

DECISION



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

10,010

FILE: B-193863

DATE: May 3, 1979

MATTER OF: Sound Refining Inc.

[Protest That Timing of Solicitation Amendment
Resulted in Late Bid]

DIGEST:

Protester received amendment to solicitation 4 days prior to new bid opening date set in amendment. Protester argues that its late hand-carried bid should be considered because timing of amendment prevented it from mailing bid 5 days prior to bid opening, ensuring bidder of protection afforded it under IFB terms concerning acceptance of late bids. Bid was properly rejected, however, because paramount cause of lateness was not Government's action but commercial carrier's failure to hand deliver within time agreed upon.

Sound Refining, Inc. (Sound), a Seattle, Washington, firm, has protested the rejection of its late bid under invitation for bids (IFB) No. FB0179RA32001, issued by the Department of Energy (DOE).

Background

The IFB is for the public sale to the highest qualified bidders of the United States' share of crude oil produced from Naval Petroleum Reserve No. 1. Bid opening was at Tupman, California, and was originally set for December 13, 1978. A total of four amendments were issued by DOE. Amendment No. 4 was issued on December 11, 1978. The amendment, among other things, extended the bid opening date to December 18, 1978. The amendment was sent to Sound by mailgram, which was received by the Post Office in Seattle, Washington, at either 8:33 p.m., on December 12 or 12:33 a.m., on December 13 (the exact time is in dispute). According to Sound, and supported by its date stamp, it received the amendment December 14, 1978.

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Sound hired Federal Express to deliver its bid by hand, and was assured that the bid would be delivered on time. Federal Express, however, did not deliver the bid until December 21, 1978, 2 days after bid opening. The contracting officer (C.O.) notified Sound that the bid would not be considered because it was late. Sound protested this determination and the C.O. denied the protest by letter of December 29, 1978. Sound then protested to GAO on January 8, 1979. DOE awarded the contracts on January 31, 1979. Sound then filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Columbia (Civil action No. 79-0297). On February 2, 1979, Sound and DOE agreed to a Consent Order stating that the parties would "abide by any GAO decision on Plaintiff's protest."

Sound's Argument

Sound's basic argument is that DOE sent amendment No. 4 too late to permit Sound to mail its bid and still be protected by the Federal Procurement Regulation (FPR) provision governing the acceptance of late bids, which was incorporated into the IFB. Therefore, Sound argues, sending its bid by Federal Express was a reasonable course of action, and the lateness was caused by DOE's improper action in sending the amendment too late.

Section C-4 of the IFB (C-4), as amended by amendment No. 4, incorporated FPR § 1-2.303-5 which permits acceptance of late bids only if the bid was mailed by certified or registered mail at least 5 days prior to the bid opening date, or the bid was mailed and the late receipt was due solely to Government mishandling after receipt at the Government installation.

Sound argues that since it received amendment No. 4 only 4 days prior to bid opening, it was prevented by DOE from protecting itself under C-4 if it mailed its bid. Since telegraphic bids were not acceptable, Sound took the only reasonable action left to it; sending its bid by Federal Express.

Sound cites The University of New Hampshire Center for Industrial and Institutional Development, B-191956, 78-2 CPD 169, Scot Incorporated, B-189345, 77-2 CPD 425, and 51 Comp. Gen. 69 (1971), for the proposition that a late handcarried bid may be considered where the lateness was due to improper action of the Government. The improper action alleged in this case was DOE's late sending of amendment 4.

Sound argues that the C.O. may issue amendments only when there is ample time for all bidders to consider the information in submitting or modifying their bids. Sound cites FPR § 1-2.207(d) and 45 Comp. Gen. 651 (1966) for the proposition that no award should be made where an amendment is issued that does not give all bidders adequate time to respond. According to Sound, 45 Comp. Gen., supra, holds that the fact that some bidders had time to respond is not significant, if all did not have sufficient time.

Sound also contends that its bid should be considered "for the additional and independent reason that, despite its lateness, consideration of the bid will not compromise the integrity of the competitive bidding system." Sound argues that it relinquished control of its bid prior to bid opening and did not have the opportunity to alter its bid. Therefore, its bid should be considered.

DOE's Response

DOE first argues that Sound's protest is untimely because Sound knew that it could not mail its bid and be protected by C-4 when it received amendment No. 4 only 4 days before bid opening. DOE contends that this amounts to a protest based on a patent solicitation impropriety, which must be filed prior to the date for bid opening to be timely. 4 C.F.R. § 20.2(b)(1) (1978). Since the protest was not filed until after the date for bid opening it is untimely, DOE asserts.

