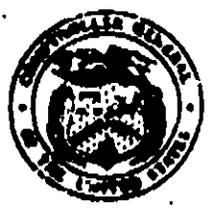


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Page II

DECISION



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

FILE: R-187742

DATE: February 3, 1977

MATTER OF: P&N Construction Company, Inc.

DIGEST:

1. Additional statement submitted in support of initial protest is timely because statement was not shown to have been mailed more than five days after receipt of GAO request for additional statement, allowing for a reasonable time for protester to receive GAO request. Fact that more than ten days elapsed between receipt of initial protest, which promised additional statement, and receipt of supplemental statement is not material.
2. Even though low bid apparently was submitted on basis of alternative not contemplated by bidding schedule, bid may be accepted because it is responsive to specifications, both as submitted and as clarified. In circumstances protester was not prejudiced by low bidder's deviation from bid schedule instructions.
3. Low responsive bid may be reduced after bid opening.

This case involves the acceptability of the bid of Avco Construction, Inc. (Avco) under invitation for bids (IFB) DACW 27-76-B-0113, issued on September 27, 1976, by the Louisville District, Corps of Engineers (Corps), United States Army. The IFB calls for construction of certain recreation facilities at Brookville Lake, on the East Fork of the Whitewater River, Indiana. The Corps proposes to make award to Avco under the IFB, but P&N Construction Company, Inc. (P&N), the only other bidder, has protested this matter to our Office by mailgram dated November 1, 1976, and subsequent submissions of its attorneys.

In commenting upon this protest, Avco has raised a question concerning the timeliness of P&N's protest. The Bid Protest Procedures published by our Office at 4 C.F.R. § 20.2 et seq. establish a general requirement that bid protests shall be filed not later than 10 days after the basis for the protest is known or should have been known. 4 C.F.R. § 20.2(b)(2). In this case, bids were opened on

B-187742

October 27, 1976, and on November 1, 1976, the contracting officer formally determined Avco's bid to be responsive. P&N was also notified of this determination on November 1, and it sent a mailgram of protest to us later the same day. The mailgram was received here on November 2, 1976, and by letter of November 5, 1976, we requested the protester to submit a statement of the specific grounds for protest within five working days from receipt of our request. P&N's attorneys detailed the basis of the protest in a letter dated and mailed on November 15, which we received on November 18.

Avco originally raised the timeliness issue when it apparently was unaware of P&N's November 1 mailgram and when it considered the P&N attorneys' letter dated November 15 to have been the initial protest communication. After becoming aware of P&N's November 1 mailgram, Avco seems to have conceded the mailgram's timeliness; instead, Avco now questions the delay between our receipt of the mailgram on November 2 and our receipt of the P&N attorneys' letter on November 18, in light of P&N's statement in the mailgram that "LETTER WILL FOLLOW WITHIN TEN DAYS."

Avco's suggestion of untimeliness is not supportable. The November 1 mailgram is clearly timely under 4 C.F.R. § 20.2(b)(2), because it was filed within 10 days of the time the basis for the protest became known. In addition, we cannot conclude that the November 15 letter is untimely, because 4 C.F.R. §§ 20.2(d) and 20.6 provide for submitting additional statements or information by the protester when requested by our Office. Such statements or information must be submitted within five work days after receipt of the request. In this instance, we asked P&N by letter dated November 5, 1976, for a statement of the specific grounds of its protest. Allowing for a reasonable period for receipt of our November 5 request, we believe counsel's letter of November 15, was mailed and therefore submitted, within the five work day period permitted by our procedures. The mere fact that more than 10 days elapsed between our receipt of the initial protest and our receipt of the November 15 letter is, in this regard, of no consequence.

The substance of the P&N protest is that Avco's bid should be declared nonresponsive for failure to conform to the IFB as to items 50 and 50A of the bidding schedule. The schedule consists of 106 numbered items on seven pages. Items 50 and 50A, as submitted by Avco, appeared as follows:

B-187742

<u>Item No.</u>	<u>Description</u>	<u>Estimated Quantity</u>	<u>Unit</u>	<u>Unit Price</u>	<u>Estimated Amount</u>
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NOTE TO BIDDER: BID ONE OPTION ONLY

50	Stone protection for R. C. [reinforced concrete] Pipe				
	a. Riprap, Type 1	257	S. Y.	18.00	4626.00
	b. Riprap, Type 2	227	S. Y.		NO BID
50A	Stone Protection for C. M. [corrugated metal] Pipe				
	Riprap, Type 2A	227	S. Y.	21.00	4767.00"

P&N contends that Avco's bid shows on its face that Avco made a mistake and did not intend to comply with the specifications. P&N further asserts that Avco's failure to comply exactly with the bidding instructions rendered the bid ambiguous and it should therefore be considered nonresponsive.

