

DECISION



THE COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

FILE: B-221889

DATE: July 3, 1986

MATTER OF: Howard Management Group

DIGEST:

Agency should have considered protester's late bid modification because government mishandling in the process of receipt was paramount cause of the late receipt since the agency erroneously informed protester it had a telex to which Western Union could transmit the modification when, in fact, the agency had a telecopier connected to the telephone network.

Howard Management Group (HMG) protests the award of a contract to Don Moorhead Construction, Inc. for construction of a water main by the Department of the Navy under invitation for bids (IFB) No. N62468-84-B-4144. The Navy refused to consider HMG's late bid modification and without such modification, HMG's bid was not low. HMG contends that the delay in the Navy's receipt of the modification was due to erroneous information it had received from the Navy regarding the presence of a telex machine at the Navy facility.

We sustain the protest.

The bids were opened at 2:30 p.m., December 3, 1985, with HMG's bid of \$5,000,000 being the highest of the three bids received. HMG, however, had attempted to reduce its price by \$3,200,000 by a telegram sent at 12:47 p.m. The telegram was not delivered until after bid opening. HMG contends that the telegram was late because the Navy furnished it a number for a XEROX Telecopier rather than the telex number it requested. This machine could not receive Western Union messages and HMG was not aware that it was not

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a telex until after bid opening.^{1/} As a result, Western Union's attempts to transmit HMG's modification were futile until a telegram was delivered to the Navy at 4:57 p.m.

As an initial matter, the Navy contends that the protest is untimely. The Navy's report contains a memorandum dated December 4 and written by the contract specialist for this procurement. It states that HMG's president had called that day and was told that the late modification could not be considered. Another memorandum, dated February 26, 1986, by the same contract specialist states that the HMG president had called to determine the status of the procurement. He was told that award had been made to the second low bidder after the first low bid had been withdrawn. The memorandum further states that HMG's president then insisted that HMG was the second low bidder because of its bid modification, and that the contract specialist's response was "I told [him] that his bid modification was late the day of bid opening and could not be considered." HMG's protest to our Office was received on February 27.

HMG maintains that its president cannot recall being told on December 4 that the modification could not be considered. He remembers the conversation as indicating that the contract specialist was uncertain how the modification would be treated. HMG points to its letter of December 6 asking the contract specialist to have a size determination made with regard to the low bidder. HMG contends this supports HMG's position because it would not have been written if HMG had been told its modification would not be considered. HMG insists that February 26 was the first indication it had that its modification was not considered.

We generally resolve disputes over timeliness in the protester's favor if there is at least a reasonable degree of evidence to support the protester's version of the facts. Lucco Art Studio, Inc., B-217422, Feb. 27, 1985, 85-1 CPD ¶ 249. We recognize that the memorandum of

^{1/} Telex is a common carrier direct dial teletypewriter switching service. In the United States, Western Union is the carrier. A telecopier, on the other hand, is a device for transmitting facsimile copies of a document over ordinary telephone lines. A telecopier number is therefore an ordinary telephone number to which the telecopier equipment is connected; it is not the equivalent of a telex number since telex service is not connected to the telephone network. In addition, Western Union has advised us that a telex number can have from 4 to 9 digits. Thus, a Western Union operator would not be aware that an ordinary telephone number would not, in fact, be a proper telex number.

December 4 by the contract specialist is entitled to great weight. HMG's letter of December 6, however, is inconsistent with HMG having been told 2 days before that its late modification would not be considered. We think that this letter raises sufficient doubt as to what was conveyed to HMG in the December 4 telephone conversation to warrant consideration of the merits of HMG's protest that was received in our Office 1 day after HMG was informed that award to another firm had been made. See Ikard Mfg. Co., Inc. B-192578, Feb. 5, 1979, 79-1 CPD ¶ 80; Conine Rentals, Inc., B-194143, June 26, 1979, 79-1 CPD ¶ 456.

