

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

60037

FILE: B-184310

DATE: October 9, 1975 97839

MATTER OF: In-Trol (International Controls)

DIGEST:

Where invitation expressed only desired delivery date of 30 days from date of award and permitted submission of varying delivery periods by bidders, award to firm submitting low bid offering delivery within 100-120 days after receipt of order was proper as varying delivery period was determined to be reasonable by contracting officer. However, agency has advised contracting officer to use delivery clauses set forth in FPR in future as open-ended delivery terms are not considered compatible with sound procurement policy. See cases cited.

Invitation for bids No. 515-24-75 was issued by the Veterans Administration Hospital (VA), Battle Creek, Michigan, for the procurement of a diesel engine-generator electric plant. The In-Trol Division of the Aseeco Corporation (In-Trol), the second low bidder, protests the award made to the low bidder, the Empire Generator Corporation (Empire), because it believes the Empire bid was non-responsive to the delivery requirements of the invitation.

The delivery requirements were expressed in the invitation in the following manner:

"TIME OF DELIVERY: Delivery within 30 days from date of award, unless otherwise specified below. Be advised that in some cases award may be made on the basis of best delivery time.

" (Date)

In the space designated by the word "Date," In-Trol inserted "6-13-75." We presume this to be the date the bid was prepared as bids were opened on June 19. Empire inserted in that space "100-120 days after receipt of order." It is the position of In-Trol that inasmuch as the contracting activity did not insert any time in the "Date" space, the maximum 30-day requirement was binding on bidders and, consequently, the offer of a delivery schedule by Empire outside of the required delivery period made the Empire bid nonresponsive. Further, In-Trol notes that it submitted the shorter delivery schedule and brings our attention to the provision that "award may be made on the basis of best delivery time." In-Trol does not find the delivery requirement to be ambiguous.

Empire believes its bid to be entirely responsive and notes that the electric plant is not an off-the-shelf item and that a 30-day delivery requirement would have eliminated approximately 95 percent of any possible bidders for the project.

The VA states that, since the meaning of the delivery provision is not as clear as it might be, it has referred the contracting officer to section 1-1.316 of the Federal Procurement Regulations (FPR) (1964 ed. amend. 10) and the time of delivery clauses cited therein and requests our opinion as to whether any ambiguity in the delivery requirement might require cancellation of the contract.

We believe that the delivery requirement is sufficiently clear to permit a valid award. The In-Trol argument that delivery was to be made within 30 days unless the contracting activity specified otherwise (which it did not) ignores the provision in the delivery requirement that "award may be made on the basis of best delivery time." Since award on such a basis would be impossible unless insertion by a bidder of a delivery schedule or date other than 30 days was envisioned and permitted, we must conclude that the space designated "Date" was intended as a space for insertion by a bidder of a delivery schedule at variance with the specified 30 days after the date of contract award. Any other interpretation would not be reasonable as all bidders would be committed to the same delivery date, and the reference to "best delivery time" would have no meaning. In this regard, we observe that five out of the eight bidders inserted a different delivery schedule than the 30 days stated.

We have upheld the validity of invitations where, as here, bidders were permitted to select a delivery date so long as such date was within either a stipulated or a reasonable time after the "desired" delivery

date stated in the invitation. 46 Comp. Gen. 746 (1967), and cases cited therein. See also 51 Comp. Gen. 518, 521 (1972). Therefore, since there was a "desired" delivery date (30 days) and the contracting officer has determined the delivery period offered by Empire to be reasonable we can perceive of no legal basis to object to the award as made. Therefore the protest is denied.

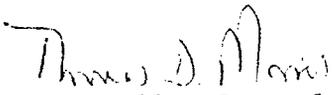
However, as noted in 46 Comp. Gen. 746, 748, supra:

"Although we have upheld as legally sufficient invitations specifying only the 'desired' delivery dates, so that the responsiveness of offered delivery terms could only be governed by a reasonableness test, as a matter of policy we feel such open ended delivery terms are unwise in that they afford an opportunity for the arbitrary inclusion or exclusion of bids. Even granting impartial consideration, these undefined delivery terms can only result in uneven and unpredictable treatment of bidders, because reasonable men will differ on what constitutes a reasonable delivery date under any given set of circumstances.

"Therefore, in the interest of providing as clear a guide to prospective bidders as possible, where early delivery is not of the essence--such as in invitations stating a desired delivery schedule--the invitation should state a final acceptable date and clearly advise that bids offering later delivery will be considered nonresponsive."

Since the agency has already taken remedial steps in this regard, it is not necessary for our Office to take any further action.

Acting


Comptroller General
of the United States