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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: J. L. Malone & Associates

File: B-290282

Date: July 2, 2002

Joel S. Rubinstein, Esq., Bell Boyd & Lloyd, for the protester.
Matthew S. Simchak, Esq., John A. McCullough, Esq., and Emily W. Murphy, Esq.,
Wiley Rein & Fielding, for Garnet Electric Company, Inc., an intervenor.
Sumara M. Thompson-King, Esq., and Christi L. Dame, Esq., National Aeronautics
and Space Administration, for the agency.
Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest against agency's acceptance of late hand-carried bid is denied where the bid was received at the government installation and was effectively under the government's control prior to the scheduled bid opening, notwithstanding the role played by a contractor in receiving and controlling the bid.

DECISION

J. L. Malone & Associates protests the decision by the National Aeronautics and Space Administration to accept the apparent low bid submitted by Garnet Electric Company, Inc. under invitation for bids (IFB) No. MSFC0-02-05, issued for the construction of an electrical substation at the Marshall Space Flight Center (MSFC) in Huntsville, Alabama. Malone, the second low bidder, argues that the Garnet bid should have been rejected as late because the bid was not received in the designated bid opening room until after the time scheduled for bid opening, and the circumstances did not meet the regulatory standard for acceptance of a late bid.

We deny the protest.

The IFB required bids to be submitted by 1:30 p.m. on April 9, 2002 in room 36 of MSFC's Building 4250; the designated place for bid opening was Room 38 in Building

4250.¹ IFB at 1. As amended, the IFB incorporated by reference the Federal Acquisition Regulation (FAR) § 52.214-7 provision entitled “Late Submissions, Modifications, and Withdrawal of Bids,” governing the treatment of late bids. As relevant here, the current regulatory language of FAR § 52.214-7(b)(1) states:

Any bid, modification, or withdrawal received at the Government office designated in the IFB after the exact time specified for receipt of bids is “late” and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late bid would not unduly delay the acquisition; and—

....

(ii) 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.

FAR § 52.214-7(c) provides:

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

The propriety of the agency’s acceptance of Garnet’s bid is the central issue in this protest; the protester alleges it should have been rejected as late. Our Office conducted a hearing, recorded by videotape, to ascertain the facts and to assess the credibility of the respective parties’ witnesses concerning the circumstances of the bid delivery. Testimony was obtained from the contracting officer, who served as the bid opening official; the Project Manager for R.W. Beck, Inc.—the MSFC’s construction management and inspection services contractor; the Beck construction manager; and the Garnet representative.

¹ MSFC is located within Redstone Arsenal Army base and visitors to MSFC must pass through military checkpoints and comply with security measures. These include photo identification and a point of contact to escort the visitor onto the base. The point of contact may be either a federal employee or a contractor employee for Redstone Arsenal or MSFC. After the military checkpoint, visitors to MSFC must proceed to the Visitor Badging and Registration Office in MSFC’s Building 4312 to obtain a visitor’s badge that must be worn for the duration of the visit. Contracting Officer’s Initial Statement, May 3, 2002, at 1.

The contracting officer states that, on April 9, the day of bid opening, because bidders might have difficulty gaining access to the base, he asked the Beck project manager to send an employee to Gate 9 of Redstone Arsenal to escort bidders through security to the bid opening room.² Contracting Officer's Supplemental Statement, May 14, 2002, at 3. The Beck project manager designated the Beck construction manager, who had conducted the pre-bid site visits for this project, to serve as the point of contact at Gate 9. The contracting officer testified that he met with the Beck construction manager and instructed him "to be at the gate at 1:00 and stay until 1:30 and receive any bids [and] to act as a courier only for those bids." Video Transcript (VT) at 10:28:24. The Beck construction manager was further advised that when the time set for bid opening had arrived, the contracting officer would contact him and instruct him to return to the bid opening room with any bids in his possession. VT at 14:05:53; 14:51:20; 12:19:26.

