receive the telegraphic modification of Standard's bid until the day after bid opening.

We sustain the protest.

Goodyear Tire and Rubber Company's bid of \$74.71 per unit, F.O.B. origin, was low when bids were opened at 1:30 p.m. on July 12. Standard's bid was third low at \$80 per unit, F.O.B. origin. On the day after bid opening, Standard hand delivered to TACOM a copy of a Western Union telex message that it contends it attempted to transmit before bid opening. The message indicated that Standard had reduced its bid price by \$5.18 on each item and had changed its bid to F.O.B. destination. If considered timely, this modification would make Standard the low bidder. The Western Union copy indicated that the message had been accepted by the Western Union Infomaster message system at 9:59 E.S.T. (10:59 local time) on July 12. Standard also submitted a telex from Western Union that indicated that the bid modification had been "cancelled because the terminal did not respond to 10 delivery attempts." This message indicated that it had been sent

031013

to Standard at 11:08 E.S.T. (12:08 local time) on July 12, 1984. According to Standard, however, this message was not noticed by its employees until it was too late for resubmission before bid opening.

The record indicates that TACOM's telex service had been suspended on July 10 due to TACOM's failure to make timely payment on its telex account. Western Union reports that it reminded TACOM twice by mail that its payment was late, and sent a message by telex on July 6 stating that service would be suspended in 48 hours for nonpayment of its overdue account. TACOM denies having received the letters or the telex notification.

The late bid clause permits a telegraphic 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. In order for mishandling after receipt to occur, however, the government first must have physical possession of the notification. See Hydro Fitting Manufacturing Corporation, 54 Comp. Gen. 999 (1975), 75-1 CPD ¶ 331. That was not the case here since TACOM's telex machine was not functioning when Standard's bid modification was transmitted and the modification was not received at TACOM.

Nevertheless, a strict and literal interpretation of the late bid regulations should not be used to reject a bid or modification where to do so would contravene the intent and spirit of those regulations. Hydro Fitting Manufacturing Corporation, *supra*, at 1003. Thus, a bid received after bid opening may be considered where there was government mishandling in the process of receipt (as opposed to after receipt) that was the paramount cause of the bid's being late. CWC, Inc., B-204445, Dec. 15, 1981, 81-2 CPD ¶ 475. For example, in Hydro Fitting Manufacturing Corporation, *supra*, we held that a telex machine malfunction (the machine had run out of paper) which prevented transcription of a telegraphic bid prior to bid opening constituted mishandling by the government. Similarly, in Kings Point Manufacturing Company, B-199992, Apr. 16, 1981, 81-1 CPD ¶ 243, and in Singleton Contracting Corp., B-215186, Oct. 29, 1984, 84-2 CPD ¶ 471, we held that the agency's removal or discontinuance of the use of a telex terminal designated in the solicitation for the

receipt of telegraphic bids or modifications also constituted government mishandling. We think the situation here is similar to those covered by the cited cases.

Standard contends that government mishandling of the bid modification was the sole cause of TACOM's failure to receive the modification prior to bid opening. The protester argues that its modification was not received prior to bid opening because the TACOM telex machine was out of service due to TACOM's failure to pay its bills. The Army, in contrast, argues that the paramount cause of the late receipt was the failure of Western Union to notify TACOM or the protester that telex service had been disconnected. The Army contends that Western Union knew that the government frequently paid its bills late and that TACOM thus had no reason to anticipate that late payment in this case would lead to a suspension of service. In this connection, the Army explains that TACOM's receipt of messages by telex was sufficiently sporadic so that the lack of messages during the period of suspended service did not put them on notice of Western Union's action. While the Army concedes that the applicable FCC tariff authorized Western Union to disconnect service after written notice to the customer if payment was not made within 30 days of billing it argues that the basic agreement between the Department of Defense and Western Union covering these services prohibited interruption of service for nonpayment.

The record indicates that Western Union transmitted at least one notification to TACOM, although the agency maintains it was not received. Even though the agency may have had a legal defense against the suspension of service and had not had its service disconnected for past late payments, we think that TACOM must be held responsible for the service interruption. TACOM simply failed to exercise due care in ensuring that its Western Union bill was paid on time.

The Army argues that even if the suspension of the telex service was its responsibility Western Union should have apprised Standard of the fact that service at the TACOM terminal had been disconnected when Standard originally delivered its message for transmission. Standard

responds that Western Union employees do not monitor the transmission of messages through the Infomaster system since it is fully automated. We are informed that when Infomaster is unable to deliver a message, it is programmed to attempt delivery nine more times over the course of the next 30 to 40 minutes. If delivery has not been accomplished after 10 attempts, the message is canceled and returned to the sender with an explanation. We cannot agree with the Army's view that Western Union was negligent in failing to program its Infomaster system to alert users of out-of-service terminals before transmission has been attempted.

The Army also argues that once Western Union had notified Standard that its bid modification had not been transmitted, Standard could and should have pursued alternative expedited methods of delivering its bid modification. Standard counters that since the cancellation notification was transmitted during lunchtime, it was not discovered until after bid opening, and that it is unreasonable to expect that Standard could have successfully delivered its bid modification to the TACOM bid room before bid opening even if the message had been discovered immediately. We think that Standard must be considered to have received notification of cancellation at 12:08, when the message was received, and not after bid opening, when its employee actually discovered the message. We also believe that when a bidder discovers its bid modification has not been transmitted it should, if reasonable, attempt to pursue alternative means of delivering its message. We agree with Standard, however, that under the circumstances, it would be unreasonable to require delivery through alternative means. Western Union transmitted the notification of cancellation at 12:08 and bid opening was set for 1:30, meaning that Standard would have had only an hour and twenty-two minutes to deliver its modification via alternative means. There is nothing in the record indicating that such an alternate means of delivery was readily available to Standard.


Consequently, we conclude that the paramount cause of the delay in receiving Standard's modification was the inoperative telex machine which resulted from TACOM's failure to pay its bills in a timely manner.

B-215832

The record contains a copy of the message as transmitted by Western Union. From this copy it is possible to verify both the contents of the message and the time of its transmission.

Consideration of Standard's bid modification under these circumstances is appropriate. Thus, by letter of today to the Secretary of the Army we are recommending that TACOM consider Standard's bid as amended by the July 12 message.

The protest is sustained.

*for*   
Comptroller General  
of the United States