

**DECISION**

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

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FILE: B-183438

DATE: June 2, 1975

MATTER OF: Hydro Fitting Mfg. Corp.

**DIGEST:**

1. Telegraphic bid transmitted to procuring agency before bid opening but not transcribed due to Government Telex machine malfunction cannot properly be classified as lost bid as protester can establish, without use of self-serving statements, time of bid transmission and receipt as well as contents of bid.
2. Untranscribed telegraphic bid (due to Government Telex machine malfunction) should not be rejected as late bid, even though ASPR § 7-2002.2 appears to indicate opposite result in determining possible mishandling by Government due to lack of requisite acceptable evidence of time of receipt and question concerning whether "receipt" occurred, since to do so would contravene intent and spirit of late bid regulation. Conclusion is reached in view of fact that mishandling in transcription of telegraphic bid and resultant failure of Government installation to have actual control over bid or evidence of time of receipt does not appear to have been contemplated by ASPR § 7-2002.2.

On February 3, 1975, the Defense Supply Agency (DSA), Defense Construction Supply Center (DCSC), Columbus, Ohio, issued invitation for bids (IFB) No. DSA700-75-B-1579 as a 100-percent small business set-aside for bids on 19 contract line items (CLINs 0001 through 0019) of Federal Supply Class Code 4730. CLINs 0020, 0021 and 0022 were added by amendment No. 0001, issued on February 5, 1975. Section "C," paragraph C01 of the IFB authorized telegraphic bids.

Hydro Fitting Mfg. Corp. (Hydro), at 4:45 p.m. on February 28, 1975, transmitted a telegraphic bid to DSA. The telegram was acknowledged by the automatic "reply back" system of the DSA Telex receiver, the DCSC automatic acknowledgment appearing at the beginning (acknowledging a proper hook-up) and end (acknowledging receipt) of Hydro's copy of its telegram.

Bid opening took place at 10:30 a.m. on March 5, 1975. The abstract reveals that seven bids were received and opened, but Hydro's name does not appear among the seven bidders listed. On March 10, 1975, an envelope postmarked in El Monte, California, on March 6, 1975, the day after bid opening, was received at DSA. The envelope was identified as a confirming bid on the IFB in question but, according to DSA, did not identify the bidder. Since the bidder was not identified and DSA had no record of any telegraphic bids having been received under the IFB, the envelope was opened for the purpose of identifying the bidder. Inside the envelope was a copy of what purported to be a telegraphic bid submitted by Hydro at 4:45 p.m. on February 28, 1975, together with a properly signed bid. Hydro has stated that it sent the confirming letter as a matter of course, before learning that its telegraphic bid had not been received.

Hydro, upon learning that its telegraphic bid had not been recorded on the abstract, questioned DSA as to the reason therefor. DSA's investigation of this matter revealed that the Digital Branch at DSA had no record of the telegraphic bid but that the Telex machine was out of order from sometime after 3:30 p.m. until about midnight on February 28, 1975. DSA states that:

"\* \* \* There is no record of incoming messages during this period because the Telex machine ran out of paper and the tape was jammed but it continued to acknowledge incoming messages \* \* \*."

Hydro was then informed that its telegraphic bid was not received and could not be considered for award purposes because of the difficulties with the Telex machine. Hydro, having submitted what would have been the lowest bid on CLINs 0009 through 0012, 0013 through 0017, 0020, 0021 and 0022, protested to our Office DSA's rejection of its bid.

The facts of this matter are not in dispute. DSA states that "There can be little doubt that the telegram was received and acknowledged by the Digital Branch \* \* \* on 28 February 1975 but was not recorded because the Telex machine ran out of paper and the tape jammed." DSA, however, has taken the position that Hydro's telegram should be regarded in the same manner as a lost bid and not considered for award. DSA argues further that, even if the telegram is not considered as a lost bid, it could only be

considered for award as a late bid under clause C39 of the IFB, entitled "LATE BIDS, MODIFICATIONS OF BIDS OR WITHDRAWAL OF BIDS," since it clearly was not received in the bid opening room by 10:30 a.m. on March 5, 1975.

As a result of Hydro's protest, DSA is withholding the making of any awards under the IFB until our Office has decided this matter. For our Office, this appears to be a case of first impression.