DOE contends that the amendment was issued and sent to Sound and all other bidders early enough to provide them with adequate time to respond by the new bid opening date. In support of this, DOE points out that eight of the 25 responsive bidders were located further from the bid opening site than Sound, yet the bids of all eight firms were timely.

DOE argues that the improper actions of Sound and its agents caused its bid to be late, not the length of time that Sound had to respond to amendment No. 4. Sound could have mailed its bid 5 days before the original bid opening date, and then responded to amendment No. 4 by telegram, according to DOE. Additionally, DOE contends that Sound should have contacted DOE for clarification when Sound realized that it could not meet the requirements for protection under C-4.

DOE also argues that Aqua-Trol Corporation, B-191648, July 14, 1978, 78-2 CPD 41, is dispositive of this case, and quotes the following passage from that case:

"Aqua-Trol contends next that because it did not receive the amendment in time to respond through the mail at least five days before bid opening, it should not be penalized for submitting the amendment late. Our cases clearly establish, however, that the onus is upon the bidder to comply exactly with the bid opening time requirements in the solicitation. See, e.g., 52 Comp. Gen. 281 (1972); Oil Country Materials of Houston, Inc., B-189646, December 13, 1977, 77-2 CPD 459. (Emphasis added by DOE)

Timeliness

We have consistently held that when a Court requests, expects or otherwise expresses interest in a GAO decision, we will consider untimely protests. Dr. Edward Weiner, B-190730, September 26, 1978, 78-2 CPD 230; Kleen-Rite Corporation, B-189458, September 28, 1977, 77-1 CPD 237. While DOE argues that the Consent Order does not necessarily contemplate a decision on the merits of the protest, we do not believe the opposite conclusion necessarily follows. In this connection, we note that under the Consent Order further litigation is suspended but there is no indication that the court has relinquished control of the case or does not expect a decision from our Office. Therefore, it is our opinion that the Court does expect a decision on the

merits. Accordingly, we need not resolve the issue of the timeliness of Sound's protest.

Merits

We have consistently held that a bidder is charged with the responsibility of insuring that its bid is delivered to the proper place at the proper time. A late handcarried bid may be considered where lateness was due to improper action of the Government and where consideration of the late bid would not compromise the integrity of the competitive procurement system. However, a late bid should not be evaluated if the bidder significantly contributed to the late receipt by not acting reasonably in fulfilling its responsibility of delivering a handcarried bid to the proper place by the proper time, even though lateness is substantially caused by erroneous Government action or advice. See Avantek, Incorporated, 55 Comp. Gen. 735 (1976), 76-1 CPD 75; Presnell-Kidd Associates, supra. For a late handcarried bid to be considered, it must be shown that wrongful Government action was the sole or paramount cause of late receipt.

For the following reasons, it is our opinion that DOE's action in sending amendment No. 4 was not the sole or paramount cause of Sound's bid having arrived late. Sound received the amendment a full 4 days before bid opening but did not request an extension of the bid opening date or otherwise indicate to DOE that it felt the time was insufficient. Rather, Sound chose to rely on Federal Express' promise of timely delivery. Additionally, no other bidder was late or complained of insufficient time.

The essence of Sound's position is that whenever an agency issues an amendment that is received by a bidder less than 5 days before bid opening, the agency bears the risk of the bid arriving late, so long as the bidder chooses some reasonable method of bid submission. As DOE has pointed out, we explicitly rejected that argument in Aqua-Trol Corporation, supra. While Sound has argued that Aqua-Trol is distinguishable on its facts, the statement cited by DOE is properly applicable to a broader range of factual circumstances, including those of the instant case. See, e.g., Oil Country Materials of Houston, B-189646, December 13, 1977, 77-2 CPD 459.

While we did find, in 45 Comp. Gen. 651, that the protester had insufficient time to acknowledge an amendment and submit its bid even though other bidders submitted timely bids, the other relevant circumstances in the case were extreme. The amendment was issued 2 days prior to bid opening, and had not yet been received by the protester a few hours before bid opening.

In summary, even if DOE's actions did contribute to the lateness of Sound's bid, which we are not holding, the paramount cause of the lateness was the action of Sound's agent, Federal Express. Therefore, Sound's bid was properly rejected as late and should not be considered.

It is unnecessary to decide the issue of whether Sound had relinquished control of its bid so that the bid could not be altered. That is not an independent ground for accepting a late bid as Sound argues, but rather is an additional test that must be met once it is established that improper Government action was the paramount cause of lateness.

Accordingly, Sound's protest is denied.



Deputy Comptroller General
of the United States