



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Bartomeli Company, Inc. *100*

File: B-246060

Date: February 10, 1992

V. Michael Simko, Jr., Esq., Simko & Elstein, for the protester.

Robert E. Beeton, Department of Veterans Affairs, for the agency.

Ralph O. White, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency acted improperly in continuing with bid opening and award is sustained where protester's bid was prematurely opened, read aloud, and recorded on an unrelated bid abstract 1 day prior to scheduled bid opening, and where agency failed to give sufficient time for protester to revise its bid.

DECISION

Bartomeli Company, Inc. protests the premature opening and disclosure of its bid, submitted pursuant to invitation for bids (IFB) No. 689-54-91, to construct and replace storm drains at the Department of Veterans Affairs (VA) Medical Center in West Haven, Connecticut. Bartomeli complains that its competitive price for the storm drain procurement was disclosed when VA mistakenly opened its bid 1 day prior to bid opening.

We sustain the protest.

BACKGROUND

The facts in this protest are not in dispute. The IFB for VA's storm drain replacement project set bid opening for 10:00 a.m. on September 26, 1991. Bartomeli submitted its bid 1 day early. Upon receipt, the bid was stamped by the agency with the date and time--9:08 a.m., September 25--and placed in the facility's bid deposit box.

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At 2:00 p.m. on September 25, VA held a public opening for bids received on another construction project for the Medical Center. The solicitation number for that project (IFB No. 689-50-91) was very similar to the number for the storm drain replacement project (IFB No. 689-54-91). As a result of the similar IFB numbers, Bartomeli's bid for the storm drain replacement project was inadvertently opened, read aloud, and recorded in the bid abstract with the bids received for the other project. The contracting officer, after realizing that Bartomeli's bid had been prematurely opened, resealed the bid, marked it "opened in error," and returned it to the bid deposit box.

Later the same afternoon, Bartomeli's president received a telephone call from an individual with another construction company. The caller had been present at the 2:00 p.m. bid opening and related that Bartomeli's bid for the storm drain replacement project had been prematurely opened and disclosed to the parties present for the bid opening on the other project.

After learning that his company's bid had been disclosed, Bartomeli's president placed a telephone call to the contracting officer. In the contracting officer's notes memorializing that conversation, also dated September 25, he confirms that he informed Bartomeli's president that the company's bid had been opened and disclosed at the 2:00 p.m. bid opening. The notes reflect that the contracting officer told Bartomeli's president that the company could submit a new bid at bid opening, scheduled for 10:00 a.m. the following morning. However, Bartomeli's president responded that there was insufficient time to revise the bid before the next morning's bid opening. In addition, the notes indicate that Bartomeli's president stated the company would file a protest.

The next morning at 10:00 a.m., as planned, VA opened bids for the storm drain replacement project. At bid opening, the contracting officer announced that Bartomeli's bid had been opened the previous day, read aloud, and recorded on an unrelated bid abstract. The competition yielded a total of six bids, with prices as follows:

Mechanical Services, Inc.	\$ 124,200
Bartomeli	125,993
Company A	139,000
Company B	163,731
Company C	178,000
Company D	198,250

Based on the announcement that ~~Mechanical Services~~ was the apparent low, responsive bidder, Bartomeli protested to our Office. No award has been made.

CONTENTIONS BY THE PARTIES

Bartomeli argues that VA acted improperly when it failed to reject all bids and to cancel and readvertise the procurement of replacement storm drains. Bartomeli seeks the cost of filing and pursuing the protest, including reasonable attorneys' fees. In response, VA contends that since Bartomeli was given the opportunity to confirm or revise its bid, no further corrective action was necessary.

DISCUSSION

The facts here raise the issue of how an agency should address a violation of one of the most important principles of the sealed bid process: public opening of all bids at the time and place stated in the invitation. See 34 Comp. Gen. 395 (1955). When bids are not so opened there is serious question as to the propriety of the transaction, and ordinarily all bids should be rejected and the matter readvertised. Id.

