



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: George W. Kane, Inc.

File: B-245382.2

Date: February 4, 1992

L. Bruce Stout, Esq., Peterson Dillard Young Self & Asselin, for the protester.

Karl Dix, Jr., Esq., Smith, Currie & Hancock, for Valley Construction Co., Inc., an interested party.

Lester Edelman, Esq., and William Richards, Esq., Department of the Army, Office of the Chief of Engineers, for the agency.

Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A hand-carried bid that is received by the appropriate official at the bid opening location after the time set for bid opening may not be accepted for award where the bidder's failure to follow solicitation procedures (which directed that hand-carried bids be deposited at another location), rather than improper government action, was the paramount cause of the late delivery.

DECISION

George W. Kane, Inc. protests the rejection of its bid as late under invitation for bids (IFB) No. DACW54-91-B-0044, issued by the Army Corps of Engineers, Wilmington District, for the construction of recreational facilities at the Holly Point Recreation Area, Falls Lake, Wake County, North Carolina.

We deny the protest.

Block 8 of the IFB's cover page, Standard Form (SF) 1442, provided that all mailed bids should be addressed to the post office box address of the District, as listed in block 7 of the SF 1442. Block 8 of the SF 1442 further provided: "[i]f hand carried, bids may be delivered to Room 306, 69 Darlington Ave. [Corps of Engineers building], Wilmington, NC 28403, until the time specified herein for

bid opening. All bids must be delivered to Room 306." The SF 1442, as amended, stated that bids were "due at the place specified in [Block] 8 by 11:00" a.m. on August 21, 1991.

The record shows that two Kane employees arrived at the Corps of Engineers building at approximately 10:53 a.m. on August 21 to deliver Kane's bid. Not seeing a receptionist or the signs posted by the agency with information regarding the bid depository and bid opening locations, Kane's employees followed some people walking down the corridor and asked a Corps employee (a secretary) at a reception area "Is this where the bid goes in for the Holly Point bid?" The secretary evidently answered in the affirmative (although not confirmed by the agency, the protester claims that its employee was told "Yes sir. Go right in.") This room was in fact room 403, the office of the Chief of the District Engineering Division, which was the bid opening room, not room 306, which the IFB designated as the bid depository location. Kane states that, after waiting several minutes and noticing that no Corps personnel appeared to be in the room to accept its bid, a Kane employee placed the firm's sealed bid package on the desk of room 403 at 10:59 a.m. (Although Kane states that its bid was placed on the desk of room 403 before 11 a.m. and before the bid opening officials entered room 403, the record contains affidavits from Corps personnel who believe Kane's bid was placed on the desk shortly after the bid opening officials entered the room.)

The Corps explains that, in accordance with standard agency procedures for receiving and opening sealed bids, the bid opening official remained in room 306, the designated bid depository room, where the date/time stamp machine was located, until at least 11 a.m. when the date/time stamp machine was used to stamp the attendance sheet used in the bid opening room. The bid opening official, and the Corps procurement clerk assisting her in bid opening, then proceeded to the bid opening room carrying the six bids they had received in room 306 before 11 a.m. The Corps' contract specialist authorized to conduct the bid opening (i.e., the bid opening official) states that upon arrival in room 403, she immediately began distributing bid tabulation sheets for bidders to record bid information and that after a Corps attorney in the room directed her attention to Kane's bid on the desk, she announced that the bid was late. Kane's employee argued that its bid was not late and stated "I've been here for six minutes I know and no one told me any different about where to turn the bid in." Following the Corps' attorney's suggestion, the contracting specialist added Kane's bid to the pile of other bids to be opened. The bid opening official then announced that the time set for receipt of bids under the IFB was 11 a.m. and stated

"[w]e will proceed with opening the bids which were received by the specified time. No other bids will be received." Kane's bid was opened and determined to be the apparent low bid.

In response to a protest filed with our Office by Valley Construction Co., Inc., the apparent second low bidder at bid opening, alleging that Kane's bid should be rejected, the Corps reviewed its earlier determination to consider Kane's bid and rejected the bid as late. Consequently, Valley, which became the apparent low bidder, withdrew its protest. On October 11, Kane filed its protest with our Office.

