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DECISION



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

FILE: B-189345 DATE: November 30, 1977
MATTER OF: Scot, Incorporated

DIGEST:

Commercial carrier attempted to deliver protester's bid to office designated in IFB for receipt of hand-delivered bids. Government personnel directed carrier to deliver bid to Central Receiving Warehouse instead and, consequently, bid was "late." Since bid was late due to improper Government action, and protester's bid was in Government hands before bid opening, protester's bid was properly for consideration.

By letter dated June 10, 1977, Scot, Incorporated (Scot), protested the rejection as late of its bid submitted in response to invitation for bids (IFB) No. DAAH01-77-B-0115. IFB -0115 was issued by the United States Army Missile Materiel Readiness Command (MIRCOM) on April 16, 1977. The IFB specified that bids would be received in Room A-148, Building 4488, at the Redstone Arsenal in Alabama until "1300" (1 p.m.) "CST" (Central Standard Time), May 20, 1977.

Scot's bid was properly addressed and identified as a bid. The bid number, opening date and time, and delivery destination were on the wrapper. The bid was delivered by Federal Express, a commercial carrier, to Building 8022 at the Redstone Arsenal at 10:20 a.m. on May 20, 1977. Apparently, the carrier attempted to deliver Scot's bid to Room A-148, Building 4488, but was not permitted to do so. Instead, Government personnel directed the carrier to deliver the bid package to Building 8022, the Central Receiving Warehouse. The Government personnel were acting in accordance with MIRCOM Regulation No. 55-13(J), paragraph 5.b., which states:

"Internal Security Division, RASA, will direct all commercial carriers to Storage Branch, Supply and Transportation Division receiving area, Building 8022 * * *."

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According to the contracting officer, the bid was forwarded from the warehouse through normal channels to the office designated in the IFB for receipt of bids. Scot's bid was not received in that office until May 24, 1977--4 days after bid opening. Scot's bid, therefore, was a "late bid" as it was received in the designated office after the time set for opening, Armed Services Procurement Regulation (ASPR) § 2-303.1 (1976 ed.). On that date, Scot was advised by telephone that its bid was late, and could not be considered for award. Scot formally protested this decision in a letter to the contracting officer dated June 2, 1977. The contracting officer denied the protest on June 8, 1977, whereupon Scot requested review by our Office.

The contracting officer's disallowance of Scot's bid was based on ASPR § 7-2002.2 (1976 ed. as amended by DPC 76-7, April 29, 1977). That regulation provides in pertinent part:

"LATE BIDS, MODIFICATIONS OF BIDS OR WITHDRAWAL
OF BIDS (1977 APR)

"(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:

"(i) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for the receipt of bids (e.g., a bid submitted in response to a solicitation requiring receipt of bids by the 20th of the month must have been mailed by the 15th or earlier); or

"(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."

Since Scot's late bid was delivered by commercial carrier, and not sent by mail, the contracting officer determined that it could not be considered for award even though it was low, as neither of the above exceptions applied.

Scot protests the contracting officer's determination on the ground that the Government's failure to permit the carrier to deliver Scot's bid to the office designated in the IFB placed the responsibility for its delivery on the Government. Scot believes that since

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its bid was in the Government's hands prior to the time set for bid opening, it should not be penalized for the Government's failure to deliver the bid to the bid office on time.

The question as to whether late bids delivered by commercial carrier are rendered ineligible for consideration by late bid provisions such as ASPR § 7-2002.2 has been dealt with by our Office previously. The Army contends that its action was proper under our holding in Federal Contracting Corp., et al., 54 Comp. Gen. 304 (1974), 74-2 CPD 229. In that case, the IFR set April 11, 1974, as the bid opening date and included a "late bid" clause similar to ASPR § 7-2002.2. It advised bidders to either mail their bids to a particular address at McClellan Air Force Base or to handcarry them to Room 245 of Base Building 200. The bid of Taylor Air Systems, Inc. (Taylor), was addressed to Base Procurement, but was delivered by REA Air Express to the Central Receiving Office of the Base on April 4. It was not received by the contracting officer until April 12. In view of the fact that Taylor's bid had been in the hands of base personnel for 1 week prior to bid opening, the contracting officer concluded that the bid's lateness was due to Government mishandling after its receipt. Consequently, the bid was accepted for award. In reviewing the contracting officer's determination, we stated,

