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**Comptroller General
of the United States**

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

Decision

Matter of: Weeks Marine, Inc.

File: B-292758

Date: October 16, 2003

Timothy A. Sullivan, Esq., Starfield & Payne, for the protester.
Daniel C. Sauls, Esq., and Douglas L. Hilleboe, Esq., Steptoe & Johnson LLP, for Great Lakes Dredge & Dock Company, an intervenor.
Joseph J. Cox, Esq., Lorraine C. Lee, Esq., and Rita M. Fang, Esq., U.S. Army Corps of Engineers, for the agency.
Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably accepted late bid where the paramount cause of the late receipt was affirmative misdirection by the agency and where consideration of the late bid did not compromise the integrity of the competitive procurement system.

DECISION

Weeks Marine, Inc. protests the decision by the U.S. Army Corps of Engineers to accept the apparent low bid submitted by Great Lakes Dredge & Dock Company under invitation for bids (IFB) No. DACW51-03-B-0013, issued for the Maintenance Dredging Shinnecock Inlet Interim Beach Nourishment Project. Weeks, the second low bidder, argues that the bid submitted by Great Lakes was late and should have been rejected because it did not qualify under any of the exceptions to the late bidding rules.

We deny the protest.

The IFB provided that sealed bids were due in original, with one copy, “at the place specified in Item 8 by 11:00 AM local time” on August 22, 2003.¹ IFB, Standard Form

¹ The original date for bid opening, August 18, 2003, was changed by amendment. See IFB, amend. No. 001.

1442, Item 13.A. Item 8 designated the place for receipt of bids as:

OPS-Support-MGT Support
26 Federal Plaza, Room 1934
New York, NY 10278.

The IFB also incorporated, by reference, Federal Acquisition Regulation (FAR) § 52.214-7, entitled “Late submissions, modifications, and withdrawals of bids,” which, as relevant here, 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.

As explained by the agency, on the day scheduled for bid opening, approximately 10 minutes before the 11:00 a.m. bid opening time, Great Lakes’ representative, Andrew Inglis, arrived on the 19th floor of 26 Federal Plaza, with Great Lakes’ bid in hand. Unable to immediately locate Room 1934, at approximately 10:55, Mr. Inglis obtained directions to Room 1934 from Jovencio Cariaga (a Corps employee) who was standing in the hallway. See Declaration of Andrew Inglis, Aug. 24, 2003; Contracting Officer’s Report (“CO Report”), Tab C, Memorandum for the Record by Jovencio Cariaga, Aug. 22, 2003.

Based on Mr. Cariaga’s directions, Mr. Inglis proceeded to Room 1934, which is also identified as Room 1936 (number 1934 is listed on top of the doorframe, while number 1936 appears at the side of the doorframe). In Room 1934/1936, Mr. Inglis encountered two Corps employees (Milagros Alexoudis and Wedad Youssef) and told them that he had a bid to deliver to Room 1934. Ms. Alexoudis observed Mr. Inglis holding what appeared to be a bid package and informed him that bids are usually received on the 18th floor and that he should go there to deliver his package. Ms. Youssef also told Mr. Inglis that he should go to the 18th floor. Ms. Alexoudis noted the time of the conversation to be approximately 10:55 a.m. See Inglis Declaration, supra; CO Report, Tab D, Memorandum for the Record by Milagros Alexoudis, Aug. 22, 2003, and Tab E, statement of Wedad Youssef, Aug. 27, 2003.

As explained in his declaration, Mr. Inglis then proceeded immediately to the 18th floor where he saw a sign indicating that the bid opening for the Shinnecock project was in Room 1841. Running down the hall, he located Room 1841 and tried to open

the door but found that it was locked. After knocking, someone opened the door and Mr. Inglis entered the room.