Our prior decisions involving prematurely opened bids have arisen in two ways: (1) an agency has proceeded with award after determining that the bidder whose bid was prematurely opened was not prejudiced, and the protest before our Office challenged that determination, see 34 Comp. Gen. 395, supra; Boyd Lumber Corp., B-189641, Oct. 21, 1977, 77-2 CPD ¶ 315; Leach Co., B-212534, Nov. 29, 1983, 83-2 CPD ¶ 623; or, (2) an agency has taken corrective action, such as canceling the procurement and resoliciting, and the protest before our Office challenged the corrective action as unreasonable, see Air, Inc., 69 Comp. Gen. 504 (1990), 90-1 CPD ¶ 533; Chemical Compounding Corp., B-210317, May 10, 1983, 83-1 CPD ¶ 499, aff'd, B-210317.2, Aug. 15, 1983, 83-2 CPD ¶ 209; Safemasters Co., Inc., 58 Comp. Gen. 225 (1979), 79-1 CPD ¶ 38.

VA points to our prior decisions to support proceeding with bid opening and award despite the disclosure of Bartomeli's bid. Specifically, VA cites our prior decisions in Boyd Lumber Corp., supra (agency decision that no prejudice resulted to Boyd as a result of the premature opening of its bid because Boyd was offered a reasonable time for preparation of a revised bid, or to file a protest, was upheld), and Leach Co., supra (agency decision that any prejudice to Leach was mitigated since Leach was given an opportunity to revise its bid prior to bid opening, which was postponed more than 2 weeks by an amendment to the IFB, was upheld). Although we agree with VA that these cases are the most relevant to this dispute, we do not think these cases support the agency's position.

The similarities between this protest and the Boyd case are striking. For example, although Boyd's bid was opened 2 days prior to the scheduled bid opening, the contracting officer was unable to reach the president of the company until the evening before the scheduled bid opening. In presenting Boyd's president with the alternatives of revising or confirming its bid, or protesting, the contracting officer stated that if Boyd chose to revise its bid, the agency would delay the scheduled bid opening to permit revision of the bid. Unlike in Boyd, the VA's contracting officer--in a conversation with Bartomeli's president that took place sometime after the 2:00 p.m. bid opening--made no offer to postpone the bid opening scheduled for 10:00 a.m. the next morning, even in the face of Bartomeli's assertion that there was insufficient time to revise its bid.

The issue of sufficient time to revise a prematurely opened bid did not arise in Leach because of a factual difference between that case and this one. In Leach, two bids were prematurely opened after an amendment postponing bid opening failed to reach Leach and one other bidder before they submitted their bids in accordance with the originally scheduled bid opening time. Because the postponed bid opening was scheduled more than 2 weeks beyond the originally scheduled bid opening date, and more than 2 weeks beyond the date when Leach was given the opportunity to revise its bid, Leach had ample time to revise its bid.

In our view, providing a bidder sufficient time to revise its disclosed bid is an integral part of mitigating any prejudice to the bidder as a result of the disclosure. This mitigating factor was present in both Boyd and Leach, but is lacking here. The contracting officer's offer to Bartomeli of an opportunity to revise its bid, without affording the firm sufficient time to do so, deprived Bartomeli of any effective mitigation of potential prejudice as a result of the disclosure.

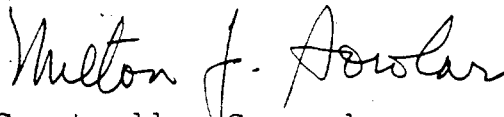
Further, under the circumstances, we fail to understand how VA can be certain that Bartomeli was not prejudiced by the premature opening and disclosure of its bid. Both bid openings involved construction projects in the same city and presumably at the same VA hospital in that city. In addition, at least one bidder at the first bid opening was sufficiently aware of Bartomeli to alert the company to the events leading to this dispute. Although we recognize that the low bidder provided the agency with a letter stating that the low bidder was unaware of Bartomeli's previously

opened bid, we find that the integrity of the procurement should have been preserved by at least postponing bid opening long enough to permit Bartomeli to revise or confirm its disclosed bid. See Boyd Lumber Corp., supra; Leach Co., supra.

CONCLUSION AND RECOMMENDATION

For the reasons set forth above, we find the agency acted unreasonably in failing to postpone its scheduled bid opening to give Bartomeli a reasonable opportunity to revise its prematurely disclosed bid. As a result, we recommend that the agency cancel and resolicit this procurement. In addition, we find that Bartomeli is entitled to recover the costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d) (1991). Bartomeli should submit its claim for such costs directly to the agency.

We sustain the protest.

for 
Comptroller General
of the United States