Kane first contends that the agency erred in rejecting its bid as late because Kane "tendered" its bid before the stated time for bid opening. Kane argues that it placed its bid on the desk (which was unattended) of the bid opening room at 10:59 a.m. and that, in any event, the bid opening officer received the bid before she declared that the bid opening time had passed. In support of its position, the protester cites several decisions of our Office in which we found that a bid could be accepted in the bid opening room, rather than the designated bid depository location, where the bid was tendered to the appropriate official by the time set for bid opening (e.g., Brite-Lite Elec. Co., Inc., B-216349, Sept. 24, 1984, 84-2 CPD ¶ 342). The protester also cites other decisions of our Office in which we have held that the bid opening official's declaration of bid opening is determinative of lateness unless it is shown to be unreasonable (e.g., Swinerton & Walberg Co., B-242077.3, Mar. 22, 1991, 91-1 CPD ¶ 318).

As a general rule, a bidder is responsible for delivering its bid to the proper place at the proper time. Late delivery of a bid requires its rejection, even if it is the lowest bid, in order to maintain confidence in the integrity of the government procurement system. Hi-Grade Logging, Inc., B-222230, B-222231, June 3, 1986, 86-1 CPD ¶ 514. The time when a bid is submitted is determined by the time that the bidder relinquishes control of the bid. Chestnut Hill Constr., Inc., B-216891, Apr. 18, 1985, 85-1 CPD ¶ 443.

Under the Federal Acquisition Regulation, § 14.402-1(a), the bid opening officer must decide when the time set for opening bids has arrived and must inform those present of that decision. Generally, the bid opening officer's declaration of bid opening time is determinative of lateness unless it is shown to be unreasonable under the circumstances. Hi-Grade Logging, Inc., supra. The absence of a formal announcement that no further bids would be accepted,

however, is irrelevant since a bid opening officer has no authority to accept a bid clearly submitted after the deadline. See Chestnut Hill Constr., Inc., supra.

To the extent the protester contends that it timely submitted its bid by 11 a.m., by placing it on the desk of the bid opening room at 10:59 a.m., we cannot find that Kane properly tendered (i.e., relinquished control of) its bid, as required, to an appropriate official by the time set in the IFB for bid opening. First, regardless of Kane's allegation that its bid was placed on the desk at 10:59 a.m., the bid opening official did not enter the bid opening room (room 403) until after 11 a.m., as evidenced by the attendance sheet which was date/time stamped at exactly 11 a.m. in the bid depository room (room 306). Thus, the bid was not in the control of an appropriate government official by 11 a.m., the time designated in the IFB for bid opening. Kane claims that there was no appropriate Corps official to whom Kane could tender its bid in the bid opening room prior to 11 a.m. The protester, however, has not cited, nor are we aware of, any requirement for an agency to have a procurement official in the bid opening room to receive bids prior to the time set for bid opening where the solicitation expressly instructs bidders to deliver hand-carried bids to a location different from the bid opening room for deposit and there is an appropriate official at that designated bid depository location until the time set for bid opening.¹

Second, we do not find applicable here the line of cases cited by the protester in support of its contention that the bid opening official's declaration that the time for bid opening has passed is determinative of the lateness of a bid. Our Office has adopted this general standard only in limited types of cases--primarily where questions are raised regarding the accuracy of the clock relied upon by the bid opening official, see e.g., Chattanooga Office Supply Co., B-228062, Sept. 3, 1987, 87-2 CPD ¶ 221; Hi-Grade Logging, Inc., supra., or where a bid was clearly in the government's control by the time stated in the solicitation, see e.g., Amfel Constr., Inc., B-233493.2, May 18, 1989, 89-1 CPD ¶ 477, and only where the facts of such case support the reasonableness of the official's declaration. Here, the protester does not challenge the accuracy of the bid opening

¹To the extent the protester alleges that the IFB was ambiguous as to where to deposit hand-carried bids, we find there is only one reasonable reading of this IFB instruction. The IFB clearly stated that "[a]ll bids must be delivered to room 306." This instruction was underscored.

room clock, and, as discussed above, Kane did not tender its bid to the appropriate official by the IFB's designated time for bid opening.

