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**DECISION**



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

**FILE:** B-186699

**DATE:** October 22, 1976

**MATTER OF:** James R. Parks Co.

**DIGEST:**

Failure of bidder in possession of Government-owned property to include written authorization for use at fair rental value, as required by IFB, renders bid nonresponsive. Authorization is material since it may affect contract price, and may not be waived as mere informality even though it is alleged that value of Government-owned property is de minimus. Strict maintenance of established principles of competitive procurement held infinitely more in public interest than for Government to obtain pecuniary advantage in particular case by violation of rules.

The United States Army, Frankford Arsenal, Philadelphia, Pennsylvania, on April 16, 1976, issued invitation for bids (IFB) No. DAAA25-76-B-0228, covering manufacture and delivery of 1,638 each light, aiming post M14.

Low bidder on opening date, May 14, 1976, was James R. Parks Co. (Parks), with a unit price of \$22.50 (total bid \$36,855) including required first article testing. Second low bidder was Cable Electric Products, Inc. (Cable), with a unit price of \$24.78 (total bid \$40,589.64, or \$3,734.64 more than that of protester).

Section C-35 of the IFB required submission of Use Agreements for Government-owned property to be used in performance of the contract. The section reads, in pertinent part:

"\* \* \* All bidders are CAUTIONED, that if they \* \* \* intend to use for the manufacture of any part of the end item or items being procured under this Invitation for Bid, Government-owned production and research property \* \* \* which is currently in his or their possession, that Use Agreements requiring the payment of a fair rental value \* \* \* must be consummated with the cognizant agency prior to bid opening date." (Emphasis in original.)

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Bidders were instructed to furnish a list of all such property and to indicate the intended period of use.

Section C-35 also specifically states that failure to furnish written authorization for use of such property on a rental basis, or bids offering use on a rent-free basis, will "cause the bid to be declared nonresponsive and ineligible for award."

Responding to the IFB, Parks checked the "Yes" box of section C-35, indicating intent to use Government-owned property, and added "Currently being used on DAAA25-76-C-0252." No written authorization for use on the contract being bid upon was submitted.

During bid evaluation, the contracting officer attempted to determine whether authorization for further use had been requested or obtained. Establishing that Parks' authorization had been limited to contract No. DAAA25-76-C-0252, that no inquiry regarding further use had been made to the Defense Contract Administration Services District (DCASD), and that Parks did not have a facilities contract or other blanket authorization for future use, the contracting officer on May 20, 1976, declared Parks' bid nonresponsive. The award to Cable was made on June 4, 1976.

The amount and value of Government-owned property held by Parks is disputed. According to the contracting officer, per DCASD, Milwaukee, the value of such property includes 10 items of special tooling with a total acquisition cost of \$11,264. This equipment had been offered to all bidders on a rent-free basis under amendment 0001 to request for proposals (RFP) No. DAAA25-75-R-0441, which resulted in contract No. DAAA25-76-C-0252; contract amendment A00003 added a washer die and a pierce tool, with acquisition costs of \$845 and \$365, respectively, bringing the total value of Government-owned property held by Parks to \$12,474.

Parks claims ownership of the first 10 items of special tooling, stating that they were purchased as part of the total assets of the bankrupt National Aviation Electronics, Inc. (NAE). Parks states that the company also paid more than \$5,000 in mechanics' liens to secure release of the tooling. However, records of the United States Army Armament Command (Armcom), Rock Island, Illinois, indicate that the tooling had been paid for by NAE prior to default termination, and became Government property.

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Parks concedes that the two additional items of special tooling are Government property, but argues that their rental should be based upon a total value of only \$600, since repairs and rework which the company performed normally are at Government expense.

The protest, filed June 11, 1976, is based upon the contention that failure to provide written authorization for use of Government-owned property already in the possession of the bidder is a technicality subject to correction or waiver in a case where the value of the property involved, \$600, is de minimus.

The sole issue presented here is whether the protester's bid was responsive to the invitation. According to Armed Services Procurement Regulation (ASPR) § 2-301(a) (1975 ed.),

"To be considered for award, a bid must comply in all material respects with the invitation for bids so that, both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing and the integrity of the formal advertising system may be maintained."

A minor informality or irregularity is defined by ASPR § 2-405 (1975 ed.) as one which is:

"\* \* \* merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on price \* \* \* or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to, bidders."

