

DOCUMENT RESUME

02722 - [A1882934]

[Request for Reconsideration of Decision Holding That Solicitation Should Be Cancelled and Readvertised]. B-186691. June 30, 1977. 13 pp.

Decision re: Redifon Computers Ltd.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services: Definition of Performance Requirements in Relation to Need of the Procuring Agency (1902).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: General Government: Other General Government (806).

Organization Concerned: Arnessen Marine Systems; Maritime Administration.

Authority: 31 U.S.C. 71. 31 U.S.C. 74. 41 U.S.C. 253. 4 C.F.R. 20.9(a). 45 Comp. Gen. 809. 36 Comp. Gen. 535. 37 Comp. Gen. 110. 41 Comp. Gen. 721. 49 Comp. Gen. 761. B-186621 (1976). B-185097 (1976). B-184810 (1975). F.P.R. 1-2.406-3(a). F.P.R. 1-2.301(c). F.P.R. 1-2.402. United States v. Brookridge, 111 F.2d 461, 464. City of Chicago v. Mohr, 74 U.S. 1056.

Company requested reconsideration of a decision which held that a solicitation should be cancelled and the requirement readvertised. Since the request did not provide additional information on the issue of whether the firm may be recognized to protest and failed to show any error of law, the original decision that another company had standing to protest was affirmed. The decision that the company's bid was nonresponsive because it incorporated additional terms and conditions which did not conform to those in the solicitation was also affirmed, as was the decision that the solicitation was defective and should be cancelled because it lacked essential terms.

(Author/SC)

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DECISION



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

*ZUCKERMAN
P.L. II*

FILE: B-186691

DATE: June 30, 1977

MATTER OF: Redifon Computers Limited--Reconsideration

DIGEST:

1. Request for reconsideration of bid protest which fails to provide additional information on issue of whether firm may be recognized to protest and fails to show any error of law does not comply with standards for reconsideration set forth in 4 C.F.R. 20.9(a) (1976). Original decision on that issue therefore is affirmed.
2. Because it is a function of GAO to assure compliance with rules governing expenditures of public funds, protest is not confined only to issues raised by parties. GAO will register views regarding deficiencies which are obvious on the face of the solicitation or bids received.
3. Bid which is made subject to bidder's standard terms and conditions which are at variance with terms of Government's advertisement is nonresponsive and may not be accepted by contracting officer.
4. Bid correction procedures are available only to correct bids which are responsive to the invitation. After bid opening bidder may not be given opportunity to delete nonresponsive conditions.
5. Formal advertising procedures for the procurement of supplies do not contemplate that a separate formal agreement will be concluded. It is a fundamental principle of formal advertising that only firm bids will be considered, and that the contract awarded be the contract advertised, without negotiation. Accordingly, a nonconforming bid submitted in anticipation either of its acceptance or a counter offer is not responsive and must be rejected.
6. Acceptance of a bid which was grossly nonresponsive and contrary to the terms of the invitation would be plainly and palpably illegal and thus void.
7. Under formal advertising procedures bids are opened in public and available for public inspection with only limited restrictions on the disclosures of descriptive literature which is not applicable

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in this case. Therefore bidder may not complain that competitor's inspection of its bid results in prejudice to it.

Redifon Computers Limited (Redifon), requests reconsideration of our decision, Arnessen Marine Systems, Inc., B-186691, October 20, 1976, 76-2 CPD 35.

In that decision we held that solicitation No. B2-MA76-9, issued by the Maritime Administration, Department of Commerce (MARAD), should be cancelled and the requirement readvertised. We held that Redifon's bid was nonresponsive because it incorporated additional terms and conditions which did not conform to those in the solicitation. Specifically, Redifon's bid required payment prior to delivery and acceptance. The bid also incorporated Redifon's own standard terms and conditions which, in part, changed the warranty provisions required by the Government; provided that the agreement would be governed and interpreted in accordance with English law; provided that its offer could be withdrawn and was conditional upon Redifon's written acceptance; and provided that the price was subject to adjustment for increased costs prior to completion of the contract. In addition, our decision concluded that the solicitation was defective and should be cancelled because it lacked essential terms, such as, time for performance, place of inspection and acceptance, and clear delivery terms.

Redifon presents several arguments in support of its request for reconsideration which, for the sake of convenience, we shall address separately below.

I. Arnessen (the protester) is not an "interested party" and thus has no standing to protest the award or proposed award of the contract.

Redifon asserts, because the contracting officer for MARAD found that Arnessen's bid was nonresponsive, that Arnessen is not an "interested party" under our Bid Protest Procedures, 4 C.F.R. § 20.1(a)(1976). Thus, Redifon contends that Arnessen is not in a position to protest the award or proposed award of this formally advertised solicitation, and that the opportunity given Arnessen to participate by the "boot straps" by its mere allegation has worked a hardship on Redifon.