DSA first seeks to reject Hydro's bid as a lost bid, relying on the following previous decisions of our Office--B-170437, August 10, 1970; B-167369, September 18, 1969, and B-166973, June 26, 1969. In each of these cases, the ostensible bidder had complied with all of the requirements of the particular invitations dealing with the timely submission of bids, but the bid had been lost after being received at the procuring activity prior to bid opening. In each case, notwithstanding the fact that the ostensible bidder produced a receipt for certified mail evidencing that an envelope had been mailed to and received by the procurement agency, the receipt did not show the contents of the envelope or the mailing time. In those circumstances, we concluded that it would not be reasonable or permissible to allow the ostensible bidder to resubmit the bid for award purposes. We felt that award on the basis of self-serving statements as to the contents of the bid would not be consistent with the maintenance of the competitive bidding system. See, also, B-149981, October 25, 1962.

In our opinion, however, the case at hand can be distinguished from the lost bid cases and should not be governed by the results there. The facts here eliminate the situation extant in the lost bid cases--the attempted resubmission of a bid through self-serving statements as to what exactly a lost bid contained. Here, Hydro has produced a copy of the acknowledged telegraphic bid which was sent to DSA. The copy of the telegram contains the contents of the bid, the time of the hook-up with the DSA Telex, the time of transmission, and DSA's acknowledgment of receipt symbol. In our opinion, this evidence clearly establishes the time of bid transmission and receipt, as well as the contents of the bid. In support of this, we observe that Hydro was unaware of the time frame within which the DSA Telex was inoperative when it sent the confirming copy of its bid to DSA. In our opinion, this fact precludes any doubt that the copy of the telegram purporting to

be Hydro's bid is authentic and represents the bid transmitted to DSA prior to bid opening.

Moreover, we disagree with DSA's position that since Hydro's bid was not received in the bid opening room by 10:30 a.m. on March 5, 1975, it must necessarily be treated as a late bid. Armed Services Procurement Regulation (ASPR) § 2-303.1 (1974 ed.) states:

"Bids received in the office designated in the Invitation for Bids after the exact time set for opening are 'late bids.' A late bid \* \* \* shall be considered only if the circumstances outlined in the provision in 7-2002.2 are applicable."

ASPR § 7-2002.2 (1974 ed.) prescribes the use of the following clause, which was utilized in the IFB as clause C39, mentioned above, which states in pertinent part:

"(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either:

\* \* \* \* \*

(ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

"(c) The only acceptable evidence to establish:

\* \* \* \* \*

(ii) the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation."

B-183438

DSA, relying on the above-cited provisions, has stated that:

"Since receipt of the telegraphic bid in question cannot be established by the time/date stamp or other documentary evidence maintained at this Center, the telegraphic bid does not qualify for consideration under Clause C39 \* \* \*."

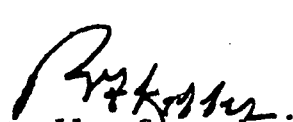
In the past, our Office has construed ASPR § 7-2002.2 (formerly ASPR § 2-303.2) as authorizing the consideration of a late bid which arrived at a Government installation in sufficient time prior to bid opening to have been timely delivered to the place designated in the invitation. However, in the cases considered, bids did not reach the designated bid opening office until after bid opening due to mishandling on the part of the installation. See 46 Comp. Gen. 771 (1967); 43 *id.* 317 (1963); B-165474, January 8, 1969; B-163760, May 16, 1968; and B-148264, April 10, 1962. In these cases, the time/date stamp on each bid wrapper was used to establish timely receipt at the Government installation. In the instant situation, there is neither the bid nor a time/date stamp or other documentary evidence of receipt maintained at the installation to establish receipt. Therefore, argues DSA, the test of ASPR § 7-2002.2(c)(ii) has not been met and Hydro's "late" bid cannot be considered.

