

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

29
60928

98893

FILE: B-185265

DATE: May 26, 1976

MATTER OF: Sierra Engineering Company

DIGEST:

1. Time/date stamp on bid modification may be disregarded in determining time of receipt at Government installation where independent evidence establishes that times marked by machine were inaccurate and were inconsistent with stipulated order of receipt.
2. Where time/date stamp is inaccurate, contracting officer may seek other documentary evidence maintained by installation, including telegrams, for purpose of establishing time of receipt of bid modification at Government installation.
3. Decision to consider late bid modification was proper where documentary evidence maintained by Government installation established that bid would have been timely received in bid opening room but for Government mishandling following receipt in communications center.
4. Bid containing allegedly ambiguous price term may be accepted where no prejudice could result to other bidders because bid is low under all possible interpretations and bidder agrees to be bound by interpretation yielding lowest bid.

Sierra Engineering Company (Sierra) protests consideration of a late telegraphic bid modification submitted by Gentex Corporation (Gentex) which would displace Sierra as the low bidder under invitation for bids N00383-76-B-0055, issued by the Department of the Navy, Aviation Supply Office (ASO), Philadelphia. Sierra contends that the Navy has failed to establish the time of receipt of the modification at the Government installation (the Communications Center) within the evidentiary standard of Armed Services Procurement Regulation (ASPR) § 7-2002.2 (c)(ii) (1975), making it impossible to determine whether late receipt in the bid opening room was due solely to Government mishandling as required for consideration by ASPR § 7-2002.2(a)(i).

In the alternative, Sierra claims that the modification is nonresponsive because ambiguous. For the reasons which follow, we find that the Navy may consider the late modification in making award.

Bids for several sizes of helmet shell assemblies were opened at 2:00 p. m. on September 30, 1975, in the ASO bid room. Of the two bids received, Sierra was the low bidder. However, on October 1, a telegraphic modification of the Gentex bid arrived in the bid room which, if considered, would make Gentex the low bidder. Clause C-302 of the solicitation incorporates ASPR § 7-2002.2, providing for consideration of late bid modifications as follows:

"(a) Any bid [or bid modification] 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 is made and * * *

(ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

* * * * *

"(c) The only acceptable evidence to establish:

* * * * *

(ii) 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."

The Navy proposes to consider the Gentex modification, notwithstanding a time/date stamp indicating late receipt, based on its determination that the time/date stamp was unreliable and that "documentary evidence of receipt maintained by the installation" establishes that the modification was received at the Communications Center 35 minutes prior to bid opening and that, absent mishandling by the Government, the bid would have been timely received in the bid opening room.

The evidence relied upon by the Navy consists of a series of telegrams bearing (1) numbers affixed by Communications Center personnel to indicate the order in which these telegrams were received in the Center and (2) the times of transmission contained in the messages. The Navy contends that this evidence reliably establishes the latest time at which the Gentex modification could have been received in the Communications Center. Specifically, the Gentex modification bears the handwritten notation, "24 ASO," indicating that it was the twenty-fourth wire received at the Communications Center on September 30 and that it was directed to the Aviation Supply Office. This notation was affixed while the messages were in a continuous strip of paper from the Telex machine. Sierra concedes that the order of receipt is as stated by the Navy. The contents of the telegram indicate that transmission was commenced at 1:00 p. m. and completed at 1:15 p. m. Since this information was part of the message sent by Gentex, it must be discarded in favor of reliable independent evidence of the time of receipt at the Communications Center. This evidence is provided by the succeeding wire which bears the notation "25 NPFC," indicating that it was the twenty-fifth message of the day and that it was intended for the Naval Publications and Forms Center. This telex was sent by Varian Associates of Beverly, Maine, and indicates a time of transmission of 1:25 p. m. We are advised that the time stated in the message, 1:25 p. m., was the time that a telex tape was prepared; that transmission of the taped message followed immediately thereafter; and that the Varian message was sent directly to the Communications Center without the interposition of the Western Union Infomaster Computer that may delay messages as a result of transmission line tie-ups.

We believe that there are sufficient indicia of reliability here to justify concluding that the Varian message was received at or just slightly after 1:25 p. m. Since the Gentex modification was received prior to commencement of the Varian transmission, that message had to have been received at the Communications Center at or before 1:25 p. m. The Navy indicates that the distance between the Communications Center and the bid opening room is approximately one hundred yards and that the normal time for delivery of telex messages involving bids can be expected to take less than 35 minutes.