"The general rule followed by our Office is that the bidder has the responsibility for the delivery of its bid to the proper place at the proper time. Exceptions to the rule requiring rejection of late bids may be permitted only in the exact circumstances provided for in the invitation. While application of the rule here may be harsh, [the "Late Bid" clause] * * * allows consideration of a late bid only when the bid was sent by mail.
* * *

* * * * *

"Inasmuch as the Taylor bid was sent by commercial carrier rather than by mail, consideration of the Taylor late bid for award would not be proper. B-138148, December 24, 1958; B-144842, March 10, 1961; Matter of Rocket Research Corporation, B-179405, January 24, 1974."

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Similarly, in Defense Products Company, B-185889, April 7, 1976, 76-1 CPD 233, we declared ineligible for award a late proposal which had been delivered by a commercial carrier to the procuring activity's Mail Services Branch, instead of to the Office designated in the IFB and to which the proposal package was addressed. The proposal was delivered to the Mail Services Branch 2-1/2 hours before closing time, but was not delivered to the designated office until the next day. Noting that the "Late Proposal" clause of the solicitation allowed consideration of a late proposal only when it had been sent by mail, we stated,

"* * * Since the proposal was sent by commercial carrier rather than by mail, consideration of the late proposal for award would not be proper in any event." (Citations omitted.)

For similar cases, see Social Engineering Technology, Inc., B-187194, April 5, 1977, 77-1 CPD 234; Greer Hydraulics, Inc., B-182826, April 22, 1975, 75-1 CPD 249; Rocket Research Corporation, B-179405, January 24, 1974, 74-1 CPD 28.

However, the instant case is distinguishable from the previously cited cases in that the Federal Express delivery-person did attempt to deliver Scot's bid package to the office designated for the receipt of hand-carried bids, but was prevented from doing so by base personnel, whereas in the cited cases the carriers apparently delivered the bids to the wrong offices on their own initiative. The contracting officer has stated that this action was mandated by MIRCOC regulation No. 55-13(J), paragraph 5.b. While that regulation requires Internal Security Division personnel to direct all commercial carriers to the Supply and Transportation Division receiving area in Building 8022, it does not mandate actual delivery of the bid package to that Division. In fact, paragraph 5.a. of the regulation provides:

"a. Supply and Transportation Division * * * will:

"(1) Operate a Central Control Point to which all commercial carriers (except in situations not relevant here) will report prior to delivery of freight to any military activity on the installation.

"(2) Examine carrier documentation to determine the appropriate receiving activity for each shipment.

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"(3) * * * Direct the carrier to the appropriate receiving location for shipments consigned to (an accountable property officer other than the Supply and Transportation Division.)

* * * * *

"(4) Unload the material for later delivery or direct the shipment to the appropriate receiving area and provide in-checker, equipment and labor to unload the shipment, as required, when material is marked for delivery to an activity not having an APO." (Emphasis added.)

These provisions indicate that commercial carriers can deliver shipments to other activities on the Base, after first reporting to Building 8022. The regulations do not mandate delivery of bid packages to Building 8022. Scot's agent, the Federal Express carrier, could have been directed to deliver the bid package to the designated office. The failure of the carrier to deliver Scot's bid to the designated office was thus attributable to Government action. In this connection, we have stated,

"* * * A hand-carried bid which is received late may be accepted where bid lateness was due to improper Government action and consideration of the late bid would not compromise the integrity of the competitive bid system." See Avantek, Inc., 55 Comp. Gen. 735, 739-740 (1976), 76-1 CPD 75, and cases cited therein.

