



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: PBM Construction, Inc.

File: B-271344

Date: May 8, 1996

David J. Bader, Esq., Dillin & Bader, Inc., for the protester.

Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.

Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where facsimile bid modification was unacceptable because it was not authorized by the solicitation, agency determination to award on the basis of the unexpired original bid is unobjectionable.

DECISION

PBM Construction, Inc. protests the award of a contract to Dunton Construction Co., Inc. under invitation for bids (IFB) No. FWS 1-96-014 issued by the Department of the Interior, Fish and Wildlife Service, for certain construction at the Coleman National Fish Hatchery, Anderson, California. PBM contends that the agency improperly accepted the awardee's bid.

We deny the protest.

Bid opening was scheduled for 1:30 p.m. on February 6, 1996. The IFB required bidders to offer a 75-calendar-day government acceptance period and included the clause at Federal Acquisition Regulation (FAR) § 52.214-5, which provides in relevant part that "[f]acsimile bids, modifications, or withdrawals, will not be considered unless authorized by the solicitation." The IFB did not contain such an authorization.

The agency received Dunton's original bid of \$491,796 on February 2. By facsimile transmitted on February 5, Dunton increased its bid by \$42,700 to a total of \$534,496. PBM's bid was second low at \$544,780. Both bidders agreed to offer a 75-day government acceptance period. On February 6, PBM filed a pre-award agency-level protest, asserting that because facsimile bid modifications were not allowed under the solicitation, Dunton's bid should be rejected.

The contracting officer denied PBM's protest, stating that although facsimile bids were not authorized by the IFB, she had orally authorized facsimile bid modifications, as permitted under FAR § 14.202-7,¹ since "all contractors who inquired were told . . . they could fax a modification to their bid." Of the 28 bids considered for award, ten were modified by facsimile. By letter dated February 22, the agency made award to Dunton at the increased price of \$534,496, whereupon PBM protested to our Office.

The rules regarding the acceptance of facsimile bid modifications are well settled: a facsimile bid modification must be rejected where the solicitation does not expressly authorize its submission. See Michelin Aircraft Tire Corp., B-248498 *et al.*, Aug. 31, 1992, 92-2 CPD ¶ 142; G.D. Searle & Co., B-247077, Apr. 30, 1992, 92-1 CPD ¶ 406; H. Bendzulla Contracting, B-246112, Nov. 8, 1991, 91-2 CPD ¶ 441; Mabuhay Bldg. Maintenance Co., Inc., B-241908, Nov. 23, 1990, 90-2 CPD ¶ 424. The government cannot orally modify an IFB to allow for receipt of facsimile bid modifications where the IFB prohibits their submission, because to do so may be prejudicial to the other bidders.² G.D. Searle & Co., *supra*; see also Recreonics Corp., B-246339, Mar. 2, 1992, 92-1 CPD ¶ 249; Auto-X Inc., B-241302.2, Feb. 6, 1991, 91-1 CPD ¶ 122.

Shortly after PBM filed its protest with our Office, the agency recognized that it was improper for the contracting officer to accept facsimile bid modifications under the IFB. The agency reports that it has counseled the contracting officer that, while FAR § 14.202-7 permits her to authorize facsimile transmissions, FAR § 14.201-6(w) requires that she notify all bidders that facsimile transmissions will be

¹FAR § 14.202-7, Facsimile Bids, provides that a contracting officer may authorize facsimile bids and cites FAR § 14.201-6(w), which requires that the contracting officer insert the provision at FAR § 52.214-31 in the solicitation if facsimile bids or bid modifications are authorized. FAR § 52.214-31, among other things, defines a facsimile transmission, specifically states that facsimile transmissions will be acceptable under the solicitation, and provides a space for the contracting officer to insert the telephone number of the receiving facsimile equipment.

²The FAR prohibits the selected release of procurement information to only one bidder; that regulation provides that any information which is necessary in submitting bids, or the lack of which would be prejudicial to an uninformed bidder should be provided to all prospective bidders as a solicitation amendment. FAR § 14.208(c). Information concerning the availability of facsimile transmissions is procurement information that must be provided to all bidders since facsimile communication confers the potential competitive advantage of more time for preparation and/or modification of bids. See G.D. Searle & Co., *supra*.

acceptable by inserting the FAR § 52.214-31 clause into the solicitation. In addition, the agency took corrective action by modifying Dunton's contract to reflect its original bid, *i.e.*, imposing a price reduction of \$42,700. Dunton is currently performing the work in question at this reduced price.

PBM responded by asserting that this corrective action is impermissible. In PBM's view, protection of the integrity of the competitive bidding system requires the rejection of Dunton's bid because, when Dunton was told that its modified price was unacceptable, in effect it was given an improper opportunity to decide whether or not to be bound by its original bid. The protester also takes the position that the agency's initial, albeit improper, acceptance of Dunton's modified bid somehow extinguished the agency's right to require Dunton to perform at the original bid price, because the agency knows that Dunton intended a higher price.

In support of its position, PBM cites CCL, Inc., B-251527; B-251527.2, May 3, 1993, 93-1 CPD ¶ 354, aff'd, B-251527.3, Sept. 17, 1993, 93-2 CPD ¶ 178, in which our Office held that the award of a contract on the basis of an initial proposal was improper where the acceptance period for that offer had expired, the proposal had been modified during discussions, and the awardee had submitted a late best and final offer (BAFO). In that case, however, there was no viable offer extant on the basis of which the agency could properly have made an award. Under those circumstances, award on the basis of the initial offer was improper.

In contrast, here, while the facsimile modification was unacceptable, by its own terms, the original bid remained available for acceptance for 75 days. Bids on formally advertised or sealed bid procurements are required to be firm and are not subject to withdrawal, unless there is a bona fide mistake in bid. Duro Paper Bag Mfg. Co., 65 Comp. Gen. 186 (1986), 86-1 CPD ¶ 6, aff'd, B-221377.2, Feb. 14, 1986, 86-1 CPD ¶ 165. In this case, upon being advised that its modification was invalid, the awardee did not assert that the modification reflected the correction of any mistake; rather, it simply agreed to perform at its initial price. Absent any evidence that a mistake had been made,³ Dunton was bound by its initial bid, which the agency could not properly reject. Id.

As to PBM's contention that Dunton was given "two bites at the apple," as stated above Dunton was not given an opportunity to decide whether to be bound by its original bid—the bid was firm and was available for acceptance for 75 days. While such a second opportunity is, in some sense, made available to bidders in alleged mistake situations, typically in those situations a bid may not remain in contention

³Aside from the fact that the awardee did not claim a mistake, nothing in the reconsideration suggests the reasonable possibility of a mistake in the awardee's bid.

for award where the claimed correction is denied, id., and in payment Dunton never claimed a mistake in bid. In these circumstances, we fail to see how acceptance of Dunton's bid could be considered detrimental to the integrity of the competitive bidding system, and the agency's contract modification to reflect such an acceptance is unobjectionable.

The protest is denied.

Comptroller General
of the United States