General note 11 to the Corps drawings provided:

"PLANS SHOW REINFORCED CONCRETE PIPE THROUGHOUT THE PROJECT. HOWEVER, CONTRACTOR MAY USE OTHER GROUP A TYPES IN LIEU OF RCP (PER INDIANA SPECIFICATIONS AND STANDARD DRAWING MP)."

Items 25 through 29 of the bidding schedule called for bids on various lengths of Group A pipe, in diameters of 15, 18, 24, 30 and 48 inches. Indiana surface drainage pipe standards, appearing on sheet 25 of the detailed drawings, permits three options as to types of pipe in these

B-187743

diameters: reinforced concrete, standard cast iron, and fully bituminous-coated corrugated steel. Items 50 and 50A of the bidding schedule provides for furnishing riprap required for two of these options: reinforced concrete (R. C.), and corrugated metal (C. M.).

Sheet 3 of the detailed drawings included the following table in the information entitled "RIPRAP DETAILS AND NOTES:"

STA.	LAYER		D'		L'		AREA (S. Y.)	
	THICKNESS		RCP	CMP	RCP	CMP	RCP	CMP
	RCP	CMP						
11+80	Type 1	-	12'	-	50'	-	206	-
18+14	Type 1	-	6'	-	25'	-	51	-
69+30	Type 2	Type 2A.	12'	12'	53'	53'	227	227

In an effort to explain the relationship between the Corps' drawings, the Indiana pipe standards, and the way it bid on the bidding schedule, Avco submitted a letter to the contracting agency later in the day on which bids were opened. Part of the letter follows:

"In our telephone conversation today about 2:00 P. M. we understand that perhaps our bid on the referenced project was non-responsive due to the way we bid and/or interpreted the requirements for bid Items 50 and 50A, stone protection. We must admit that at first, upon examining the unit price schedule, we did not understand what to bid and/or not bid on the three items listed. Upon examining the plans we thought that it was clear that in order to bid what was called for on the plans, we were obliged to bid as we did, i. e., riprap Type I and either rip rap Type 2 or 2A. We cite as follows:

"1. The schedule on plan sheet 3, above note "riprap details and notes" says:

"a. At station 11+80 there will be 206 sy of Type I riprap. This material and quantity are as noted on the plan view, sheet 7.

"b. At station 18+14 there will be 51 sy of Type I riprap. This material and quantity is noted on plan view sheet 7.

B-187742

1) When we found the above information we felt compelled to bid the 257 sy of Type I stone protection.

"c. At station 69+90 there will be 227 sy of riprap, and we presumed that depending on the type of pipe to be used, the material would be either Type 2 or 2A. We note that the plan sheet #8 calls for 227 sy of Type 2 riprap - but also it calls for 70' of 48" concrete pipe (which is consistent).

1) Due to the above facts we felt compelled to bid 227 sy of either Type 2 or Type 2A and we chose type 2A.

2) We note that the bid form calls for 48" pipe Group 'A.' The chart on Indiana State Highway Standard Sheet MP under "Pipe for Surface Drainage Group 'A', states that 48" pipe may be concrete, structural plate steel, or fully bituminous coated corrugated steel. Since we thought we could furnish either concrete or steel pipe, we felt we were free to choose either Type 2 or 2A riprap to bid, but it seemed clear we must bid one or the other.

"We hope the above clarifies our intent and understanding in this matter, and that you will agree there is logic in what we did. It does appear that 257 sy plus 227 sy of riprap will be installed on the job and there should be a unit price for the material."

P&N is correct in asserting, and Avco concedes, that the Avco interpretation of the bidding requirements was not in accord with the stated intent of the Corps. The Corps states it intended that bidders select either item 50 (a and b) or 50A. The real choice here is among types of pipe to be supplied, with the type of riprap to be bid as a consequence of that choice; however, the bidding schedule creates the appearance that the primary choice concerns the riprap while obscuring the significance of the pipe. The potential for confusion is increased by the table on "RIPRAP DETAILS AND NOTES," quoted above, because either riprap is not provided therein for all permissible options of pipe or the table does not clearly indicate where riprap is unneeded. In addition, the bidding schedule makes no clear provision for bidders to bid on the basis of using a combination of concrete and metal pipe,

B-187742

even though such a combination is not precluded by the specifications and is in fact technically acceptable to the Corps. For these reasons, we are suggesting by separate letter that the Corps amend its bidding schedule, which has been in use since July 1, 1960.

