



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Brazos Roofing, Inc.

File: B-275113

Date: January 23, 1997

Alan M. Grayson, Esq., and Ronald B. Vogt, Esq., Grayson and Associates, for the protester.

Karl Dix, Jr., Esq., Smith Currie & Hancock, for ACC Construction Company, Inc., an intervenor.

Anne W. Westbrook, Esq., and Gregory W. Vanagel, Esq., Department of the Army, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly rejected protester's bid as late is sustained where: (1) agency amended solicitation so close to the deadline for submitting bids that bid submission by facsimile was the only practicable alternative available to bidders; (2) facsimile machine designated in solicitation became inoperable for some indefinite period of time during the morning of the bid submission deadline; (3) protester transmitted its bid to an alternate facsimile machine based on advice from an agency employee other than the designated point of contact only after unsuccessfully attempting to telephone the designated contact; and (4) the protester's bid package arrived at the installation and was in the hands of agency officials by the deadline for submitting bids.

DECISION

Brazos Roofing, Inc. protests the award of a contract to ACC Construction Company, Inc. under invitation for bids (IFB) No. DACA21-96-B-0137, issued by the U.S. Army Corps of Engineers for hurricane damage repairs at Seymour Johnson Air Force Base, North Carolina. Brazos contends that the Army improperly rejected its low bid as late.

We sustain the protest.

The IFB was issued on September 13, 1996 and, because of the urgent need for the repairs, called for bids to be submitted by September 17.¹ Two amendments were issued and bid opening was ultimately set for Monday, September 23 at 1:00 p.m. local time. The second amendment, which made numerous substantive changes to the work contemplated, was provided to prospective bidders on Friday, September 20, by overnight delivery; because of the late issuance of this amendment in relation to the deadline for submitting bids, the agency orally advised firms that bids could be submitted by facsimile (fax) and specified the contracting activity's official fax number for receiving bids.

On the day of bid opening, Brazos made several unsuccessful attempts to transmit its bid to the agency's official fax machine, beginning at approximately 10:30 a.m. agency time. After these unsuccessful attempts, the Brazos employee responsible for transmitting the firm's bid attempted several times to telephone the individual designated in the solicitation as the agency's official point of contact to determine what steps to take to fax its bid. Brazos was unable to contact the individual after three or four attempts. The final call was routed by an operator to another individual in the contracting office. After the Brazos employee explained that she had been unsuccessfully attempting to transmit to the designated fax machine, the agency's employee (a secretary) provided an alternate fax number to the Brazos employee. After receiving this information, the Brazos employee began attempting to fax to both numbers. At approximately 11:30 a.m., three pages of Brazos's 35-page bid document were successfully transmitted to the official fax machine, after which the transmission was interrupted. Thereafter, at approximately 12:20 p.m., the Brazos employee transmitted the bid document to the alternate fax machine; this transmission lasted approximately 21 minutes, and was completed at approximately 12:41 p.m.

At some point during this time period, the agency's official fax machine was inoperable because it had run out of ink; the record does not show how long the machine remained inoperable, but does show that it was not until shortly before the 1:00 p.m. deadline for submitting bids that agency personnel became aware of the problem and fixed it. Further, because a bid was being received at about 1:00 p.m., and because this was the only bid received on the official fax machine up to that time, the contracting officer decided to extend bid opening to 1:30 p.m. (apparently without advising bidders). Two more bids were received at the official fax machine by 1:30 p.m.² At approximately 1:30 p.m., an agency employee discovered the

¹The procurement utilized other than full and open competitive procedures because of urgency pursuant to 10 U.S.C. § 2304(c)(2) (1994).

²The record shows that it was the awardee's bid that was being received at the time
(continued...)

