Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pacific Tank Cleaning Services, Inc.

File: B-279111.2

Date: July 1, 1998

C. Patrick Callahan, Esq., Callahan, Little & Sullivan, for the protester.
Vicki E. O'Keefe, Esq., Department of the Navy, for the agency.
Robert Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly considered a late bid under the government mishandling exception where the evidence of record does not establish that the bid was timely received and remained under the government's control until it was first discovered 6 days after bid opening.

DECISION

Pacific Tank Cleaning Services, Inc. (Pac Tank) protests the decision of the Department of the Navy to consider a late bid from California Marine Cleaning, Inc. (Cal Marine) under invitation for bids (IFB) No. N63387-96-B-3145, a total small business set-aside for hazardous waste pumping and transportation services in the San Diego, California area. The protester alleges that the record does not establish that Cal Marine's bid was timely received and remained under the government's control until it was discovered 6 days after bid opening.

We sustain the protest.

The IFB, which contemplated an indefinite-quantity contract for a base year with four 1-year options, was issued on December 9, 1997. It provided that hand-carried bids would be received at the depository located in Building 291 of the Naval Station in San Diego until 10 a.m. on January 8, 1998.

Shortly before 10 a.m. on January 8, bidder representatives convened in a reception area in Building 291 in which the bid depository ("bid box") is located. At 10 a.m., a procurement technician and a contract specialist entered the reception area; the technician then announced that the time for bid opening had arrived and directed bidder representatives to an adjacent conference room where bid opening was to occur.

The technician states that she then unlocked the bid box and removed all loose bid envelopes--leaving only one package marked "old bids," which was bound with a rubber band, in the bid box. She then sorted through the bids for no more than half a minute and set aside the five which were marked for the instant procurement. She states that, after checking to see that none of the remaining envelopes were for this bid opening, she then returned at least two, but not more than four, envelopes to the bid box, relocked the box and carried the bids to the bid opening officer who was in the conference room. Five bids, including Pac Tank's but not Cal Marine's, were opened and read. The protester's bid was low at $2,891,185.

A representative of Cal Marine signed in the Building 291 log at 8:37 a.m. on January 8 and signed out at 9:40 a.m. Cal Marine did not send a representative to the bid opening. On the afternoon of January 8, Cal Marine's president left a voice mail message with the contract specialist designated in the IFB as the agency's point-of-contact, which simply inquired whether the bid results had been posted. The call was not returned because the point-of-contact was on emergency leave from work.

Six days later on January 14, a representative of Cal Marine signed the Building 291 log at 2:30 p.m. and left at 2:35 p.m. On January 14, Cal Marine left another message indicating that the bidder had examined the contracts department's "Bid Board" at the Naval Station and was surprised that Pac Tank could be listed as the apparent low bidder when Cal Marine's price was lower than the posted price.

Because the point-of-contact was still on leave, on January 14, Cal Marine's president spoke to another contracting specialist who had been designated as an alternate point-of-contact, between 2:44 p.m. and 3 p.m. He repeated his concern about Pac Tank's bid being higher than Cal Marine's, as a result of which the agency states that for the first time it learned that Cal Marine claimed to have submitted a bid in response to the IFB. The technician and the designated alternate point-of-contact opened the bid box about 3 p.m. and discovered, on the bottom of a stack of at least three loose bids, a bid envelope from Cal Marine bearing a time/date stamp of 8:38 a.m. on January 8. The envelope was opened and the bid price contained in the schedule of items was $2,587,250--approximately $300,000 lower than Pac Tank's.

In conjunction with an agency-level protest[1] filed by Pac Tank following the agency's decision to accept Cal Marine's late bid, the contracting officer conducted an investigation during which Cal Marine's president and an employee provided sworn statements. According to these statements, the bid was prepared on January 7, sealed in an envelope that day and taken to the reception area of Building 291 by the employee at about 8:30 a.m. on January 8. The employee states

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[1] The agency-level protest was subsequently denied.

that he personally time/date stamped the envelope and placed the bid in the bid box and then left promptly.

Pac Tank maintains that Cal Marine's late bid must be rejected because this record does not adequately support the agency's conclusion that the bid was timely received and remained under the government's control until discovered on January 14. The agency believes that the bid was timely deposited because, in addition to the time/date stamp on the bid envelope, it appeared likely that the technician opening the bid box on January 8 had overlooked the bid while sorting out those not pertaining to this procurement. Award has not been made pending our decision in this matter.

