**Comptroller General**
**of the United States**

**Washington, D.C. 20548**

# Decision

**Matter of:** Boines Construction & Equipment Co., Inc.

**File:** B-279575

**Date:** June 29, 1998

John I. Hulse IV, Esq., Hulse & Wanek, for the protester.
Jud E. McNatt, Esq., Department of Housing and Urban Development, for the agency.
Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Bid in an envelope marked "BID ENCLOSED," which was hand-carried by commercial carrier to the contracting agency's mailroom several hours before bid opening but was not received by the contracting office where the bid depository was located until after bid opening, was late and not properly accepted for award; rather than government mishandling being the primary or paramount cause of the lateness, the mailroom's routing of the bid to another office in the same building that also handles bids was attributable to the bidder's failure to mark its commercial carrier-provided envelope as required by Federal Acquisition Regulation § 52.214-5 when using a commercial carrier to deliver a bid.

## DECISION

Boines Construction & Equipment Co., Inc. protests the award of a contract to Pierce Foundations, Inc. under invitation for bids (IFB) No. B-FTW-00041, issued by the Department of Housing and Urban Development (HUD), Fort Worth, Texas, for demolition of vacant buildings and related site work at the Hillcrest Homes Apartments public housing project in Larose, Raceland, and Thibodaux, Louisiana. Boines contends that HUD should not have accepted Pierce's late bid.

We sustain the protest.

The IFB, issued December 30, 1997, incorporated by reference at L-1 the standard "Submission of Bids" provision, FAR § 52.214-5, which instructs bidders to submit bids in sealed envelopes or packages (1) addressed to the office specified in the solicitation and (2) showing the time and date specified for receipt, the solicitation number, and the name and address of the bidder. FAR § 52.214-5(a)(1), (2). The provision states that bidders using commercial carrier services shall ensure that the bid is addressed and marked on the outermost envelope or wrapper as prescribed above when delivered to the office specified in the solicitation. FAR § 52.214-5(b).

The IFB also incorporated, on its Standard Form (SF) 33 cover sheet and at L-1, the standard "Late Submissions, Modifications, and Withdrawals of Bids" provision, FAR § 52.214-7, which states, in relevant part, that 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 and, if it was hand-carried (including delivery by a commercial carrier), it is determined by the government that the late receipt was due primarily to government mishandling after receipt at the government installation. FAR § 52.214-7(a)(2); see FAR § 14.304-1(a)(2).

The IFB's SF 33 cover sheet provided in Item (Block) 9 that sealed bids "will be received at the place specified in Item 8, or if hand-carried, in the depository located in 1600 Throckmorton, Fort Worth, TX until 2:00 PM local time 01-30-98." Item 8 of the SF 33, "ADDRESS OFFER TO (If other than Item 7)" was erroneously filled in as "SAME AS BLOCK 6" ("REQUISITION/PURCHASE NO"), which was blank. Item 7, "ISSUED BY," specified the following office and address:

> U.S. Dept. of Housing and Urban Development
> Contracting Division, 6AAC
> 1600 Throckmorton (76102)
> Fort Worth, TX 76113-2905

Amendment No. 1 to the IFB, issued January 28, 1998, extended the bid opening date to February 9 at 2 p.m.

Six bids were received by the Contracting Division by the time of the February 9 bid opening, including a bid from Boines. No bid from Pierce was received. Immediately before the bid opening, Contracting Division staff contacted the HUD mailroom to determine if any further bids had been received but, according to the agency, "the answer was negative." The agency explains that this inquiry was made because commercial carriers, such as Federal Express, have been instructed to deliver all items addressed to HUD to the mailroom regardless of the person or office at HUD to which the item is addressed. At bid opening, Boines's total bid of $1,196,620 appeared to be the low bid.

Shortly after bid opening, a representative from Pierce telephoned the Contracting Division to inquire about the bid opening results, and when told, alerted contracting personnel that Pierce's bid of $1,120,921.16 had apparently been misplaced by the agency. Contracting personnel then immediately contacted the HUD mailroom, and learned that Pierce's bid had been delivered by Federal Express to the mailroom that morning at 9:40 a.m., but was routed by a mailroom clerk to the mailbox of the Single Family Real Estate Owned (SFREO) Branch, which processes bids for the sale of houses owned by HUD, and that a representative from the SFREO Branch had only minutes before picked up that office's mail from the mailroom. Contracting personnel, accompanied by the mailroom clerk, then went to the

SFREO Branch and retrieved the envelope containing Pierce's bid, as yet unopened, at about 2:45 p.m.