The late bid clause permits a telegraphic bid modification that is received after bid opening but before contract award to be considered if the government determines that the late receipt was due solely to government mishandling after receipt at the government installation. In order for mishandling to occur, however, the government must first have possession of the modification. See Hydro Fitting Mfg. Corp., 54 Comp. Gen. 999 (1975), 75-1 CPD ¶ 331. That was not the case here since the lack of a telex machine resulted in the failure of Western Union's several attempts to transmit HMG's modification to the Navy installation prior to bid opening.

Nevertheless, we have held that a strict and literal interpretation of the late bid regulations should not be used to reject a bid modification where it would contravene the intent and spirit of those regulations. Hydro Fitting Mfg. Corp., supra. Thus, a bid modification received after bid opening may be considered where there was government mishandling in the process of receipt that was the paramount cause of the modification being late and the bidder did not gain the kind of unfair competitive advantage the regulations were designed to prevent. CWC, Inc., B-204445, Dec. 15, 1981, 81-2 CPD ¶ 475. For example, in Hydro Fitting Mfg. Corp., supra, we held that the fact that a telex machine ran out of paper and prevented the transcription of a telegraphic bid prior to bid opening constituted government mishandling. We found that there was no unfair competitive advantage because a copy of the telegram indicated it was transmitted prior to bid opening and a copy was also mailed to the agency prior to the time the protester could have known of the telex malfunction. In Singleton Contracting Corp., B-215186, Oct. 29, 1984, 84-2 CPD ¶ 471, we held that the agency's discontinuance or removal of a telex machine designated in the solicitation for receipt of telegraphic bids or modifications also constituted government mishandling. We noted that the codes on the Western Union message clearly indicated the message had been entered

into the Western Union system in sufficient time to have reached the agency telex terminal designated in the message if it had been operative. See also The Standard Products Co., B-215832, Jan. 23, 1985, 85-1 CPD ¶ 86.

We think the situation presented here fits within the rationale of these cited cases. As in Singleton, supra, the codes on the Western Union message indicate that the message amending Howard's bid was in the possession of and transmitted by Western Union at 12:47 p.m. on the day of bid opening--a time that should have been sufficient for it to reach its intended destination by the 2:30 p.m. bid opening if the telex was in existence or by telegram if Howard was aware of the lack of telex equipment.^{2/} Moreover, as in CWC, supra, the agency, not Western Union, was the paramount cause of the delay.

Thus, we believe that while there was not conscious effort to do so, the Navy did, in fact, mislead HMG by erroneously referring to its machine as a "telex" and failing to recognize that its machine was not capable of receiving messages from Western Union.^{3/} We conclude that the Navy's communication of erroneous information constituted government mishandling in the process of receipt and was the paramount cause of HMG's modification being late. We further conclude that under these circumstances, no unfair competitive advantage will inure to Howard by consideration of its bid. We therefore believe the modification should be considered.

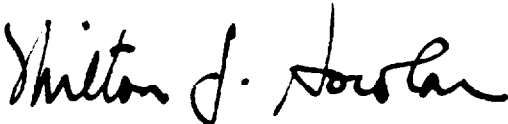
By separate letter of today to the Secretary of the Navy, we are recommending that HMG's bid modification be considered and if HMG is found to be the low responsive and

^{2/} The Federal Acquisition Regulation, § 14.303(a) FAC 84-5), authorizes the receipt of a telegraphic modification by telephone from the receiving telegraph office if the telephone message is later confirmed by a written copy of the telegram that formed the basis of the telephone call. It seems clear that the receiving telegraph office had ample opportunity to telephone the content of the message prior to bid opening if it had not instead attempted to transmit the message via telex.

^{3/} The Navy's report still insists it gave its "telex" number to the protester even though its internal documents indicate that the number given is for access to the Xerox telecopier.

responsible bidder, that the contract with Don Moorhead Construction be terminated for convenience and the award made to HMG.

The protest is sustained.

for 
Comptroller General
of the United States