Brazos bid on the alternate fax machine, which he then delivered to the bid opening official sometime between 1:30 p.m. and 1:40 p.m. The official determined that, because the bid had not been received in the bid opening room by the 1:30 p.m. deadline, it was late and could not be accepted.³

As a general rule, a bid received in the office designated in a solicitation for the receipt of bids after the time set for bid opening is a late bid and cannot be considered for award. Butt Constr. Co., Inc., B-258507, Jan. 30, 1995, 95-1 CPD ¶ 45. On the other hand, where a bid that has been mailed or faxed does not timely arrive at the bid opening room due solely to government mishandling at the contracting installation, the bid may be considered even though it is late. Id.; Federal Acquisition Regulation (FAR) § 14.304-1. In addition, as a general principle, where a bidder has done all that it could and should to ensure the timely delivery of its bid, it should not suffer if the government fails in its own responsibilities, provided that acceptance of the bid does not compromise the integrity of the competitive bidding process. AABLE Tank Servs., Inc., B-273010, Nov. 12, 1996, 96-2 CPD ¶ 180 (and cases cited therein).

We conclude that Brazos did everything it reasonably could in order to timely deliver its bid, and that the agency's actions were the cause of Brazos's bid being received in the bid opening room late. First, the late IFB amendment--provided to bidders the business day before bid opening--made fax transmission the only practicable alternative for remotely located bidders to deliver their bids, and the agency apparently realized this in orally authorizing faxed bids after issuance of the

²(...continued)

the official fax machine was repaired. The record further shows that the awardee's entire bid document was not successfully transmitted at that time, and that at some time after 1:30 p.m., ACC transmitted the remainder of its bid document. The agency concluded that, because all of the essential portions of the bid (such as the firm's pricing schedule and essential representations and certifications) had been received prior to 1:30 p.m., the firm had submitted a timely, responsive bid. As for the two remaining bids received at the official fax machine, one was not transmitted in its entirety before the original 1:00 p.m. deadline, and transmission of the second did not commence until approximately 1:13 p.m.

³The Brazos bid document did not have the legend typically imprinted by a receiving fax machine showing the time and date of receipt. This, in part, led the bid opening official to find that he could not determine with certainty whether the bid had arrived at the facility by 1:30 p.m. The record before our Office, however, includes a copy of the telephone bill for Brazos's fax machine. This bill shows dispositively that a call was placed to the alternate fax machine at approximately 12:20 p.m. and that the duration of the call was approximately 21 minutes.

second amendment. Second--and centrally--Brazos was unable to timely transmit its bid to the official fax machine because the machine ran out of ink for some indeterminate amount of time prior to bid opening.⁴ Although Brazos tried to fax its bid well before the original 1:00 p.m. deadline, it was unable to do so because of this problem. Third, Brazos repeatedly attempted to telephone the agency's designated contact to determine how to proceed in faxing its bid, but that individual was unavailable; the agency does not explain why no contracting official was available to respond to bidder questions during the period before bid opening. It was only due to this unavailability that Brazos ultimately was transferred to another individual, who gave Brazos the alternate fax number. Finally, Brazos transmitted its bid to this alternate number (and also actually transmitted three pages--received at 11:49 a.m.--to the official fax machine) and it is undisputed by the agency that the bid was received at the installation no later than the extended bid opening time.⁵ It thus is apparent that the bid would have been transmitted to the official fax machine, and received in the bid opening room, prior to the extended bid opening time but for the agency's actions.

The Army argues that Brazos's own actions--relying on the oral advice of an unauthorized agency employee in faxing its bid to other than the official fax machine--were the cause of the lateness of its bid. However, while Brazos's actions may have been in the chain of events that resulted in the late receipt, those actions were solely in response to the agency's actions: had the ink been replenished in the official fax machine, Brazos could have timely transmitted its bid to that machine, would have had no need to call the agency, and would not have been advised of the alternate fax number; or, had the designated contact been available after Brazos was unable to transmit its bid, that individual could have advised Brazos how to proceed, and Brazos never would have spoken to the unauthorized agency employee. Not only were Brazos's actions in response to the agency's, but Brazos's actions were reasonable at each step of the way--indeed, each step Brazos took was

⁴The agency states that its fax machine has a memory function which permits the receipt of documents even when the machine has run out of ink. The protester has submitted the manual for the machine, however, which shows that it has only a 28-page memory capacity. The agency has not rebutted this evidence, and also has not addressed whether the machine's memory was full at the time of Brazos's unsuccessful transmission attempts. We thus have no reason to question the protester's assertion that the agency's fax machine would not accept its attempted transmission.