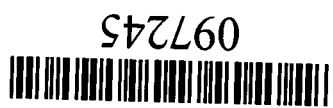
We agree with DSA in that a reading of the regulation as implemented in the invitation would correctly appear to authorize not considering the confirming telegraphic bid of Hydro submitted after bid opening. Not only is the requisite acceptable evidence of time of receipt nonexistent but, despite DSA's statement that the original telegraphic bid was received and acknowledged, we believe that whether there was "receipt" in the context of the regulation is questionable. In this regard, consideration of a late telegraphic bid is permitted only if late receipt was due to mishandling by the Government after receipt at the Government installation. That mishandling by the Government occurred here is, we believe, clear. But, in our view, the regulation contemplates, and our decisions thereon have involved, instances where a tangible bid was mishandled after physical receipt.

While this may be the case, we believe that strict and literal application of the regulation should not be utilized to reject a bid where to do so would contravene the intent and spirit of the late bid regulation. The regulation insures that late bids will

not be considered if there exists any possibility that the late bidder would gain an unfair advantage over other bidders. In addition, "\* \* \* The purpose of the rules governing consideration of late bids is to insure for the Government the benefits of the maximum of legitimate competition, not to give one bidder a wholly unmerited advantage over another by over-technical application of the rules." 42 Comp. Gen. 508, 514 (1963); and B-157176, August 30, 1966. This belief is particularly proper here because, in our view, the current regulation did not contemplate the instant circumstances, i.e. mishandling in the transcription of a telegraphic bid and the resultant failure of a Government installation to have actual control over the bid or evidence of time of receipt.

Hydro has produced an acknowledged copy of its transmission to DSA with the time of transmission at the bottom of the message. This copy represents the best evidence available and establishes both the receipt and time/date of Hydro's bid. Moreover, the authenticity of the telegraphic copy of Hydro's bid seems to be buttressed by the mailing of the confirming copy prior to the time Hydro could have known of the DSA Telex malfunction. Based upon this evidence, we conclude that Hydro's telegraphic bid was not timely considered for award purposes due solely to Government mishandling within the intent and the spirit of the late bid regulation. Accordingly, Hydro's telegraphic bid should be considered for award. We reach no conclusion as to the possibility of mistake in Hydro's bid on CLINs 0020, 0021 and 0022.

  
Deputy Comptroller General  
of the United States



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# DECISION



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

FILE: B-133972

DATE:

JUN 2 1975

MATTER OF: Charles E. Lane - Request by  
temporary employee for military leave

DIGEST: Temporary limited employees of the Federal  
Government are not eligible for military  
leave as authorized by 5 U.S.C. §6323 (1970).

This decision is in response to a grievance  
by Mr. Charles E. Lane, 1018 Essex Street, Lawrence,  
Massachusetts. Mr. Lane states that he was denied  
military leave by his employer, the Portsmouth Naval  
Shipyard, Portsmouth, New Hampshire.

Mr. Lane was employed by the Boston Naval  
Shipyard, Boston, Massachusetts, until June 28, 1974,  
at which time his employment ceased due to a reduction  
in force caused by closure of the base. Effective  
July 1, 1974, Mr. Lane received a temporary appoint-  
ment with the Portsmouth Naval Shipyard which had a  
termination date of September 30, 1974.

Mr. Lane is a Staff Sergeant in the United States  
Army Reserves. He received orders sending him to  
annual training for the period of August 18 through  
31, 1974. Although we do not have before us a  
certificate indicating Mr. Lane's completion of  
service for that period, such a certificate is not  
necessary for the purposes of this decision. Mr. Lane  
requested and was denied military leave for the period  
of his annual training. As a consequence he used 11  
days of annual leave which he claims should have been  
military leave and not charged against his leave  
record.

Our Office has previously held that the Congress,  
in restricting eligibility for military leave to  
"permanent and temporary indefinite" employees  
(5 U.S.C. §6323 (1970)), excluded from eligibility

PUBLISHED DECISION  
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B-133972

employees having part-time, intermittent, and temporary appointments or periods of less than 1 year. 46 Comp. Gen. 72 73 (1966). Although Mr. Lane had previously been eligible for military leave, as a result of his removal during a reduction in force, he lost that eligibility. His subsequent temporary appointment for less than 1 year does not carry with it eligibility for military leave.

In view of the above, Mr. Lane's request for military leave with pay and restoration of his annual leave is denied.

R.F. KELLER

Deputy Comptroller General  
of the United States