The matter of Arnessen's interest to protest the award has been fully considered by this Office in our earlier decision. Section 20.9 of our Bid Protest Procedures requires that requests for reconsideration "contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying

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any errors of law made * * *." 4 C. F. R. § 20.9(a) (1976). Redifon, in the request for reconsideration, has not offered any additional information which was not previously considered, nor has it shown any errors of law which were made on that issue. Accordingly, our decision to consider a protest by Arnessen is affirmed.

II. The Comptroller General should have restricted his decision only to issues raised by the protester.

In its submission, Redifon complains that our October 20, 1976, decision focused on issues which were separate and apart from the issues raised by Arnessen, the original protester. Redifon requests that we limit our decision only to the issues raised by Arnessen or by Redifon on request for reconsideration.

This Office has the authority to settle and adjust claims by or against the Government of the United States. 31 U.S.C. § 71 (1970). This Office also has the authority to settle and adjust public accounts. 31 U.S.C. § 74 (1976). Pursuant to this authority, we have acted in the past to recommend or direct action to preserve the integrity of the competitive bidding system and to avoid the necessity of taking exception to a public account. Viewed in this perspective, that it is the Comptroller General's purpose to assure compliance with the rules governing the expenditure of public funds, we do not consider ourselves confined to address only the issues raised by a party to a protest over the award of a Federal contract. Where, as here, the deficiencies in the solicitation and the nonresponsiveness of Redifon's bid were obvious on its face, we will register our views.

III. Redifon's bid was fully responsive.

The solicitation covered the supply and installation of a marine radar simulator and marine displays at the Merchant Marine Academy, Kings Point, New York.

Redifon's "B" bid, which is asserted to be responsive, proposed additional terms and conditions, in pertinent part, as follows:

"Terms of payment

30% within four (4) weeks of date

order/contract

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30% within six (6) months of date of order/contract

30% on completion of Factory Acceptance

10% on completion of Commissioning and acceptance on site.

Prices and Conditions of Sale

* * * * *

4. The prices quoted are based on the above terms and the Redifon Standard Conditions of Sale [quoted below] as amended by the attached Statement of Compliance, which are printed on the reverse of the front page of this quotation. Should the terms or conditions be changed, Redifon reserves the right to withdraw or vary this offer. "

The "Statement of Compliance" referred to above relates only to Redifon's intention to comply with the technical specifications for the equipment. Redifon's standard pre-printed conditions of sale, provide in part as follows:

"STANDARD CONDITIONS OF SALE

- "A. (i) This quotation, unless withdrawn, is open for acceptance within 90 days from its date of issue.
- (ii) This quotation is conditional upon Redifon's written acceptance of the customer's order.
- (iii) Printed conditions included in the customer's order are binding only in so far as they are not at variance with Redifon's own terms and conditions.
- (iv) If a separate formal agreement is concluded with the customer in respect of the equipment comprised in this quotation the terms and conditions set out below shall have effect subject to, and only in so far as they are consistent with, those of such agreement.

"B. Any order based on this quotation shall, subject to A(iv) above, be deemed to include acceptance of the following terms and conditions:

1. (a) The prices quoted are based on current costs of materials, components and labour and are subject to adjustment by reason of any changes in these costs prior to completion of the order.

* * * * *

6. (a) Payment shall be made in accordance with the terms indicated on the face of this quotation.

- (b) In the event of failure to make any payment to Redifon by the due date Redifon will be entitled to rescind the contract or may before making any further delivery or performing any further services under the contract require payment of all outstanding amounts.

* * * * *

8. (a) Subject to the provisions of Clause 8(b) hereof and in lieu of any warranty condition or liability implied by law Redifon's liability to any defect in or failure of the equipment supplied, or for any loss, injury or damage attributable thereto, is limited to making good by replacement or repair parts which, under proper use, arise solely from faulty materials or workmanship and are notified to Redifon within 12 months of shipment (or as the case may be ex-works delivery) of the equipment and provided (unless otherwise agreed in writing) the defective parts are returned carriage paid to Redifon's factory.

- (b) In the case of components not of Redifon's manufacture or design, Redifon's liability shall be limited to the guarantee if any given Redifon in respect thereof by the manufacturer.

* * * * *

10. The contract resulting from Redifon's acceptance of the customer's order shall be governed and interpreted in all respects by and in accordance with English Law."

Also included in the bid was the following statement:

"Exchange Rates:-

The prices quoted are based on a rate of Exchange of U.S. \$1.84 per [pound] sterling which is the rate ruling at the date of our offer. We would ask, for any order resulting from this offer, to contain a clause for an adjustment of prices quoted for any variation, either upwards or downwards, by which this rate of exchange varies by more than U.S. \$0.02 per [pound] sterling."

The solicitation contained no offer of progress payments, and no escalation clause.