This Office consistently has held that the requirement of written authorization for use of Government-owned property is material. Since the use of such property in the performance of a contract may materially affect the contract price, the requirement may not be waived as a mere informality. Durable Metal Products Company, B-182864, November 11, 1975, 75-2 CPD 337; B-154759, November 16, 1964, aff'd December 21, 1964. See also B-157626, March 16, 1966; B-155943, April 30, 1965; B-155770, March 25, 1965; B-154598, November 16, 1964; B-154685, November 4, 1964; B-154188, June 26, 1964. Furthermore, the failure of a bidder to submit

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authorization for use of Government property already in his possession under another contract renders the bid nonresponsive. Durable Metal Products Company, supra. The burden is upon the bidder to obtain such authorization before bid opening. Id.

The protester argues that the fair rental value of the property could have been determined by formula after contract award, and states that at no time did the company contemplate its rent-free use. Responsiveness of a bid must be established at bid opening, Wilpar Construction Company, B-184582, January 28, 1976, 76-1 CPD 56, and the bidder's intention must be determined from the bid itself. Evidence submitted after opening to show a bidder's intent may not be considered. Spartan Oil Company, Inc., B-185182, February 11, 1976, 76-1 CPD 91, quoting 51 Comp. Gen. 352 at 355 (1971) and 42 Comp. Gen. 502, 503 (1963). Nonresponsiveness "may not be cured after bid opening through explanation of intent to the prejudice of the competitive bidding system and the clear purpose of the invitation." 44 Comp. Gen. 412 at 414 (1965).

Nor would authorization obtained after bid opening satisfy the requirements of the IFB. See generally B-157626, supra; B-155943, supra; B-155770, supra. To permit a bidder to make his bid responsive after bid opening by alteration would be tantamount to permitting the submission of a new offer. 40 Comp. Gen. 432 at 435 (1961).

The protester states that the short reaction time required to meet the bid opening date, coupled with prior approval for use of the Government-owned tooling on an active contract, precluded obtaining separate approval for use on the contract being bid upon, and that omission of the tooling as Government-furnished equipment in the subject IFB is regarded as an oversight on the part of Frankford Arsenal.

We are not persuaded. As both the contracting officer and counsel for the Army point out, 28 days elapsed between the April 16 solicitation and the May 14 opening date, during which no inquiries were made by protester. A Use Agreement is a simple contractual arrangement, the Army further states, which could have been consummated in a short time providing there was no more urgent use for the Government-owned property.

The protester also argues that the \$3,734.64 greater expenditure due to acceptance of the second-low bid is not in the best interest of either the Government or the taxpayer. GAO has held the strict maintenance of the established principles of competitive procurement

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by the Government to be infinitely more in the public interest than for the Government to obtain a pecuniary advantage in a particular case by a violation of the rules. Engineering Design & Development, B-185332, February 11, 1976, 76-1 CPD 92, quoting 51 Comp. Gen. 352 (1971) and 42 Comp. Gen. 502 (1963); B-154759, supra.

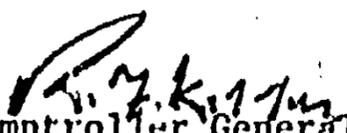
We do not find it necessary to resolve the factual questions raised by protester and the Army regarding title to the 10 items of special tooling formerly held by a bankrupt contractor. Nor need we determine the actual value of the two items conceded by both parties to be Government-owned property. In another case where it was alleged that the requirement should be waived because of the relatively low cost of the equipment involved, we stated:

"\* \* \* Aside from the monetary value of the equipment it must be recognized that where the bidder conditions its bid upon the use of such property and the required authorization cannot thereafter be obtained \* \* \* there would be serious doubt that the bidder if awarded the contract would be liable for any excess costs that might be incurred by the Government if it failed to perform. \* \* \* therefore, \* \* \* the contracting officer had no authority to waive the involved requirement." B-155943, supra.

Therefore, the protester's failure to comply with the conditions of the IFB, which required written authorization for use of Government-owned property to be submitted before bid opening, renders the bid nonresponsive regardless of the amount or value of the property involved. Such a bid cannot be accepted under 10 U.S.C. § 2305(c) (1970) and ASPR § 2-404.2 (1975 ed.).

Accordingly, the protest is denied.

Deputy

  
Comptroller General  
of the United States