In Room 1841, at exactly 11:00 am (according to the official bid opening clock), Ina Ohrwashel, the bid opening officer for the Shinnecock project, announced: "It is now 11:00 and we shall proceed with the opening of bids." CO Report at 2; CO Report, Tab I, Memorandum for the Record by Ina J. Ohrwashel, Aug. 22, 2003. Jesse Arrington, the Corps employee responsible for collecting bids prior to bid opening, then closed and locked the glass door to Room 1841. When he closed the door, he did not see anyone in the hallway. CO Report, Tab F, Statement of Jesse Arrington, Aug. 28, 2003. Two other Corps employees who were in the bid opening room (Rita Fang and Robert Greco) likewise did not see anyone behind the door at that time. See CO Report, Tab G, Declaration of Rita Fang, Assistant District Counsel, Aug. 29, 2003, and Tab H, Statement of Robert Greco, Aug. 27, 2003.

Ms. Ohrwashel then opened the bid from Weeks, the only bid then received, and began to read the 18 line items of the bid.² At 11:01, after Ms. Ohrwashel had read approximately three of the line items, Mr. Inglis knocked on the door of Room 1841. See CO Report, Tab I, Memorandum for the Record by Ina J. Ohrwashel, supra. Someone in the audience opened the door and, upon entering the room, Mr. Inglis announced that he had a bid and handed Great Lakes' bid to Rita Fang, who took custody of the bid and recorded it as received at 11:01. She noted that Mr. Inglis appeared to be out of breath when he arrived and that the envelope, which contained Great Lakes' bid, was completely sealed. See CO Report, Tab G, Fang Declaration, supra. Because it was believed that Great Lakes' bid was late due to no fault of the government, it was not opened and read into the record. See CO Report at 2; CO Report, Tab G, Fang Declaration, supra.

After the bid opening, however, the agency examined the solicitation and discovered that Block 8 mistakenly instructed bidders to deliver their bids to Room 1934. The contracting officer, in consultation with counsel and other agency personnel, determined that Great Lakes' bid was late due to the error contained in Block 8, noting that the bid was delivered in a sealed envelope and that there was no evidence of tampering. The agency then opened Great Lakes' bid and read it into the record.³ Ms. Fang, who reviewed the bid, further noted that there were no erasures

² The IFB included a total of 18 separate line items, which were divided equally between two schedules (A and B). Each schedule included a base item with two separate line items and two options. The first option included five separate line items and the second option included two line items.

³ Great Lakes was the apparent low bidder, with a total price for schedule A (including options) of \$7,492,580 and a total price of \$11,822,850 for Schedule B (including options). Great Lakes' combined price, when schedules A and B were added together, was \$19,315,430. Weeks, the second low bidder, submitted a total

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or corrections and that the handwriting, which was in blue marker, appeared to be the same throughout. See CO Report at 2, 6; CO Report, Tab G, Fang Declaration, supra.

Based on these circumstances, the protester argues that Great Lakes' bid was late and should not have been accepted. As a general matter, bidders are responsible for ensuring that their bids are received at the proper place at the proper time, and late bids, generally, must be rejected. A bid is late if it is received at the government office designated in the IFB after the exact time specified for the receipt of bids. See FAR §§ 14.304(b)(1), 52.214-7(b)(1). As set forth in the FAR provision incorporated in the IFB, a late bid may be accepted if it was received at the government installation designated for receipt of bids and was under the agency's control, prior to the time set for receipt of bids. See FAR § 52.214-7(b)(1)(ii).

Great Lakes argues that its bid was not late because it was timely delivered to the room designated in the IFB for receipt of bids. Literally applying the above regulations, however, Great Lakes' bid was late because it was not timely received by the agency. Although not defined by regulation, in order for the government to "receive" a bid, a bidder must relinquish control of the bid to the government (i.e., by transferring it to an appropriate official or by placing it in officially designated location for the submission of bids such as a bid depository box). See George W. Kane, Inc., B-245382.2, Feb. 3, 1992, 92-1 CPD ¶ 143 at 3-4 (bid untimely where it was placed on desk in bid opening room 1 minute before bid opening). While the record here clearly reflects that Mr. Inglis timely arrived at the room designated in the IFB for receipt of bids, the record also reflects that he did not relinquish control of the bid to the government until after the time set for receipt of bids; thus, the bid was not timely "received," making it late.

