Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: J.C.N. Construction Co., Inc.

File: B-270068; B-270068.2

Date: February 6, 1996

Douglas L. Patin, Esq., Spriggs & Hollingsworth, for the protester.
David P. Ray, Esq., Amerling & Burns, for D.L. Poulin, Inc., an interested party.
Howard B. Rein, Esq., Cynthia S. Guill, Esq., and Christopher M. Bellomy, Esq., Department of the Navy, for the agency.
Wm. David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A late commercial carrier-delivered bid may be considered if its late receipt is due to government mishandling after the bid is received. However, the time of the agency's receipt of the bid prior to bid opening must be established. Where the sole evidence of receipt is the carrier's records, the time of receipt cannot be properly established, and the bid must be rejected.

DECISION

J.C.N. Construction Co., Inc. protests the award to D.L. Poulin, Inc. under Department of the Navy invitation for bids (IFB) No. N62472-94-B-0421, issued for construction on a hangar at the Brunswick, Maine, Naval Air Station. J.C.N. maintains that Poulin's bid should have been rejected as late.

We sustain the protest.

The IFB, issued on August 8, 1995, set bid opening for 2 p.m. on September 8. Seven bids were received. Poulin's "bid" consisted of a facsimile of a telegram submitted by Western Union to the agency from Poulin acknowledging its receipt of amendment 0003 and reducing its bid price by $1,141,496. The telegram, however, gave no indication of what bid amount was being reduced. When bids were opened, J.C.N.'s bid was the low responsive bid.

After bid opening, Poulin complained that the agency had failed to consider the bid it submitted prior to its telegram. On September 20, the agency discovered Poulin's original bid in the agency bid box under a yellow page of paper that the agency maintained on the bottom of the box. The agency reports that the box can be

opened only with keys controlled by the bid room clerk, and, the bid could only have been placed under the yellow page by someone who had obtained the keys from that clerk. The bid package had no time/date stamp or notation as to time of receipt.

The only available evidence of delivery was the commercial carrier's cartage record. This log showed that the bid had been delivered by Airborne Express on August 30 (nine days prior to bid opening) to the agency's mail room (instead of the bid depository location designated in the IFB for hand-delivered bids), and that the mail room clerk had signed for its receipt at 9:47 a.m. Poulin's bid package, using the label supplied by the agency, was clearly marked as a bid, and included the IFB number, the date and time of opening, and a description of the project. The carrier's label placed on the bid envelope included a sticker, which was separable into three portions (each with the same airbill number)--one portion had been placed on the carrier's delivery records, and the other two were left on the bid envelope.

The agency determined that the paramount cause for the bid being received late was government mishandling--the failure to timely transmit the bid from the mail room to the bid depository down the hall from the mail room. After the agency determined that the bid envelope had not been opened or tampered with after having been sealed, Poulin's bid was opened. After adjusting the price by the price reduction in the telegram, the agency found that Poulin bid was low. Award was made to Poulin. Performance has been suspended pending resolution of this protest.

J.C.N. contends that Poulin's bid should have been rejected because the primary cause of its late receipt was the improper delivery of the hand-carried bid to the mail room (the location designated for the delivery of bid sent by mail) and not to the bid box, which was designated as the location for depositing hand-carried bids. J.C.N. also notes that no documentation was maintained by the installation to show when Poulin's bid was received--the bid envelope was not time/date stamped--and thus under the evidentiary requirements of FAR § 14.304-1(c) the requisite proof of when the agency received Poulin's bid does not exist. In any event, J.C.N. notes that the agency has offered no explanation of where Poulin's bid was between August 30 and September 20. Since the agency has not established that the bid was in the exclusive possession of agency personnel during this period of time and since if Poulin had regained possession of the bid after its submission it could, after learning the results of bid opening, have changed its original price to ensure its being low, J.C.N. believes that Poulin's bid should be rejected so as to maintain the integrity of the competitive bidding system.

As a general rule, bidders are responsible for delivering their bids to the proper place at the proper time. International Steel Erectors, B-233238, Feb. 13, 1989, 89-1 CPD ¶ 146. While a late bid, hand carried by a commercial carrier to either the location designated for hand-carried bids or to the mail room, may not be considered where it is late due to the failure of the bidder to fulfill its responsibility for ensuring timely delivery, it may be considered if the sole or paramount cause of its late receipt in the bid opening room is due to government mishandling after timely receipt at the agency. Gould Metal Specialties Inc., B-246686, Mar. 27, 1992, 92-1 CPD ¶ 311.

However, before the issue of whether the late receipt of a bid by contracting officials was caused solely by government mishandling may be considered, it must be shown that the bid was received by the agency prior to bid opening. Power Connector, Inc., B-256362, June 15, 1994, 94-1 CPD ¶ 369; Qualimetrics, Inc., B-213162, Mar. 20, 1984, 84-1 CPD ¶ 332. Where the issue is whether a hand-carried bid was timely received by the agency, all relevant evidence, including statements made by government personnel, may be considered. Kelton Contracting, Inc., B-262265, Dec. 12, 1995, 95-2 CPD ¶ ___. As noted by the protester, FAR § 14.304-1(c) provides:

> "[t]he only acceptable evidence to establish the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation."

While this provision does not by its language encompass late hand-carried bids, and thus the strict evidentiary requirements of the clause are technically inapplicable, Pan Am Constr. and Management Co., B-191238, May 9, 1978, 78-1 CPD 352, we have recognized that this provision for establishing bid receipt should apply to hand-carried bids by commercial carriers. Thus, commercial carrier records standing alone may not serve to establish the time of delivery to the agency, since they are not evidence of receipt maintained or confirmed by the agency. Hausted, Inc., B-257087, July 28, 1994, 94-2 CPD ¶ 49; Qualimetrics, Inc., supra . On the other hand, commercial carrier records may be considered in determining when a bid is submitted to a government installation, if the record contains corroborating relevant evidence (e.g., an agency time/date stamp, other documentary evidence in the possession of the agency, and statements by government personnel). Power Connector, Inc., supra (the corroborating evidence of commercial carrier records consisted of agency logs showing receipt that were maintained by the agency); M.J.S., Inc., B-244410, Oct. 17, 1991, 91-2 CPD ¶ 344 (besides the commercial carrier records, the agency had retained a copy of the Federal Express receipt signed by an agency employee and thus had evidence in its possession of the time of receipt prior to government mishandling).

Here, the agency has been unable to furnish any evidence beyond the signed receipt furnished by the carrier to establish that Poulin's bid was received at the agency prior to bid opening. The agency offers neither an explanation of how or when the bid was placed in the bid box or any evidence in its possession as to when Poulin's bid was delivered to the agency. The sole evidence establishing the time of receipt of the Poulin bid at the agency consists of the delivery records of Poulin's commercial carrier. The agency has only one mail room clerk, but he is unable to remember the receipt of Poulin's bid envelope. In short, the agency cannot corroborate the bidder's agent's time of delivery.

Therefore, Poulin's bid must be considered late and cannot be accepted. To hold otherwise would be counter to the long-standing goal of the late bid rules--protecting the integrity of the competitive bidding system--because of the possibility that the bid discovered in the bid box on September 20 was not the bid allegedly delivered on August 30. Since performance has been suspended, we recommend that the agency terminate the contract to Poulin and award the contract to J.C.N., if otherwise proper. We also recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, section 21.8(d)(1), 60 Fed. Reg. 40,737, 40,743 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.8(d)(1)). The protester should submit its detailed and certified claim for its costs directly to the agency within 90 days after receipt of this decision. Bid Protest Regulations, section 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States