The record shows that the Garnet representative arrived at Gate 9 of Redstone Arsenal to deliver Garnet's bid on April 9 and was logged in by security personnel on the visitors' roster at 12:59 p.m. VT at 17:19:23; Agency Report (AR) exh. K, Roster of Visitors Entering Redstone Arsenal. Upon learning from security personnel that he needed an escort, the Garnet representative called the Beck construction manager on his cellular telephone since the Beck construction manager had been the point of contact on Garnet's previous site visit. VT at 17:19:40; Hearing Exhibit (HE) 2, Verizon Cellular Billing Statement. When the Beck construction manager arrived at Gate 9, he informed the Garnet representative that the contracting officer had directed him to collect bids and deliver them to the bid opening room. The Beck construction manager then telephoned the contracting officer at his office at 1:07 p.m. to inform him that Garnet's representative was there with a bid, and the contracting officer reports that he made a contemporaneous notation on his desk calendar for April 9, which reads "1:08 pm from Garnet." AR exh. J, Desk Calendar. At the hearing, the Beck construction manager explained that in collecting Garnet's bid package, he gave the Garnet representative his business card on which he wrote "1:08 p.m. 4/9/02," took the bid package to his vehicle where he "locked it up." VT at 15:46:50 to 15:47:48. The Beck construction manager did not escort the Garnet representative onto the base since the contracting officer had instructed him to remain there until 1:30 p.m. Garnet's representative gained access to the base without an escort and arrived in Room 38 of MSFC's Building 4250 at approximately 1:40 p.m.

Meanwhile, the record indicates that the contracting officer entered the bid opening room between 1:15 p.m. and 1:20 p.m. where several bidders' representatives, including Malone's, were present. The contracting officer reports that he accepted

² The agency reports that Gate 9 is the main and most active gate at Redstone Arsenal which facilitates access to MSFC.

bid packages from these bidders' representatives and, although he did not use a time/date stamp, he sequentially numbered each sealed package he accepted. Contracting Officer's Supplemental Statement, May 14, 2002, at 5-6. At approximately 1:28 p.m., the Beck project manager, who was in the bid opening room, telephoned the Beck construction manager to inform him that the time set for opening bids had arrived and instructed the Beck construction manager to return to the bid opening room with any bids already in his possession.³ VT at 12:31:27. While bids were being opened, the Beck construction manager arrived in the bid opening room and delivered Garnet's bid package to the contracting officer at 1:38 p.m. VT at 16:10:46. The contracting officer accepted the Garnet bid because he believed the bid was timely delivered when the Beck construction manager took possession of it at Gate 9 at 1:08 p.m., some 22 minutes before the scheduled opening. The contracting officer also believed that the responsibility for the late delivery to the bid opening room was due to his instructions to the Beck construction manager to remain at Gate 9 until the time set for bid opening. Agency Initial Memorandum of Law, May 3, 2002, at 2. The contracting officer therefore opened Garnet's bid and it was determined to be the apparent low bid, of the eight bids received. AR exh. C, Abstract of Bids.

Malone protests that Garnet's bid was late and cannot be considered by the agency because of Garnet's alleged failure to allow sufficient time to ensure delivery of its bid to the designated opening room before bid opening. Specifically, given the security procedures in effect, the protester alleges that 31 minutes was not a reasonable amount of time to gain access to Redstone Arsenal, complete the MSFC visitor badging process, and arrive at the scheduled place for bid opening. In its post-hearing comments, Malone alleges that the information relied on by the contracting officer to establish the time of receipt of Garnet's bid at Redstone Arsenal and that the bid was under the control of the government prior to bid opening was not acceptable evidence as contemplated by the FAR. Protester's Post-Hearing Comments at 11-14.