The Corps maintains that although Avco was not entirely responsive on item 50, it was responsive on item 50A despite its mistaken bidding intention. Therefore, it proposes to delete \$4, 626 from the total price bid by Avco and to award it the contract, under the authority provided by Armed Services Procurement Regulation (ASPR) § 2-405 to waive minor informalities or irregularities which have no effect or "merely a trivial or negligible effect on price, quality, or delivery," where the relative standing of bidders would not be affected and where no other prejudice would accrue to other bidders.

Responsiveness of bids is to be determined from the face of the bid as submitted, without regard to post-opening explanations. While it is unclear from Avco's bid why a price was inserted next to item 50a, the bid makes no offer to supply Type 2 riprap required for reinforced concrete pipe at the third station shown on Table 3. By inserting prices for Items 50a and 50A, Avco's bid on its face indicates an intention to furnish reinforced concrete pipe with Type 1 riprap at the first two stations shown in the above table and corrugated metal pipe with Type 2A riprap at the third station. The protester states that Avco "intended to aggregate Item 50 and 50A by substituting Item 50A for Item 50b using 2A riprap rather than Type 2." The protester argues, and we agree, that such an intention would not have complied with the specifications. In our opinion, however, the intention or mistake attributed to Avco by the protester is not reasonably apparent from Avco's bid and appears to be a matter of conjecture by the protester.

Avco, however, has asserted after opening that it did not intend to furnish reinforced concrete pipe at the first two stations. Rather, it states it intended to furnish corrugated metal pipe at all three stations, using Type 1 riprap at the first two stations and Type 2A riprap at the third station. At worst, Avco's bid may be ambiguous, but under either our interpretation or Avco's explanation there is no question as to Avco's intention to furnish compliant pipe complete with any necessary riprap. This is because the specification neither restricts the use of a combination of metal and concrete pipe nor requires riprap for the first two stations if metal pipe is installed. Thus, we conclude that under either interpretation Avco's bid may only be construed as responsive to the specification and, at worst, as offering to furnish unneeded riprap with metal pipe at the first two stations.

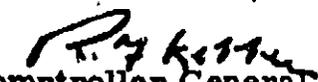
B-187742

We have taken the position that where a bidder is required to bid on each of several alternatives, any one of which will meet the Government's needs, and where the bidder bids on some but not all of the options, the bid may still be responsive to those alternatives upon which a bid was actually submitted. 45 Comp. Gen. 682 (1966). Where an IFB does not provide for alternative bidding but a bidder nevertheless submits a bid offering either of two products, one of which will meet the specifications and the other of which will not, the Government is not precluded from accepting that option which will meet the IFB requirements. 33 Comp. Gen. 499 (1954). We believe, therefore, that it is clear that a bid may be responsive despite offering alternatives other than as permitted or required by the IFB.

Even though there may be uncertainty as to Avco's bidding intent as revealed solely by the bid submitted, we do not regard the ambiguity as fatal. Where under any reasonable construction of the bid submitted the low bidder is responsive, the bid will fully meet the needs of the Government, and the bid is lower than all others, we believe that the integrity of the competitive bidding system does not necessarily require rejection of the bid and award to the next low bidder. Here we cannot conclude that the defective bidding schedule was prejudicial to the protester. The difference between Avco's highest possible evaluated bid and the protester's bid is more than \$24,000. Assuming that the protester would have been able to reduce its price by bidding a combination of metal and concrete pipe, with necessary riprap, it appears that a bid reduction in excess of \$24,000 would not have been effected by the combination because the protester's original bid price for the pipe alone did not amount to \$24,000 and the difference in the price of riprap is not sufficiently large to affect the bidding results.

For the reasons stated, we conclude that Avco's bid is responsive and may be accepted without prejudice to the protester. In addition, Avco's bid may be corrected downward by eliminating Item 50a because its bid, either as submitted or as corrected, is responsive and it is legally permissible to reduce a low responsive bid after bid opening. Leitman v. U.S., 50 F. Supp. 218 (Ct. Cl. 1945).

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States