

DECISION



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

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FILE: B-185837

DATE: May 18, 1976

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MATTER OF: McNally Bros., Inc.

DIGEST:

1. Protester requested contracting officer to waive inadvertent omission in bid; contracting officer refused, finding bid nonresponsive; protest of this action was filed with agency, denied, and subsequently filed in GAO. Protest to GAO is timely since it was filed within 10 days of notice of initial adverse agency action on protest filed with agency.
2. Bidder's failure to insert in bid its guaranteed daily capability to perform moving services rendered bid non-responsive, because bid did not commit contractor to satisfy any guaranteed daily amount of the Government's requirements. Permitting bidder to complete bid after bid opening would be prejudicial to the other bidders and the competitive system.

McNally Bros., Inc. (McNally) protests the award of several contracts by the Army Training Center and Fort Dix, Fort Dix, New Jersey. McNally alleges that the rejection of its bid as nonresponsive was improper in that its failure to fill in the Estimated Quantities Section of its bid was a clerical error which the contracting office had authority to waive.

Invitation for Bids (IFB) No. DABT35-76-B-0034 solicited bids for the preparation of personal property of Department of Defense personnel for shipment, storage and intra-city or inter-area movement in the New York/New Jersey area. Bids were opened on December 2, 1975. Three of the bidders, including McNally, failed to indicate their guaranteed daily capability required by the Estimated Quantities Clause (Section B-17) of the solicitation. On December 3, 1975 McNally informed the contracting officer that the omission of the guaranteed daily capacity from its bid was inadvertent. McNally requested that the omission be considered a minor clerical error which the contracting officer had authority to waive.

By letter, dated December 12, 1975, the contracting officer denied McNally's request by declaring the bid nonresponsive. The record indicates that McNally protested this action by telephone and confirmed the protest by a written statement on December 17, 1975. On January 19, 1976 McNally was informed that its protest had been reviewed by the Head of the Procuring Activity and was denied. McNally then protested to this Office on February 2, 1976.

The Army maintains that McNally's protest is untimely because it was not filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action with respect to the McNally protest filed with the contracting officer. See section 20.2(a) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975). In the Army's view McNally initially protested to the contracting officer by letter dated December 3, 1975 requesting that its inadvertent clerical error be corrected. This request was denied on December 12, 1975 when the contracting officer determined McNally's bid to be nonresponsive. McNally, according to this view, had 10 days from December 12, 1975 to file its protest, even though McNally chose to appeal this initial determination to a higher authority within the Army.

Our review of the record indicates that the McNally protest has been filed in a timely manner. We believe that McNally originally filed its protest with the contracting activity orally on December 12, 1975 and confirmed it in writing on December 17, 1975. There was no adverse agency action on this protest until January 19, 1976 when it was denied. Any action taken by McNally prior to December 12, 1975 was, in our view, an attempt to have the contracting officer correct what McNally described as an inadvertent clerical error. McNally was first notified on December 12, 1975 that its bid was considered nonresponsive; only then could McNally protest the contracting officer's action. We think, therefore, that the protest was filed in a timely manner since it was filed within 10 days of notification of initial adverse action on its agency protest filed on December 12, 1975.

With regard to the merits of the protest, McNally argues that its failure to submit the guaranteed daily capability required by section B-17 of the solicitation was an inadvertent clerical error which the contracting officer was authorized to waive under Armed Services Procurement Regulation (ASPR) § 2-405 (1975 ed.). In addition, McNally claims that it has the capability to meet the Government's requirements and that there is no relation between the omission in the McNally bid and the ability of the company to perform.

The Army does not dispute McNally's ability to perform, but argues that McNally's failure to submit a guaranteed daily capability in its bid did not commit that firm to satisfy any guaranteed daily amount. Therefore, no binding contractual obligation could have been created on the basis of the McNally bid. It is further noted that such an omission is significant in the light of section L-3 of the solicitation, which provides:

"3. ORDERING LIMITATION (1970 MAY) Orders for items of supplies or services required will be placed under this contract by the Government and performed by the Contractor holding the initially awarded contract, to the extent of his guaranteed maximum daily capability. However, the Contractor may accept an additional quantity in excess of his capability in order to accommodate a single order. Orders for additional requirements will be placed with and performed by the next higher Contractor to the extent of his guaranteed maximum daily capability in like manner. This procedure will be repeated until the Government's total daily requirement is fulfilled. In the event this procedure does not fulfill the Government's total daily requirement, additional orders may be offered under the contract to contractors without regard to their guaranteed maximum daily capability." (Emphasis added.)

Section L-3 establishes the contractual scheme for placing orders in a certain priority determined in part by contractors' guaranteed daily capability. The scheme is unworkable in the absence of this information.

With respect to the responsiveness of bids we stated in 52 Comp. Gen. 604 (1973):

"A fundamental rule of the competitive bid system is that in order to be considered for an award a bid must comply in all material respects with the IFB at opening. 46 Comp. Gen. 434, 435 (1966); B-162793, January 18, 1968. The bidder cannot add to or modify the bid after opening to make the bid comply with the IFB, and it does not matter whether an error is due to inadvertence, mistake or otherwise. B-161950, November 2, 1961. The question of responsiveness of a bid is for determination upon the basis of the bid as submitted and it is not proper to consider the reasons for nonresponsiveness. B-148701, June 27, 1962."

Section B-17 of the IFB put the bidder on notice as to the importance of that section by stating that a failure to submit a guaranteed daily capability would render the bid nonresponsive. We have noted in the past that a requirement in a solicitation is not necessarily material simply because it is expressed in positive terms with a warning that failure to comply will result in rejection of the bid as nonresponsive. See, e.g., 52 Comp. Gen. 265, 267 (1972). However, language does alert the bidder that the author of the IFB considered the information required to be significant.

In conclusion, the failure of McNally to submit a guaranteed daily capability required the rejection of that bid as nonresponsive since the bidder had not committed itself to satisfy any daily guaranteed capability. The submission of a guaranteed daily capability was material element of a responsive bid in that such a guarantee was to be used to determine the allocation of orders in accordance with Section L-3 of the solicitation as noted above. Furthermore, if McNally is permitted to furnish a guaranteed daily capability after bid opening that firm has the option of rendering itself ineligible for award by submitting a guarantee less than the Government's minimum acceptable daily capability, or rendering itself eligible for a minimal award by submitting a guarantee of the Government's minimum acceptable daily capability, or of rendering itself eligible for the full award by submitting a guarantee amounting to the Government's estimated maximum daily requirement. Allowing a bidder to complete its bid after opening to the detriment of another bidder who had complied with the instructions in the IFB would serve to undermine the competitive system despite the immediate advantage which the Government would gain from the lower price in this particular procurement. The action of the contracting officer in determining that the McNally bid was nonresponsive was proper in the light of the foregoing analysis.

Accordingly, the protest is denied.

R. F. K. M.
Deputy* Comptroller General
of the United States