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Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Michelin Aircraft Tire Corporation  
**File:** B-248498; B-248499; B-248500  
**Date:** August 31, 1992

William A. Roberts, Esq., and Lee Curtis, Esq., Howrey & Simon, for the protester.  
H. Douglas Hinson, Esq., Alston & Bird, for Air Treads, Inc., an interested party.  
James Dever, Esq., and David Doro, Esq., Department of the Air Force, for the agency.  
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Where solicitation permits the submission of bid modifications by facsimile machine only "if authorized" and does not elsewhere provide authorization, agency properly rejected facsimile bid modifications, notwithstanding a contract specialist's oral advice that the agency would accept the facsimile modifications.

### DECISION

Michelin Aircraft Tire Corporation protests the Department of the Air Force's rejection of low bid modifications under invitations for bids (IFB) Nos. F42630-92-B-61703, F42630-92-B-61685 and F42630-92-B-61688 for F-16, A-10, and F-5 military aircraft tires.<sup>1</sup> The Air Force rejected Michelin's bid modifications because they were transmitted by facsimile machine contrary to applicable regulations. Without consideration of the modifications, Michelin's bids are not low.

We deny the protests.

<sup>1</sup>The tires are procured from qualified sources under Federal Acquisition Regulation (FAR) § 52.209-1, Qualification Requirements (Oct. 1988). Michelin, Air Treads, and Dunlop Aviation--Aircraft Tyres Division are qualified sources for the F-5 tires while Air Treads and Michelin are the only sources named by the IFBs as qualified for the A-10 and F-16 tires.

The three protested IFBs incorporated by reference FAR § 52.214-5, Submission of Bids (Dec. 1989), a provision that generally authorizes telegraphic bid modifications and expressly prohibits facsimile bid modifications absent some other authorization in the solicitation. None of the protested IFBs authorized facsimile bid modifications.

Michelin submitted facsimile bid modifications to its previously submitted bids on the IFBs after receiving oral advice from an agency contract specialist, on at least three occasions, that the agency would accept facsimile modifications and a telephone number to which the facsimile should be directed.

Michelin states that its practice is to electronically modify its bid pricing prior to bid opening to reflect the current market. The agency's telegraphic equipment--the only means of electronic bid modification authorized by the IFBs--became inoperative in October 1991 and remained so through all three bid openings. Michelin confirmed the telegraphic equipment's continuing inoperative status prior to each bid opening. After cognizant agency officials became aware of Michelin's submission of facsimile bid modifications, award was made to Air Treads as the low bidder.<sup>2</sup>

Michelin contends that the agency's rejection of its timely received bid modifications was improper because (1) the IFB authorized electronic bid modifications, albeit telegraphic; (2) the agency knew that its telegraphic receiving equipment was inoperative when it issued the IFBs; (3) the contract

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<sup>2</sup>Michelin's submissions to our Office have focused on the timeliness of an agency-level protest filed by Air Treads against acceptance of Michelin's facsimile bid modifications. We do not find the timeliness of Air Treads's agency-level protest significant since an untimely protest does not bar agency corrective action on an improper award. See DynCorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310. Also, the record shows that on April 2, 1991, agency procurement officials first learned of the unauthorized facsimile bid modifications during a pre-award review of the procurement. The next day, April 3, Air Treads raised the same issue with respect to the F-16 tire procurement. Thus, the timeliness of Air Treads's agency-level protest of the matter is irrelevant since the agency was aware of the issue as well as its applicability to all outstanding pre-award solicitations.

specialist orally authorized the use of facsimile transmissions in place of telegraphic transmission; and (4) the only other bidder, Air Treads, was aware of the situation and raised no objection until it learned that Michelin was in line for award under the IFBs.

A facsimile bid modification must be rejected where the solicitation does not expressly authorize its submission. See G.D. Searle & Co., B-247077, Apr. 30, 1992, 92-1 CPD ¶ 406; H Bendzulla Contracting, B-246112, Nov. 8, 1991, 91-2 CPD ¶ 441; Mabuhay Bldg. Maint. Co., Inc., B-241908, Nov. 23, 1990, 90-2 CPD ¶ 424. The government cannot orally modify an IFB to allow for receipt of facsimile bid modifications where the IFB prohibits their submission, because to do so may be prejudicial to the other bidders.<sup>3</sup> G.D. Searle & Co., supra; see also Recreonics Corp., B-246339, Mar. 2, 1992, 92-1 CPD ¶ 249; Auto-X Inc., B-241302.2, Feb. 6, 1991, 91-1 CPD ¶ 122.