Similarly, Great Lakes' bid would not be acceptable under a literal application of the exception to the late bid provisions noted above. For the same reason the bid was late (Mr. Inglis had not relinquished control of Great Lakes' bid prior to the time of bid opening), the bid was not "received" at the government installation designated for receipt of bids prior to the time set for receipt of bids. Consequently, the bid was also not in the government's control prior to the time of bid opening.

A strict application of the late bid regulations, however, is not appropriate in this case. In various instances we have found late bids acceptable, notwithstanding the

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price for Schedule A (including options) of \$10,375,650 and a total price of \$13,115,650 for Schedule B (including options). Weeks' combined price was \$23,491,300. See CO Report, Tab K, Great Lakes' bid, Tab L, Weeks' bid, Tab M, Abstract of Bids.

fact that the regulations at issue did not provide for acceptance of the bid. Our holdings in these cases stem from the principle that the late bid rules should not be used to reject a bid where doing so would contravene the intent and spirit of the competitive system. See Adirondack Constr. Corp., B-280015.2, Aug. 25, 1998, 98-2 CPD ¶ 55 at 3 (noting that while the relevant FAR provision explicitly applied to government mishandling after receipt at the government installation, we have applied the same analysis even if the mishandling occurred prior to actual receipt of the bid); AABLE Tank Servs., Inc., B-273010, Nov. 12, 1996, 96-2 CPD ¶ 180 (holding that a late hand-carried bid was acceptable even though FAR provisions did not expressly apply to hand-carried bids); Kelton Contracting, Inc., B-262255, Dec. 12, 1995, 95-2 CPD ¶ 254 at 3.

As we stated in AABLE:

The purpose of the rules governing the consideration of late bids is to insure for the Government the benefits of the maximum of legitimate competition, not to give one bidder a wholly unmerited advantage over another by over-technical application of the rules.

AABLE Tank Servs., Inc., *supra*, at 4 (quoting Hydro Fitting Mfg. Corp., B-183438, June 2, 1975, 75-1 CPD ¶ 331 at 6).

When evaluating the acceptability of a late bid outside the strict confines of the late bid regulations, we are guided by the general principle that where a bidder has done all it could and should to fulfill its responsibility, it should not suffer if the bid is untimely because the government failed in its own responsibility, so long as acceptance of the bid would not cast doubt on the integrity of the bidding process. See Palomar Grading & Paving, Inc., B-274885, Jan. 10, 1997, 97-1 CPD ¶ 16 at 3-4. Accordingly, we have found late bids acceptable where the government's affirmative misdirection—such as erroneous solicitation instructions—was the paramount cause of a bidder's untimely delivery of its bid since an agency has an affirmative duty to establish procedures for the timely receipt of bids. See *id.*; Select, Inc., B-245820.2, Jan. 3, 1992, 92-1 CPD ¶ 22 at 4.

In this case, the IFB listed the wrong room for delivery of bids. This error, which was attributable solely to the government, directly resulted in Great Lakes submitting its bid 1 minute late. Had the government provided for the receipt of bids in the room identified in the IFB, there is no doubt that Great Lakes' bid would have been timely; the record clearly demonstrates that Great Lakes was at the room designated for receipt of bids approximately 5 minutes in advance of the time set for bid opening. But, because Great Lakes was required to make its way from the designated bid opening room to the actual bid opening room, the government effectively caused Great Lakes' bid to be received late. As a consequence, the misdirection by the agency was the paramount cause of Great Lakes' untimely submission of its bid.

Relying principally on our decision in Adirondack Constr. Corp., *supra*, the protester argues that the paramount cause of Great Lakes' late bid was not misdirection by the government, but rather, Great Lakes' failure to leave sufficient time before bid opening to submit its bid. The protester also asserts that Great Lakes' use of an individual who was not familiar with the agency's official bid opening room was negligent, and suggests that this contributed to the bid's late receipt by the government. These arguments, however, are without merit.