⁵We note that the time of receipt on the alternate machine, while not in dispute, is established by Brazos's telephone bill, as corroborated by statements and affidavits by agency personnel. See generally J.C.N. Constr. Co., Inc., B-270068; B-270068.2, Feb. 6, 1996, 96-1 CPD ¶ 42.

the only reasonable step it could take at that juncture.⁶ Therefore, we do not consider Brazos's actions to be the cause of the late receipt of its bid.

The Army notes that the IFB incorporated, and Brazos thus was on notice of, the clause appearing at FAR § 52.214-31 (FAC 90-39), which advises bidders that if they chose to submit a bid or modification by fax, the government is not responsible for any failure of receipt attributable to the "availability or condition" of the receiving fax machine; it concludes that availability or condition encompasses the problem encountered here, and that Brazos thus must suffer the consequences of the official fax machine being inoperable. We disagree. First, the IFB provision here was different from the standard FAR provision in that, by its terms, it applied only to bid modifications, not bids; thus, contrary to the premise of the Army's position, Brazos was not on express notice that the agency was not responsible for the availability or condition of the official fax machine for purposes of receiving Brazos's bid. More significantly, the provision, by its terms, applies where "the bidder chooses to transmit a facsimile bid. . . ." Because the agency amended the IFB only 1 working day before bid opening, remotely located bidders such as Brazos effectively could not "choose" among bid submission methods (for example, bids could not be sent by registered or certified mail at least 5 days prior to bid opening, the method Brazos states it ordinarily uses); again, the agency's last minute authorization of faxed bids seems to have been in recognition of the limited bid delivery options available to bidders following issuance of the second amendment. We conclude that the provision did not apply under the facts of this case.

Finally, we find that acceptance of the Brazos bid would not compromise the integrity of the competitive bidding process. The operative consideration in this respect is whether the late bidder would gain an unfair competitive advantage over other bidders by, for example, being able to offer more favorable pricing as a result of submitting its bid late. AABLE Tank Servs., Inc., *supra*. Although the alternate fax machine did not imprint a time/date stamp on the fax, the bid was in fact received by the agency, Brazos's telephone billing statement shows that its transmission was completed well prior to the original 1:00 p.m. deadline for submission of bids, and the record includes a statement from an agency employee showing that the bid was discovered on the alternate fax machine at approximately 1:30 p.m., the extended bid opening time. Thus, although the Brazos bid was not in

⁶The agency suggests that Brazos should have telephoned the agency to advise that it had transmitted its bid to the unauthorized machine. However, Brazos faxed its bid to the alternate machine without first contacting contracting officials only because it was unable to reach the designated official; in light of those prior difficulties--and since the agency does not assert that the contact in fact would have been available had Brazos called again--we do not think Brazos reasonably could be required to telephone the agency again after transmitting its bid.

the possession of the bid opening official until approximately 1:40 p.m., under these circumstances Brazos could not have gained an unfair competitive advantage over the other bidders by virtue of this late receipt. We conclude that the Army therefore should have accepted Brazos's bid.

We understand that the agency has suspended performance of the contract pending resolution of the protest. Accordingly, and in view of the foregoing discussion, we are recommending by separate letter of today to the Secretary of the Army that the contract awarded to ACC be terminated for the convenience of the government, and that award be made to Brazos, if otherwise proper. We also recommend that Brazos be paid the costs of filing and pursuing its protest, including reasonable attorneys' fees. Brazos should submit its certified claim, detailing the time expended and the costs incurred, directly to the Army within 60 days of its receipt of this decision. Bid Protest Regulations, section 21.8(f)(1), 61 Fed. Reg. 39039, 39046 (1996) (to be codified at 4 C.F.R. § 21.8(f)(1)).

The protest is sustained.

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