Bidders generally are responsible for delivering their bids to the proper place at the proper time, and late delivery of a bid generally requires its rejection. As the clause quoted above explains, however, a late hand-carried bid can be considered for award if it was at the government installation designated for receipt of bids, and under the control of the agency, prior to the time set for receipt of bids. FAR § 52.214-7(b)(1)(ii). Under the governing language in the FAR, it is the contracting officer, in the first instance, who should make the determination whether a late bid should be accepted, FAR § 52.214-7(b)(1), and our Office will not substitute its judgment in this

³ Telephone records for the Beck project manager's cellular telephone and that of the Beck construction manager corroborated the Beck project manager's testimony. AR exh. E, Cellular Telephone Record for Beck Construction Manager and exh. G, Cellular Telephone Record for Beck Project Manager.

regard, but will review the reasonableness of the agency's determination. States Roofing Corp., B-286052, Nov. 8, 2000, 2000 CPD ¶ 182 at 4. We find reasonable the decision made here by the agency to accept Garnet's bid.

The Garnet bid was clearly late, since it was not received at the office designated in the IFB until after the designated time. The question thus becomes whether the contracting officer reasonably concluded that the circumstances here met the criteria for acceptance of a late bid under FAR § 52.214-7(b)(1). Some of those criteria are not at issue: the protester does not claim that the Garnet bid was received after award was made or that its acceptance would unduly delay the acquisition. The dispute, rather, arises from the contracting officer's findings in two key areas: whether the Garnet bid was received at the government installation prior to the time set for receipt of bids (that is, 1:30 p.m.), and whether the bid then remained under the government's control until 1:30 p.m. Finally, there is a dispute about whether the evidence relied on for the contracting officer's findings was acceptable under the FAR.

There is no doubt that the bid was at the government installation, that is, Redstone Arsenal, by 1:30 p.m. The protester does not contend otherwise. Instead, the protester's concern (other than the evidentiary one discussed below) is about whether the bid was "received" at Redstone prior to 1:30 p.m., since the person who took custody of the bid from the Garnet representative was a contractor, not a government employee. We see no basis to find that a contracting officer cannot have a contractor employee fulfill the ministerial task of taking custody of bids, at least in these circumstances, where doing so in no way cast doubt on the integrity of the process. Accordingly, we conclude that the contracting officer reasonably found that the Garnet bid had been received at the government installation prior to the time set for receipt of bids.

Our conclusion is the same regarding whether the bid remained under the government's control between its receipt at Redstone Arsenal and the 1:30 p.m. bid opening time. We see no basis to question the reasonableness of the contracting officer's determination that the Garnet bid was effectively under the government's control between its receipt at 1:08 p.m. and the bid opening time. There is no evidence that the Beck construction manager acted other than in a purely ministerial capacity, and at the direction of the contracting officer. Consistent with the contracting officer's instructions, the Beck construction manager could not relinquish control of the bids collected without the contracting officer's authorization, and, in any event, it is undisputed that the Beck construction manager maintained custody of the bid package until he handed it to the contracting officer. In these circumstances, we find reasonable the contracting officer's finding that the Garnet bid was effectively under the government's control from 1:08 p.m.

We recognize that circumstances may exist where a contracting officer might reasonably find that concerns about the integrity of the process meant that control by a contractor employee did not meet the regulatory standard. In the facts of this

case, though, we think it was reasonable for the contracting officer to find that consideration of the Garnet bid did not compromise the integrity of the competitive process.

Finally, we turn to the acceptability of the evidence relied on by the contracting officer in reaching these two findings. The protester's contention that the information provided by the agency was not acceptable evidence as contemplated by the FAR disregards the actual language of the applicable provision. As quoted above, the FAR specifies that acceptable evidence to establish time of receipt at the government installation "includes" the installation's time/date stamp or other documentary evidence maintained by the installation. FAR § 52.214-7(c). The clause does not restrict acceptable evidence to the examples listed, and we believe that reasonable consideration of other relevant information is permissible. In particular, the evidence that the contracting officer relied on here appears both relevant and reliable.

In sum, we conclude that the contracting officer reasonably found that the Garnet bid was received at Redstone Arsenal prior to the time set for receipt of bids and then remained under the control of the government until the time of bid opening, and we thus have no basis to question the contracting officer's decision to accept Garnet's late bid.

The protest is denied.

Anthony H. Gamboa
General Counsel