It is undisputed that the contract specialist provided only Michelin the telephone number of the agency's facsimile machine for the purpose of modifying its bid, and that Air Treads and Dunlop were not given the same information and opportunity regarding the submission of their bids.<sup>4</sup>

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<sup>3</sup>The FAR prohibits the selected release of procurement information to only one bidder; that regulation provides that any information which is necessary in submitting bids, or the lack of which would be prejudicial to an uninformed bidder, should be provided to all prospective bidders as a solicitation amendment. FAR § 14.208(c) (FAC 84-60). Information concerning the availability of facsimile transmissions is procurement information that must be provided to all bidders since facsimile communication confers the potential competitive advantage of more time for preparation and/or modification of bids. See G.D. Searle & Co., supra.

<sup>4</sup>We are unpersuaded by Michelin's argument that because Air Treads never attempted to use the authorized telegraphic means of communication to modify any of its bids or request to submit facsimile bid modifications, Air Treads was not prejudiced by Michelin's sole possession of the information concerning the availability of the facsimile machine for the submission of bid modifications. Air Treads's practice merely shows that it adhered to the IFB provisions, on bid delivery and modification, while Michelin did not. Neither do we think that Air Treads's alleged knowledge--that Michelin had submitted and the Air Force had accepted unauthorized facsimile modifications in the past--waives Air Treads's and other potential bidders' rights to receive exactly the same information concerning facsimile transmission as was provided Michelin.


Michelin assumed the risk that the agency would reject its modifications when it used the facsimile number without first receiving authorization to do so in an amendment. In this regard, the IFBs incorporated FAR § 52.214-6, which provides that oral explanations or instructions given before the award of a contract are not binding on the government. Accordingly, Michelin's reliance on the contracting specialist's oral advice that facsimile bid modifications were permissible, advice inconsistent with the terms of the solicitations, was misplaced.

Michelin contends that the government had a duty to properly maintain the authorized telegraphic means of modification submission and the responsibility to authorize a substitute when the authorized means became unavailable. The FAR does not treat facsimile and telegraphic communications as interchangeable electronic substitutes as Michelin suggests. While telegraphic bid modifications are generally sanctioned, facsimile bid modifications can only be authorized after the contracting officer considers a variety of factors. FAR § 14.202-7. In addition, when facsimile transmission is authorized, all bidders must be provided receiving data. FAR § 52.214-31(f) (FAC 90-10). The agency is further required to advise bidders that the government is not responsible for a variety of possible transmission failures, see FAR § 52.214-31(g); the FAR contains no similar disclaimer for telegraphic bids, see FAR § 52.214-13 (FAC 90-10). Consequently, facsimile and telegraphic forms of communication cannot be regarded as electronic substitutes for one another.

While it is true, as noted by Michelin, that we have permitted agencies to consider certain late telegraphic bid submissions, which ordinarily would be rejected as late, where the paramount cause of such submissions' late arrival is government mishandling in the process of receipt (as distinguished from mishandling after receipt), see Hydro Fitting Mfg. Corp., 54 Comp. Gen. 999 (1975), 75-1 CPD ¶ 331 (authorized telex machine ran out of paper); The Standard Prods. Co., B-215832, Jan. 23, 1985, 85-1 CPD ¶ 86 (agency failed to pay authorized telex machine's service fee), this narrow exception cannot be extended to sanction the substitute use of a means of bid delivery or modification that the IFB expressly prohibits. In any event, no government mishandling is involved here since the rejection of Michelin's bid modifications did not stem from its attempted use of the authorized telegraphic means of transmission, but from the use of a means that was expressly prohibited by the IFBs.

Under the circumstances, the Air Force properly refused to consider Michelin's facsimile bid modifications.

The protests are denied.

  
for James F. Hinchman  
General Counsel