In Adirondack, we held that an agency properly rejected a late bid where the bidder, due to an improper assumption concerning the official bid opening clock, allowed less than 1 minute to reach the bid opening room and thus failed to notice signs posted by the agency changing the bid opening room to the room next door. In this case, however, the record clearly reflects that 5 minutes before bids were due, Great Lakes had arrived at the place designated for the receipt of bids and there were no signs directing bidders to another room. See Saint Louis Tuckpointing and Painting Co., Inc., B-212351.2, Nov. 18, 1983, 83-2 CPD ¶ 588 at 2-3 (holding that paramount cause for late delivery of bid was the agency's failure to adequately direct bidders once they arrived at the general location since bidder arrived at the general location for delivery of bids "with ample time"—5 minutes before bid opening—to deliver its bid). Because Great Lakes had arrived at the room designated in the IFB for receipt of bids with sufficient time to submit its bid, the agency's designation of the wrong room in the IFB was the paramount cause for the late delivery of its bid.

Nor do we believe that Great Lakes contributed to the lateness of its bid by using an individual who purportedly was not familiar with the agency's usual bid opening procedures. All bidders, regardless of their knowledge of an agency's internal operating procedures, should be able to reasonably rely on the bid delivery instructions in an IFB. To hold otherwise would be inconsistent with the fundamental notion that bidders must be treated equally by a procuring activity.

As a final matter, it does not appear that accepting Great Lakes' bid compromised the integrity of the procurement. When addressing this issue, the operative question is whether the late bidder gained an unfair competitive advantage over other bidders as a result of having submitted its bid late. See Brazos Roofing, Inc., B-275113, Jan. 23, 1997, 97-1 CPD ¶ 43 at 5. In this regard, the protester emphasizes the fact that the agency did not receive Great Lakes' bid until after approximately three of the protester's 18 bid line items had been disclosed. According to the protester, this provided Great Lakes with the opportunity to decide not to furnish the bid after bid opening. The protester's concern, however, is tempered by the fact that the position in which Great Lakes was placed resulted from the actions of Corps personnel and was not by its own design or choosing.

Moreover, there is nothing in the record to suggest that Mr. Inglis, who delivered Great Lakes' bid, actually heard the prices when they were read. Mr. Inglis had only a few minutes to go from the the 19th floor to the actual bid opening room on the 18th floor; when he arrived, Corps personnel noted that he appeared hurried and out of

breath. Agency personnel also indicated that they did not see anyone outside the bid opening room when the contracting officer called time. Under these circumstances, Mr. Inglis' statement in his declaration that he did not hear any prices being read prior to handing Great Lakes' bid to the agency, seems credible.

The protester also contends that the bid process was compromised because Great Lakes had the opportunity to submit a different, albeit unaltered, bid (the protester states that it is not uncommon for bidders to carry more than one bid package to a bid opening in order to make last minute changes in their bids without having to physically alter their prices). Putting aside the fact that there is no evidence suggesting that Mr. Inglis actually overheard the reading of Weeks' line items and the fact that, of the 18 line items bid, only some three had been read when Great Lakes' bid was submitted, there is simply no evidence (as the protester itself admits, see Protester's Comments, Sept. 22, 2003, at 6) that Great Lakes substituted one bid package for another.

While the record demonstrates that Great Lakes submitted its bid approximately 1 minute after bid opening, there is no evidence suggesting that Great Lakes heard any of the protester's prices, nor is there any evidence that Great Lakes tampered with its bid (its bid package was sealed when submitted and there was no evidence that any of the line items had been altered). Under these circumstances, it was reasonable for the contracting officer to conclude that acceptance of Great Lakes' bid did not compromise the integrity of the bidding process.

The protest is denied.

Anthony H. Gamboa
General Counsel