We think, under the circumstances of this case, although the bid officer verbally announced after 11 a.m. that no bids would be accepted after 11 a.m., and the official made this announcement after receiving Kane's bid, that the time set for bid opening effectively passed prior to the bid opening official's announcement and Kane's bid was late. In our view, the bid opening official's actions, as soon as she arrived at the bid opening room shortly after 11 a.m., were sufficient to indicate to all bidders present in room 403 that the time for bid opening had passed. The official immediately began to pass out bid tabulation sheets to bidders, which listed only those firms that submitted bids to the bid depository room by 11 a.m., and prepared to distribute an attendance sheet which was date/time stamped at 11 a.m., the designated bid opening time. Moreover, the bid opening official declared Kane's bid to be late as soon as she became aware of the bid on the desk. Since the record shows that the bid opening official's actions were sufficient to inform the bidders in the bid opening room that the time set for bid opening had passed at 11 a.m., as scheduled, and that her prepared announcement about the 11 a.m. bid opening time was delayed because of the confusion concerning the acceptance of Kane's bid, we find it would be unreasonable here to rely on the bid opening official's late declaration of bid opening as definitive of the timeliness of Kane's bid. We believe that the official's actions prior to her declaration, in effect, demonstrated that the time for submission of bids had already occurred. It was only after Corps counsel (who was apparently concerned about whether there was any improper government action involved) suggested that Kane's bid be opened that the bid opening official reluctantly received and opened it.

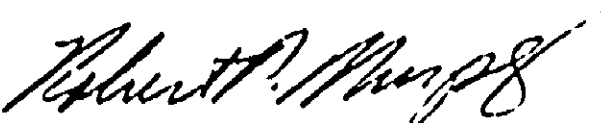
The protester alternatively argues that we have allowed late hand-carried bids to be considered where it can be shown that the government's wrongful or improper action was the paramount cause for the late arrival at the designated place and that consideration of the late bid would not otherwise compromise the integrity of the competitive bidding system. Improper government action may be misdirected from authorized government personnel, but the fact that a government employee may have contributed to the lateness in some minor way does not justify acceptance of the late hand-carried bid on the grounds of improper government action. Imperial Maintenance, B-218614, July 26, 1985, 85-2 CPD ¶ 94. A late bid should not be accepted if the bidder significantly contributed to the late receipt by

not acting reasonably in fulfilling its responsibility of delivering the bid to the proper place by the proper time. See J.E. Steigerwald Co., Inc., B-218536, Apr. 19, 1985, 85-1 CPD ¶ 453.

The IFB here specifically advised that all hand-carried bids were to be deposited in room 306 by the time set for bid opening, and that any bids submitted by hand after the time set for receipt would not be accepted. Had Kane complied with these express IFB terms, it would not have had to seek the assistance of the secretary outside room 403, and it would not have had to rely upon the assistance of a student aide that had evidently been sent to the bid opening room to assist in the direction of bidders to room 306 (which aide Kane alleges did not effectively inquire if any bidders were confused about the bid depository location). Most importantly, had Kane followed the express IFB instructions for bid deposit, its bid would likely have been timely received since Kane personnel apparently arrived in sufficient time to deliver the bid to the bid depository. Instead, Kane relied on information from a Corps secretary who was evidently unfamiliar with the procurement and had no authority to accept bids. In fact, the record shows that Kane ignored the IFB's express hand-carried bid deposit instructions since the Kane employees responsible for submission of the bid never requested information regarding the location of room 306--the IFB's designated bid depository room--and the protester incorrectly addressed its bid envelope to the post office box address provided in the IFB for mailed bids.

Under these circumstances, we consider Kane's failure to follow the express IFB instructions to be the paramount cause of the late bid. While the misleading information from the Corps secretary may have contributed to the late bid, and although that secretary (or the student aide) may have believed there was some confusion among bidders regarding the bid deposit and opening procedures, we view these factors as incidental rather than paramount; once the Corps provided explicit directions for delivery of bids in the solicitation, its obligation towards prospective bidders with respect to the timely delivery of bids was fulfilled. Imperial Maintenance, supra.; Geiger Co., B-216502, Feb. 7, 1985, 85-1 CPD ¶ 155.

The protest is therefore denied.


for James F. Hinchman
General Counsel