A late misplaced bid may be considered for award only where the record shows that: (1) the bid was received at the installation prior to bid opening, (2) it remained under the agency's control until it was discovered, and (3) it was discovered prior to award. Pershield, Inc., B-256827, July 27, 1994, 94-2 CPD ¶ 46 at 3. The late bid regulations provide, at Federal Acquisition Regulation (FAR) § 14.304-1(c), as follows:

> Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of such installation on the bid wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

Records and other evidence under the control of a bidder or its agent may not, standing alone, serve to establish the time of delivery to the agency since they are not evidence of receipt maintained or confirmed by the agency. J.C.N. Constr. Co., Inc., B-270068, B-270068.2, Feb. 6, 1996, 96-1 CPD ¶ 42 at 3. The late bid requirements must be strictly enforced since maintaining confidence in the integrity of the competitive bidding system outweighs any monetary savings that might be obtained by consideration of a late bid. Arnold Rooter, Inc., B-220497, Nov. 20, 1985, 85-2 CPD ¶ 574 at 2-3.

Here, as indicated above, Cal Marine's employee states that he went to the reception area before bid opening and that he personally time/date stamped the bid and placed it in the bid box. This testimony does not serve to establish the time of delivery since it is outside the control of the agency. J.C.N. Constr. Co., Inc., supra, at 3-4. As for the time/date stamp itself which appears on the envelope containing Cal Marine's bid, under the circumstances presented here, it does not provide acceptable evidence of the time of receipt at the installation. The agency does not dispute that the time/date stamp is in a lobby area relatively open to the public, is

not continuously monitored by the agency,[2] and, most significantly, may be operated by bidders or their representatives, who may or may not immediately place a stamped envelope in the bid box. In this regard, to illustrate the possibility that an offeror could merely stamp an envelope and not place it in the bid box, Pac Tank's president states in his affidavit that, on January 16, he had a Pac Tank employee time/date stamp a blank envelope and return it to the firm.

FAR § 14.304-1(c) recognizes that acceptable evidence to establish the time of receipt includes "the time/date stamp of such installation [or] other documentary evidence of receipt maintained by the installation . . . ." (Emphasis supplied.) This language clearly contemplates that the time/date stamp be securely under the control of the agency. Here, the record reflects that the stamp was not secure, so that bidders could themselves operate the stamp and then place a stamped bid in the bid box. Thus, the stamp placed on Cal Marine's bid envelope on January 14 does not establish that the bid was received prior to bid opening. J.C.N. Constr. Co., Inc., supra, at 3-4.

The agency asserts that receipt is also established by the statement of agency personnel. However, the statement of the technician who opened the bid box at 10 a.m. on January 8, and who removed the loose bids returning several to the box, does not establish that Cal Marine's was in the bid box prior to opening. She states that "[g]iven the small number of bids in the box . . . I do not see how I could have missed the Cal Marine bid," although she adds that "it is possible I did."

The January 14 visit to Building 291 by Cal Marine's representatives between 2:30 p.m. and 2:35 p.m., followed 9 minutes later by the first contact with an agency representative in which Cal Marine's president asserted that the firm had submitted a bid is not inconsistent with the protester's theory that, while the bid envelope was time/date stamped on January 8, this envelope may have been deposited on the afternoon of January 14. On this record, the scenario posited by the protester is no less plausible than the agency's position that the technician overlooked a bid while sorting through very few bids in the bid box.

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[2]The agency report contains an affidavit of a receptionist assigned to the reception area where the bid box is located who states that her duties include typing and answering the telephone as well as greeting guests to the contracts office. On the morning of January 8, she states that she was on duty from 7 a.m. until 11:30 a.m. "[e]xcept for a 10 to 15 minute break some time after 8:00 AM." Pac Tank's president's affidavit states that, on or about March 18, he visited the reception area with his counsel and asked to meet with the contracting officer. The employee left the room to go to an adjacent office and did not return for several minutes during which time no government personnel were present in the area.

In short, there is no acceptable evidence which establishes that Cal Marine's bid was received at the installation prior to bid opening, as required under the test set forth in Pershield, Inc., supra, at 3, and it follows that if timely receipt cannot be established by acceptable evidence, then the second requirement of Pershield--i.e., that the bid was in the government's sole custody from prior to bid opening until discovered--is also not met. In this case, the location of Cal Marine's bid at any time prior to its discovery on January 14 remains unaccounted for. Accordingly, the bid cannot be properly considered, Chelsea Clock Co., Inc., B-251348.2, May 24, 1993, 93-1 CPD ¶ 401 at 4, and the protest is sustained.

We recommend that the agency reject Cal Marine's bid as late and award the contract to Pac Tank, if otherwise appropriate. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorney's fees. 4 C.F.R. § 21.8(d)(1) (1998). The protester's certified cost for claims, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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