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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Amigo-JT Joint Venture

File: B-292830

Date: December 9, 2003

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Dava-Kay F. Kaitala, Esq., and Albert C. Proctor, Esq., U.S. Army Corps of Engineers, for the agency.
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DIGEST

Protest challenging agency's rejection of facsimile bid modification as late is denied where the record shows protester began transmitting modification only a few minutes before scheduled bid opening, the transmission was completed after bid opening was declared, and the modification therefore did not reach the designated bid opening room prior to bid opening; even if the modification was in the facsimile machine's memory before bid opening (as the protester contends), the agency was not required to accept it.

DECISION

Amigo-JT Joint Venture protests the rejection of its second bid modification as late under invitation for bids (IFB) No. DACA63-03-B-0012, issued by the Army Corps of Engineers for construction of a consolidated wing support facility at Laughlin Air Force Base in Del Rio, Texas. The protester's second bid modification, which was transmitted by facsimile, was rejected because it was not received by the agency until after bid opening.¹

We deny the protest.

The IFB, as amended, instructed bidders that bids were due by 2 p.m., local time, on August 29, 2003, and that bid opening would be held in Room 2A20 at the Corps's

¹Without consideration of this second modification, Amigo's bid was not low.

Fort Worth District Office in Texas. IFB at 00100-1; amend. 5, at 2. The IFB included the clause at Federal Acquisition Regulation (FAR) § 52.214-31, which authorized the submission of facsimile bids and bid modifications; the solicitation also stated that the facsimile machine was “subject to heavy use for long periods of time” and bidders were cautioned that “last minute” bids might be received late due to heavy message traffic. IFB at 00100-1 and 00100-7. Further, another solicitation clause at FAR§ 52.214-31(g) stated that:

If the bidder chooses to transmit a facsimile bid, the Government will not be responsible for any failure attributable to the transmission or receipt of the facsimile bid including, but not limited to, the following:

* * * * *

(4) Delay in transmission or receipt of bid.

IFB at 00100-7. The solicitation also included the late bid clause at FAR § 52.214-7, which stated, in relevant part, that a bid or bid modification received at the office designated after the “exact time specified for receipt . . . will not be considered unless it is received before award” and there is acceptable evidence to establish that it was “received at the Government installation designated for receipt of bids and was under the Government’s control prior to the time set for receipt of bids.” This clause also stated that acceptable evidence to establish the time of receipt of a bid or bid modification included the agency’s time/date stamp on the bid, other documentary evidence of receipt maintained by the agency, and oral testimony or statements of government personnel. IFB at 00100-6.

Amigo’s original bid was sent by commercial carrier and received by the Corps on August 28. On the scheduled opening date, Amigo sent two bid modifications by facsimile. A contracting employee retrieved Amigo’s first modification from the facsimile machine which was located in a conference room adjoining the bid opening room, placed it in an envelope, wrote the name of the sender, the solicitation number, the date and time received (8/29 at 11:35 a.m.), and initialed the envelope. Agency Report (AR) exh. 4, Amigo’s First Bid Modification.² This employee gave the envelope to the assigned contract specialist who secured the package in accordance with the agency’s internal control procedures. Contracting Officer’s (CO) Statement at 3.

²The record shows that this 4-page bid modification had the sender’s facsimile machine date stamp of “Aug. 29 03” at “10:08 a.m.,” as well as the sender’s facsimile number on each page. The record also shows that the bid modifications sent by Amigo did not have the legend typically imprinted by a receiving facsimile machine showing the time and date of receipt.

The contract specialist, who served as the bid opening official, reports that at approximately 1:58 p.m. local time, he went to the conference room adjoining the bid opening room to check the facsimile machine for other bids and discovered that the facsimile machine had printed the cover page of Amigo's second bid modification, which indicated that a 4-page submission (including cover sheet) was being transmitted to the agency. According to the contract specialist, as the facsimile machine began to print the third page, the procurement clerk advised him that it was 2 p.m.; therefore, the contract specialist left the conference room, entered the adjoining bid opening room, and commenced bid opening. AR exh. 5, Contract Specialist's Memorandum for Record. Three bids, including a bid and the first bid modification from Amigo, were opened and recorded on the bid abstract. Amigo's total bid, as modified, was the highest priced at \$8,427,290.24. AR exh. 6, Abstract of Bids.

Following bid opening, the contract specialist states that he returned to the conference room to retrieve the facsimile transmission from Amigo which he considered late since the complete bid modification had not been received before bid opening.³ Upon returning to his office, the contract specialist received a message that a representative from Amigo had telephoned the contracting office to alert him that the firm had sent a second bid modification by facsimile. The contract specialist then telephoned Amigo's representative and advised her that the second bid modification had been received after the official bid opening time and would not be considered. CO's Statement at 4. The contracting officer subsequently determined that Amigo's second bid modification could not be accepted because it was not received in its entirety until after bid opening and the exceptions for consideration of a late bid modification as set forth at FAR clause § 52.214-7, were not applicable. Accordingly, the contracting officer rejected Amigo's second bid modification as late, notwithstanding its lower price. AR exh. 10, CO's Letter to Protester, Sept. 2, 2003. This protest followed.