The outermost envelope containing Pierce's bid was a Federal Express envelope that was not marked with the solicitation number or the date and time of bid opening, and exhibited no further delivery information beyond what was on the Federal Express mailing label. The mailing label was completed, in relevant part, as follows:

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| To<br>Recipient's Name | BID ENCLOSED | Phone (817) 978-9301 | |
| Company | U.S. Dept. of Housing & Urban Development | | |
| Address | 1600 Throckmorton | Dept/Floor/Suite/Room [blank] | |
| City | Fort Worth State TX | ZIP | 76102 |

The mailing label indicated that the envelope had been sent from Pierce on Friday, February 6, via "FedEx Priority Overnight" for delivery the next business morning, which was Monday, February 9. The mailing label had been time/date stamped by the agency mailroom at 9:40 a.m. on February 9. The phone number on the mailing label was that listed on the IFB's SF 33 cover sheet for the HUD contract specialist.

Pursuant to FAR § 52.214-7, contracting personnel determined that the late receipt of Pierce's bid was primarily due to mishandling by the government after receipt at the government installation, and proceeded to open the bid and record the amount on the abstract of offers. Because Pierce's bid was $75,699 lower than the bid submitted by Boines, HUD accepted Pierce's bid for award.

On February 13, Boines filed an agency-level protest of HUD's intended award to Pierce, which the agency denied on March 10. Boines then protested to our Office on March 20. The contract was awarded to Pierce on March 24. On March 30, HUD executed a determination and finding under FAR § 33.104(c)(2)(ii) to allow Pierce to perform the contract, based on urgent and compelling circumstances that would not permit awaiting a decision, including the deteriorated physical condition of the buildings to be demolished, related security considerations, and costs incurred pending demolition.

In its protest, Boines contends that Pierce's bid was improperly considered for award by HUD under FAR § 52.214-7 because the lateness of Pierce's bid was not primarily due to government mishandling, as maintained by HUD, but to Pierce's own failure to ensure that the outermost envelope of its bid was addressed to the office specified in the IFB and marked with the solicitation number and date and time of bid opening, as required for the submission of bids by FAR § 52.214-5.

In response to the protest, the contracting officer contends that, since Pierce's bid was hand-carried by a commercial carrier, it was correctly addressed in accordance with Item 9 of the IFB's SF 33 cover sheet, which specified where hand-carried bids would be received, namely "the depository located in 1600 Throckmorton, Fort Worth, TX." As HUD did not further specify in Item 9 where in the building the depository for hand-carried bids was located (it is actually in the Contracting Division) and "has clearly instructed that all items delivered by commercial carrier will be routed through the HUD mailroom," the contracting officer argues that Pierce's bid was delivered to the location designated in the IFB for hand-carried bids prior to bid opening and thus timely received.

As a general rule, bidders are responsible for delivering their bids to the proper place at the proper time, and late delivery of a bid generally requires its rejection even if it is the lowest bid. J.C.N. Constr. Co., Inc., B-270068, B-270068.2, Feb. 6, 1996, 96-1 CPD ¶ 42 at 3; Aztec Dev. Co., B-256905, July 28, 1994, 94-2 CPD ¶ 48 at 3. A bid is late if it does not arrive at the office designated in the solicitation by the time specified. FAR § 14.304-1; Aztec Dev. Co., supra. Normally, receipt at other places, such as the agency mailroom, is insufficient. Inland Marine Indus., Inc., B-233117, Feb. 16, 1989, 89-1 CPD ¶ 165 at 3; J.E. Steigerwald Co., Inc., B-218536, Apr. 19, 1985, 85-1 CPD ¶ 453 at 4.

Here, Pierce's bid is treated as having been hand-carried, since it was delivered by a commercial carrier, Kelton Contracting, Inc., B-262255, Dec. 12, 1995, 95-2 CPD ¶ 254 at 3, and it was late because it was not received in the depository, which the solicitation designated as the place of receipt for hand-delivered bids, by bid opening. Even though commercial carriers were instructed to bring deliveries to the mailroom, the relevant time is the time of receipt in the bid depository, not receipt in the mailroom, and, since Pierce's bid arrived in the depository after bid opening, it was late. See Weather Data Servs., Inc., B-238970, June 22, 1990, 90-1 CPD ¶ 582 at 2-4; Inland Marine Indus., Inc., supra, at 3.

