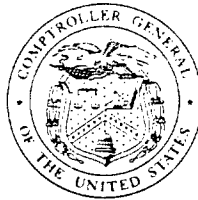


DECISION



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

9916

FILE: B-193953

DATE: April 24, 1979

MATTER OF: Gross Engineering Company--Reconsideration

[Protest of Late Bid Rejection]

DIGEST:

1. Where protester questions accurate mailing and subsequent receipt of its bid because of handwritten time/date stamp on envelope by Government installation and illegible time/date stamp indicating receipt at Postal Service branch, only documentary evidence indicates bid was received at installation after date set for bid opening and is controlling under provisions of solicitation and regulation.
2. Fact that late bid was mistakenly opened confers no additional rights on protester.
3. Even though late bid is lower than awarded contract price, it may not be accepted.
4. Where provisions of solicitation, which incorporated FPR, allowing consideration of late bids are not met, late bid properly was not considered for award.

DLG 01019

Gross Engineering Company (Gross) requests reconsideration of our decision in Gross Engineering Company B-193953, February 23, 1979, 79-1 CPD 129, wherein we summarily denied its protest.

DLG 01020

Gross protested the rejection of its bid as late by the United States Penitentiary, Leavenworth, Kansas (Leavenworth), under invitation for bids (IFB) No. 132-8918. The determination that Gross' bid was late was based upon the fact that it was not received in the designated bid opening room until after the time set for bid opening (2:00 p.m., December 21, 1978), as specified in the IFB. Gross' first contention was that in accordance with clause 7, "Late Bids, Modifications

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of Bids, or Withdrawals of Bids," its bid should be reviewed to determine the accurate mailing and receipt of its bid. Gross's second contention was that due to "timely notification" to the contracting officer (less than 30 minutes after bid opening) that Gross' bid, even though it had not been received, was approximately \$20,000 lower than the low bid award should be made to it under clause 10 of Standard Form 22 as the most advantageous bid. Our Office found that Gross' bid had been properly rejected by the contracting officer.

With regard to the first contention, Gross now contends that our decision was without merit because it was based upon Gross' December 28, 1978, letter which stated "per my conversation with * * * [the contracting officer], our proposal was received at 9:15 a.m. on December 22, 1978," and that this fact was not verified by our Office. Gross further contends that when its bid package was returned by Leavenworth (received March 1, 1979), Gross noted that not only had the envelope been opened, but the time/date stamp affixed to the envelope was only a handwritten notation. Gross now questions the opening of its bid as well as the validity of the handwritten notation. Gross also noted that the time/date stamp indicating receipt at the Leavenworth Post Office was not legible and therefore questions the accurate mailing and subsequent receipt of its bid.

At the time the protest was filed with our Office, we contacted Leavenworth and verified the time/date stamp quoted in Gross' December 28 letter. As we stated in our prior decision, documentary evidence is necessary to establish whether a bid was timely received. Section 1-2.201(31) (1964 ed. amend. 193) of the FPR provides that the only acceptable evidence to establish the time of receipt at the Government installation is the "time/date stamp on the bid wrapper or other documentary evidence [emphasis added] of receipt maintained by the installation." The only documentary evidence indicates that the bid was received at the installation after the date set for bid opening. Although the Leavenworth Post Office's time/date stamp

was illegible, this fact is not important since it is the time of receipt at the Government installation that is controlling.

With regard to the opening of Gross' bid, we agree that the opening was unauthorized since FPR § 1-2.303-7 (1964 ed. amend. 118) provides that late bids ineligible for consideration are to be held unopened until after award and then returned to the bidder. However, we have held that the erroneous opening of a late bid does not justify disregarding the requirement that a contract award be made to the lowest responsible and responsive timely bidder. V.J. Gautieri, Inc., B-181720, September 17, 1974, 74-2 CPD 173. Therefore, the fact that the late bid was mistakenly opened confers no additional rights upon Gross. Peter Kiewit Sons' Company, B-189022, July 20, 1977, 77-2 CPD 41.

With regard to Gross's second contention that its bid was most advantageous because it offered a lower price, our Office held that in accordance with FPR § 1-2.301 (1964 ed. amend. 178) for a bid to be considered for award it must comply with the IFB (as to the method and timeliness of submission and as to the substance of any resulting contract) so that all bidders may stand on an equal footing and the integrity of the competitive bidding system may be maintained. Since Gross' bid did not comply with the IFB as to timely submission it could not be considered for award. In this case, the rule works to the financial disadvantage of both Gross and the Government but the purpose of the rule is to maintain the integrity of the competitive bidding system and that purpose transcends the Government's loss of a lower price in a particular procurement.

Gross now contends that our decision was without merit because it was based upon the contents of the FPR and that there was nothing in the solicitation that referred the bidder to the FPR. Gross further argues that clause 10 indicates that the Government "may waive any informality in the bid received."

The current procedures used in soliciting bids are prescribed by departmental procurement regulations which supplement Title III of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. §§ 251-260 (1976). The regulations, referred to as the Federal Procurement Regulations, are promulgated by GSA and are applicable to all Federal agencies to the extent specified in the Federal Property and Administrative Services Act or other law. Bidders are charged with constructive notice of these regulations. AII Systems, B-181729, February 27, 1975, 75-1 CPD 117. Further, as we pointed out in our prior decision clause 7 of the IFB provided that bids received after the exact time set for opening would not be considered, except under circumstances not prevailing here. Since Gross' late bid was not for consideration, clause 10 does not apply.

Gross also complains that (1) after our Office requested a report from the contracting agency (as provided for by § 20.3 of our Bid Protest Procedures, 4 C.F.R. part 20 (1978)), we decided the protest on the merits without receiving the report; (2) as required by § 20.3 of our Procedures, the contracting officer did not give notice to "all bidders or proposers who appear to have a substantial and reasonable prospect of receiving an award"; (3) the contracting officer failed to notify the Comptroller General of the contract award while the protest was pending before our Office; and (4) our Office took approximately 50 days to issue a decision on the protest instead of the stated 25 days.

First, as we held in our February 23 decision, since it was clear from Gross' submission that the protest was legally without merit, we were able to decide the matter on that basis and therefore a report from the contracting agency was not necessary.


Second, the question of whether the contracting officer did or did not notify the appropriate parties that a protest was pending before GAO is a procedural matter which would not affect the award of a contract.

Third, while the protest was pending with this Office, Leavenworth determined pursuant to FPR 1-2.407-8(b)(3) (1964 ed. amend. 68) to proceed with an award prior to resolution of the protest because of the urgent need for the item being procured. In accordance with § 20.4 of our Procedures, Leavenworth notified our Office that award was being made.

Fourth, Gross' protest was filed with our Office on January 19, 1979. Our Office issued a decision on February 23, 1979, or within 23 working days after filing of the protest, which is within the 25-working-day goal specified in our Procedures.

In view of the above, our prior decision is affirmed.

Deputy


Comptroller General
of the United States