³The record shows that the second facsimile modification from Amigo consisted of the cover page, the second and third pages, which were the completed bid schedule, and the fourth page, which was a signed copy of amendment 6. AR exh. 9, Protester's Second Bid Modification. The contract specialist reports that when he returned to the facsimile machine after bid opening only three pages of the modification had been printed because the facsimile machine ran out of paper before the last page was printed; he then printed the fourth page. AR exh. 5, Contract Specialist's Memorandum for Record. Notwithstanding the protester's arguments to the contrary, the fact that the facsimile machine ran out of paper while bid opening was conducted is not relevant here because when the contract specialist left the conference room to commence bid opening, the transmission from Amigo was still printing.

The protester maintains that it did everything possible to ensure that its bid modification would be timely delivered to the place specified in the solicitation. As support, Amigo asserts that prior to sending its first bid modification at 10:08 a.m. on bid opening day, one of its representatives telephoned the assigned contract specialist to ascertain the current time of the official bid opening clock in order to synchronize its clock; the contract specialist refused to provide this information. In Amigo's view, the contract specialist's refusal "directly and affirmatively prevented the timely submission" of Amigo's second bid modification. Protester's Comments at 3.⁴ Nonetheless, the protester insists that, as evidenced by the local telephone company records, the second bid modification was sent at 1:51 p.m. and the transmission was completed 7.51 minutes later at 1:59 p.m. Protest at 3; Protester's Comments at 5. Since the facsimile machine was located in a room "immediately adjacent" to the bid opening room, Amigo argues that there "still was a reasonable time" for delivery of its second facsimile modification "from the point of receipt to the designated location." Protest at 4.

It is the responsibility of bidders to ensure that their bids or bid modifications arrive at the designated location by the designated time, and submissions that arrive late must be rejected unless the specific conditions stated in the solicitation for consideration of late bids are met. Weeks Marine, Inc., B-292758, Oct. 16, 2003, 2003 CPD ¶ ____ at 4; Roy McGinnis & Co., Inc., B-275988, Apr. 28, 1997, 97-1 CPD ¶ 156 at 2. Bidders must allow a reasonable time for bids or bid modifications to be delivered from the designated point of receipt (in this case, a facsimile machine) to the bid opening room which was the ultimate destination. Butt Constr. Co., Inc., B-258507, Jan. 30, 1995, 95-1 CPD ¶ 45 at 4; Roy McGinnis & Co., Inc., supra, at 3.

We find nothing objectionable in the agency's rejection of Amigo's second bid modification. The modification was plainly late, since it did not reach the designated location for receipt of bids prior to bid opening. To the extent that the protester believes that government mishandling was the cause of the modification's being late or that Amigo did all it could reasonably be expected to do to ensure timely delivery, see Weeks Marine, Inc., supra, we believe that the record establishes that the protester's belief is unsupported. As indicated, by the protester's own account, the modification was sent by facsimile at 1:51 p.m. and the transmission took 7.51 minutes to reach the agency's facsimile machine, thereby allowing one minute for agency personnel to retrieve, process, and deliver this modification to the bid

⁴Amigo's complaint that the contract specialist impermissibly refused to provide over the telephone to the firm the current time on the official bid opening clock is without merit. The protester has cited no legal authority to support its position, the protester's statement that other contract specialists have provided this information under previous solicitations does not establish that an impropriety occurred here, and the protester has not established any causal nexus between the agency's response to the telephone request and the late arrival of the bid modification.

opening room. The record shows that at the time the contract specialist was notified that it was time to conduct the bid opening, the second bid modification was not printed in its entirety--page 3 of the four pages (containing the second page of the bid schedule) was still printing. This being the case, it was primarily (if not entirely) the protester's tardy beginning of the transmission that caused the failure of the modification to reach the bid opening room on time. Nothing in the record suggests mishandling of the modification by the government.

Finally, the protester alleges that the government was legally required to consider the bid modification, since it was received in the memory of the agency's facsimile machine before 2 p.m. and was therefore effectively in the Corps's control before bid opening. We disagree. At least in the circumstances of this case--where the solicitation clearly placed the risk of facsimile transmission problems on bidders and yet Amigo nonetheless began transmitting its second bid modification within the final few minutes before the start of bid opening--we do not believe that receipt in the facsimile machine's memory (assuming, arguendo, that the modification was in the machine's memory before bid opening) qualifies as "under the Government's control" prior to the time for receipt of bids as contemplated by the clause at FAR § 52.214-7 so as to require the agency to consider the protester's late bid modification.

The protest is denied.

Anthony H. Gamboa
General Counsel