Alternatively, HUD takes the position that, even if Pierce's hand-carried bid was late, it was nonetheless properly considered because the late receipt was due primarily to government mishandling after delivery. Specifically, the contracting officer points to the erroneous assumption by the mailroom that Pierce's envelope contained a bid for the purchase of a house and should be routed to the SFREO Branch. The contracting officer also states that the telephone number for the HUD contract specialist entered on the mailing label of Pierce's envelope "could have been used [by the mailroom] to identify the package and to alert someone to pick-up this 'Priority Delivery.'" The contracting officer asserts that had the SFREO Branch been contacted sooner by the mailroom to pick up the package, the bid could have easily been opened, found to belong to contracting division, and then routed to contracting personnel prior to bid opening. According to the contracting officer, "For a 'Priority Delivery' package to sit in the HUD mailroom for

approximately five hours without being picked-up by someone . . . is clearly mishandling on HUD's part."

Late hand-carried bids, including those delivered by a commercial carrier, may be considered, if it is determined that the late receipt was due primarily to government mishandling after receipt at the government installation. FAR §§ 14.304-1(a)(2), 52.214-7(a)(2); Palomar Grading & Paving, Inc., B-274885, Jan. 10, 1997, 97-1 CPD ¶ 16 at 3; AABLE Tank Servs., Inc., B-273010, Nov. 12, 1996, 96-2 CPD ¶ 180 at 3.[1] However, a late bid should not be accepted if the bidder significantly contributed to the late receipt by not acting reasonably in fulfilling its responsibility for ensuring delivery to the designated place for receipt by the proper time. Aztec Dev. Co., supra, at 3; John Holtman and Sons, Inc., B-246062, Feb. 13, 1992, 92-1 CPD ¶ 187 at 2; J.E. Steigerwald Co., Inc., supra, at 5.

Where the bidder fails to record required information as to the solicitation number, deadline for receipt and ultimate destination on the outside envelope provided by the commercial carrier, the bidder is usually primarily responsible for any delay in delivery. See Systems for Bus., B-224409, Aug. 6, 1986, 86-2 CPD ¶ 164 at 3-4. Here, Pierce's failure to mark its commercial carrier-provided envelope as required by FAR § 52.214-5 was the paramount reason for the delay resulting from the mailroom's "misrouting" of its bid. Indeed, the record suggests that the mailroom's routing of the bid to the SFREO Branch rather than the Contracting Division was not "mishandling," given that the SFREO Branch--located in the same building--also receives "bids" (albeit for the purchase of houses) and Pierce's envelope, merely marked "BID ENCLOSED," did not indicate that it was intended for the Contracting Division.

Due to Pierce's failure to mark the solicitation number and the bid opening date and time on its envelope to indicate the imminent bid opening, the mailroom clerk had no particular reason to expedite delivery or to call the telephone number on the mailing label. There is no evidence in the record that the mailroom personnel were required or expected to take such action in the absence of a clear indication that immediate attention was required. Pierce's use of overnight delivery was not, in itself, sufficient notice to the contracting agency that the material being delivered was a bid that must meet a particular deadline. See S & W Enters., Inc., B-219716, Aug. 19, 1985, 85-2 CPD ¶ 192 at 3.

In sum, we find that the primary or paramount cause of the lateness of Pierce's bid was not government mishandling, but rather Pierce's failure to ensure that the

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[1]When the provisions concerning the delivery of hand-carried bids by commercial carriers were added to the FAR, effective March 3, 1997, it was stated that the standards applied by the decisions of our Office were to be applicable. FAC 90-44 (FAR case No. 95-019), Item V-Consideration of Late Offers.

outermost envelope of its bid was marked as instructed by FAR § 52.214-5. Even if HUD contributed to the lateness of Pierce's bid after delivery, we view this as incidental rather than primary or paramount. See Imperial Maintenance, B-218614, July 26, 1985, 85-2 CPD ¶ 94 at 3. Accordingly, HUD's award of a contract to Pierce does not comply with the regulatory standard for the consideration of late hand-carried bids. FAR §§ 14.304-1(a)(2), 52.214-7(a)(2).

We recommend that HUD terminate its contract with Pierce, if feasible, and award the contract to Boines, the next low bidder, if Boines's bid is otherwise responsive and Boines responsible. 4 C.F.R. § 21.8(a)(2) (1998). If termination of the contract with Pierce is not feasible because of the extent of contract performance, we recommend that HUD instead pay Boines its bid preparation costs. 4 C.F.R. § 21.8(d)(2). Additionally, we recommend that HUD pay Boines the costs of filing and pursuing its protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). In accordance with 4 C.F.R. § 21.8(f)(1), the protester's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days of this decision.

The protest is sustained.

Comptroller General
of the United States