Resolution of this protest thus depends on whether the action of Government personnel in preventing the carrier from delivering the bid to Building 4488 constituted improper action and whether consideration of Scot's bid would "compromise the integrity of the competitive bid system."

The term "improper action" as it relates to late hand-delivered bids was recognized in 34 Comp. Gen. 150 (1954). In that case, a bid for a contract to supply dairy products to a naval installation was delivered by the bidder to the bid opening officer 3 minutes after the time set for bid opening. The bid was received prior to the opening of any other bid and after it had been taken to the normal bid deposit area. Evidence indicated that the bid's lateness was

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attributable to an "extraordinary delay" caused by Government personnel. In view of these circumstances, the bid, although technically "late," was deemed eligible for award. In this case, Scot's representative was confronted with more than an "extraordinary delay." The carrier was simply not permitted to deliver the bid to the designated office.

In Fredericks Rubber Co., 51 Comp. Gen. 69 (1971), the IFB provided that hand-carried bids would be received in the depository located in "Receptionist's Desk, 2nd Floor, Building 12." One month prior to issuance of the IFB, however, the bid box had been moved from the receptionist's desk to the bid room. Trenton Textile's representative, upon approaching the desk, was directed to place its bid in the bid box at the end of the hall. Due to the vagueness of the receptionist's directions, Trenton's representative placed its bid in the wrong box. Trenton's bid was not discovered until after the other bids were opened. We stated,

"The representative of Trenton Textile may not have exercised the best judgment when he deposited the bid in an open box not identified as a bid depository but it appears that the Government, and not the Ladder, should be considered to be primarily responsible for the mistake which occurred. The invitation provided, and the bidder had every right to expect, that the bid box would be located * * * on the receptionist's desk * * *. The bid was hand-carried to the desk more than 2 hours prior to the time set for the opening of bids, and it would seem unreasonable to conclude that the bidder did not comply with the terms of the invitation so far as concerns the matter of submitting hand-carried bids." 51 Comp. Gen. at 71 (1971).

Finding that there was no evidence that Trenton had altered its bid after the other bids were opened, we found consideration of the Trenton Textile bid consistent with the determination made in 34 Comp. Gen. 150, supra.

In the instant case, the IFB provided that bids could be hand-delivered to Room A-148, Building 4488. The IFB did not indicate that restrictions existed as to those persons permitted to hand-deliver bids. In the absence of such notice, Scot could reasonably anticipate that its agent, the Federal Express carrier, would be permitted to deliver its bid to the designated office. Base personnel prevented the carrier from so doing, however,

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and the carrier was forced to deliver the bid package to Building 8022. As in Fredericks, supra, Scot's representative attempted to comply with the terms of the IFB but was unable to do so because of improper Government action.

Scot's bid was received 2 hours and 40 minutes prior to bid opening, and has been in the Government's possession since that time. Scot has not had the opportunity to alter his bid so as to acquire an advantage over other bidders. As we stated in I & E Construction Company Incorporated, 55 Comp. Gen. 1340, 1342-1343 (1976), 76-2 CPD 139:

"We believe, however, 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 regulations. The regulations are intended to insure 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 Hydro Fitting Mfg. Corp., 54 Comp. Gen. 999 (1975), 75-1 CPD 331, * * * we stated: '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 by over-technical evaluation of rules.' * * *"

We therefore believe that, in view of the circumstances leading to the late receipt of Scot's low bid and the fact that Scot has acquired no advantage over other bidders, Scot's bid should have been considered for award.

In view of the foregoing, the protest is sustained.

Nevertheless, we do not believe remedial action is feasible in view of the impact termination of the contract would have on the military readiness posture of the United States. In this connection, it is reported that these replacement actuators are scheduled for delivery so as to coincide with the expired "shelf-life" actuators in missiles to prevent them from becoming non-operational. Further, it is reported that the actuators are to be supplied as Government-furnished equipment under another contract and any slippage in delivery could result in the assessment of liquidated damages under that contract.

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However, we would consider a claim for bid preparation costs if submitted and properly documented as to the amount.

Deputy


Comptroller General
of the United States