Sierra argues that the time/date stamp on the Gentex modification, which indicates a time of receipt of 7:51 p. m., cannot be impeached. Were the issue merely a question regarding the relative accuracy of the Navy's time/date stamp, we might agree. See B. E. Wilson Contracting Corp., B-184248, September 12, 1975, 75-2 CPD 145. However, the evidence indicates that the time/date stamp at the Communications Center failed even to confirm the chronology established by the sequential numbering system which Sierra concedes to be accurate. For example, the time stamp on wire number 14 indicates a time of receipt of 9:09 p. m., whereas the time stamp on the subsequently received telegram number 15, indicates an earlier time of receipt, 7:51 p. m. Fourteen telegrams--numbers 15 through 29--all bear the same time stamp, 7:51 p. m., notwithstanding the fact that the messages themselves indicate transmission between 11:37 a. m. and 2:42 p. m. Furthermore, the time stamp is contradicted by the time affixed to wire number 16 by the Western Union Infomaster Computer system. Finally, several of the wires are date stamped September 31, while subsequently received wires were dated September 30. While it is impossible to determine at this time why the time/date stamp was so grossly inaccurate, it is clear that its markings bear no relationship to either the time or sequence in which telegrams were received in the Communications Center on September 30.

The protester also argues that the Navy erred in relying on the contents of the telex messages in establishing the time of receipt of the Gentex wire, citing Lambert Construction Company, B-181794, August 29, 1974, 74-2 CPD 131. In that case, Western Union information indicating that a telegraphic bid modification was timely received was rejected in favor of a communication facility time stamp which indicated late receipt. Lambert, however, is distinguishable on several grounds. First, in Lambert the evidence indicated only that the time stamp conflicted with the Western Union information, not that the time stamp was malfunctioning as in the instant case. Second, the information supplied by Western Union was in no sense "maintained by the installation" in Lambert. In the instant case, the telegrams bearing the relied-upon information were within the Navy's custody even though the information contained therein was not within the Navy's control. The significance of this lack of control is mitigated here by the fact that the contents of the Varian and Gentex wires became relevant only after it was subsequently determined that the time stamp was unreliable.

Thus, the need to fabricate the time of transmission could only have arisen after the opportunity to do so had passed. See Hydro Fitting Mfg. Corp., B-183438, June 2, 1975, 75-1 CPD 331, in which we held that the mailing of a confirming copy of an unreceived telegraphic bid prior to the time the protester could have known of the nonreceipt reliably established the authenticity of the bid. In conclusion, we find that the evidence relied upon by the Navy falls within the standard of ASPR § 7-2002.2(c)(ii) and establishes that late receipt in the bid opening room was due solely to Government mishandling in identifying and processing the Gentex modification.

As an alternate basis for protest, Sierra alleges the ambiguity of the Gentex modification which states:

"Please reduce our quoted price by 21.33 dollars each for APH-6D helmets. All other details of bid remain unchanged."

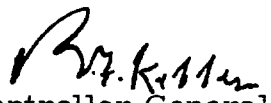
The protester contends that the message fails to indicate whether the modification applies to all, or merely one, of the two types (sizes) of APH-6D helmets being purchased and that this ambiguity renders the bid nonresponsive. Gentex argues that the issue has been untimely raised under § 20.2 of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), since Sierra failed to allege the ambiguity until February 2, 1975, over a month after the protester had an opportunity to view a copy of the subject telex which was included in the agency report dated December 16, 1975. In that report, the Navy stated that consideration of the Gentex modification would make that company the low bidder.

It is unnecessary for our Office to decide whether the allegation of ambiguity was raised in a timely manner because, even assuming that it was, Sierra would not prevail on this issue. In Chemical Technology, Inc., B-179674, April 2, 1974, 74-1 CPD 160, we upheld acceptance of a bid containing an ambiguous price term where no prejudice could result to other bidders since the bid was low under either of the two prices submitted and the contractor indicated that it intended the lower price. Likewise, in the instant protest, Gentex would be the low bidder under any of the possible interpretations suggested by the protester and Gentex indicates its intention to be bound by the interpretation yielding the lowest bid. Consequently, even assuming both the timeliness of the issue and the ambiguity of

B-185265

the Gentex modification, the Gentex bid, as modified, would still be eligible for award.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States