

# DECISION



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

FILE: B-186879

DATE: July 29, 1976 *61243* 98781

MATTER OF: Korad, a Division of Hadron, Inc.

## DIGEST:

1. Bid was properly rejected as nonresponsive where IFB required delivery within 90 days after date of contract and bidder modified bid form to show scheduled delivery within 90 days after receipt of order, since contract is deemed to result upon mailing of award and effect of delivery ARO is to shift to Government risk of failure in communication so that bidder's obligation to perform accrues 90 days after notice is received.
2. Protests concerning an affirmative determination of responsibility are no longer reviewed by GAO except for reasons not applicable in this case.

Korad, a Division of Hadron, Inc. (Korad) protests a determination by the Naval Regional Procurement Office, Washington Navy Yard, Washington, D. C. (Navy), under IFB NOO600-76-B-0127, for a laser welding system. It appears that the Korad bid was rejected as nonresponsive, since as Korad admits, "the IFB required delivery to be made within 90 days after date of contract and our stated delivery schedule showed 90 days ARO" (after receipt of order).

As stated by Korad, its bid was \$28,270, or \$7,730 less than the second low bid. Korad also offered an alternative but apparently similarly defective bid for less than the second low bid. It notes that the contracting officer found that, "since \*\*\* [Korad] referred to ARO \*\*\* next to the 90 days, this actually meant 96 days because of mail delays which would exceed the required 90 days delivery." However, Korad argues that:

"\*\*\*In addition to notification of awards via the mail, which would normally take 3-4 days to reach Santa Monica, the Purchasing Office in Washington, D. C. could have notified our local salesman whose office is in metropolitan Washington, D. C., telephoned the order to the factory in Santa Monica, as is frequently done."

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Korad indicates that it anticipates that delivery would actually be made within 60 days -- well within the 90-day period. Thus, it views the Navy's position as technical and arbitrary, and as "border[ing] on harassment."

The standard solicitation form (SF 33A, "Solicitation Instructions and Conditions," paragraph 10(d)) provides that a written award mailed or otherwise furnished shall be deemed to result in a binding contract. Thus, acceptance is effective upon mailing of the award notice, not from the date of receipt which may occur at a later time. 45 Comp. Gen. 700, 708 (1966); 35 Comp. Gen. 272, 274 (1955).

In Imperial Eastman Corp., 55 Comp. Gen. 605 (1975), 75-2 CPD 417, we denied a protest where the IFB required delivery within 280 days "after date of award," and the telegraphic bid offered delivery "280 days after receipt of award," noting that:

"This office \* \* \* has rejected the argument that 'date of contract' (or award) and 'réceipt of contract' (or award) are synonymous. To the contrary, we have regarded them as separate and distinct dates, holding that the latter is to be construed as the date upon which the award, or notice thereof, is actually received by the successful bidder, and that date is therefore to be determined by the distance between the parties involved and the manner by which either the contract documents or notice of award are transmitted from the Government to the successful bidder. \* \* \*."

Where either of two possible meanings might be attached to the terms of a bid, a bidder cannot be heard to explain his meaning, where to do so would affect the responsiveness of the bid. Simmonds Precision, B-185469, March 18, 1976, 76-1 CPD 186. Such deviations are not informalities or minor irregularities which may be waived. Infrared Industries, Inc., B-181739, November 20, 1974, 74-2 CPD 272. We have concluded that the effect of words "after receipt of order" is to require the addition of the number of days necessary for interstate transmission of the award, thereby rendering the bid nonresponsive. Cf. Kipp Construction Co., B-181588, January 16, 1975, 75-1 CPD 20. Moreover, pursuant to Armed Services Procurement Regulation 2-404.2(c) (1975), any bid which fails to conform to the delivery schedule or to permissible alternatives stated in the solicitation, must be rejected as nonresponsive.

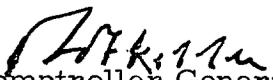
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Notwithstanding that Korad has referred to the receipt of an "order," by "order" it means award. We believe that a bidder may not thus impose upon the Government the duty to use other means of communication than were anticipated in the IFB, without also rendering the bid nonresponsive, since in any event, the consequence of the language utilized by Korad is to shift the risk of a failure in communication from Korad to the Navy. While an award of a Government contract ordinarily is effective upon mailing, and the time for performance was here intended to commence upon that event, Korad's obligation would at best accrue only 90 days after it received actual notification thereof.

Further, Korad apparently believes that the Navy should have found the second low bidder nonresponsive, suggesting that the second low bidder has not and could not build a system such as required by the Navy. In this connection, every award imports an affirmative determination of the successful awardee's responsibility. However, this Office no longer reviews protests concerning affirmative determinations of responsibility, absent allegations of fraud on the part of contracting officials or other circumstances not applicable here. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. While we do consider protests involving negative determinations of the protester's responsibility in order to provide assurance against the arbitrary rejection of bids, affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of the procuring officials who must suffer any difficulties resulting by reason of a contractor's inability to perform.

Accordingly, this protest is denied.

Deputy

  
Comptroller General  
of the United States