Redifon argues that its bid was fully responsive to the invitation because:

"The schedule of payments found in the responsive bid 'B' was in total conformity with the Solicitation. The solicitation did not expressly bar a payment schedule; Redifon's schedule was merely suggestive, supplemental to the Government's terms and specifications, and not intended to be binding upon the Government. This is supported by evidence of subsequent discussion and communication between the Contracting Officer and Redifon, wherein it was properly assumed that a final payment schedule would be resolved as the contract progressed."

In addition Redifon states that its standard terms and conditions were not intended to be included in the bid, but that in any event they were superseded by the Government's term and conditions expressed in the invitation as well as the relevant procurement regulations. Redifon states that "all the evidence after acceptance of the bid substantiates this." (Emphasis added.)

Furthermore, Redifon argues that if the Comptroller General were correct in his opinion [regarding the printed conditions], the contracting officer should have known of the "mistake" and permitted Redifon "to verify its bid free of such mistake." Finally, Redifon notes that paragraph A(iv) of its printed conditions clearly contemplates "that a separate agreement would supersede them."

We shall consider the responsiveness arguments in the order set forth above.

(1) The payment schedule.

The only provision in the IFB regarding contract payments is paragraph 7, SF 32, which provides for payment only for supplies delivered and accepted by the Government. We believe the plain and clear language of the Redifon bid, e. g., "the prices quoted are based on the above terms" (one of which was the payment schedule), cannot be reasonably viewed as a mere suggestion, not intended to be binding on the Government. We note that these payment provisions were a part of its bid on this job rather than a provision of Redifon's standard terms and conditions. But even if, as is suggested, the quoted language merely is in the nature of a request and not a condition affecting the provisions of the standard payment clause, it was, in the context of a procurement by formal advertising essential that such intention be clearly expressed. A bidder may not be permitted to explain which one of two possible meanings expressed in the terms of its bid was intended, for to do so would permit it to affect the responsiveness of its bid. Moreover, we have held that a bid conditioned upon receipt of progress payments where the payments clause of the solicitation does not contemplate progress payments must be rejected as nonresponsive. 45 Comp. Gen. 808 (1966). We therefore conclude that the inclusion of the Redifon payment schedule in its bid, without a clear expression that it was not intended as a condition of its bid, was a material deviation rendering the bid nonresponsive.

(2) The Redifon standard terms and conditions were not part of its bid.

Notwithstanding Redifon's assertions that its standard conditions of sale were not intended to supersede those of the invitation, the bid must be considered as qualified by those conditions because the bid expressly incorporated them. 36 Comp. Gen. 535 (1957).

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A bid must be interpreted as submitted rather than in accordance with a bidder's previously unstated intention. We have consistently held that a bidder may not be called upon after bid opening to explain the purpose of a material deviation to the advertised requirements, for to do so would confer on a bidder the option of accepting or avoiding award by offering an explanation which would make its bid responsive or nonresponsive as its own interests dictate. See Computer Optics, Inc., B-186621, September 21, 1976, 76-2 CPD 263. As we stated in 37 Comp. Gen. 110 (1957):

"[I]t is a cardinal rule that a contract awarded to a successful bidder must be the contract offered to all bidders. Where one bidder reserves rights and immunities from responsibility not extended to all bidders by the advertised conditions and specifications, it seems manifest that a contract awarded upon the basis of the conditional bid would not be the contract offered to all prospective bidders. Informalities which properly may be waived are those that do not go to the substance of the bid so as to be prejudicial to the rights of other bidders, but material conditions imposed by a bidder may not be waived as an informality or minor irregularity. See 20 Comp. Gen. 4. To permit public officers to accept bids not complying in substance with the advertised specifications, or to permit bidders to vary their proposals after the bids are opened, would soon reduce to a farce the whole procedure of letting public contracts on an open competitive basis. The strict maintenance of such procedure, required by law, is infinitely more in the public interest than obtaining an apparently pecuniary advantage in a particular case by a violation of the rules. Cf. United States v. Brockridge, 11 F.2d 421, 464, and the opinion of the Supreme Court of Illinois in City of Chicago v. Mohr, 74 N.E. 1058."

As we concluded in our original decision, any one of a number of the Revision terms and conditions would be sufficient to find the bid nonresponsive.

(3) The inclusion of the Revision terms and conditions was an obvious mistake which should be corrected by permitting verification.

Bid correction procedures are available only to permit correction of bids, which as submitted, are responsive to the invitation. Such procedures may not be used to correct bids to make them

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responsive. Federal Procurement Regulations (FPR) § 1-2.406-3(a) (1976). To permit otherwise, would be contrary to the principle that bids may not be altered after bid opening to make them acceptable. Any such procedure tends to subvert the purpose of the statutes governing procurement under competitive procedures. Williamsburg Steel Products Company, B-185087, January 23, 1976, 76-1 CPD 940.

(4) Paragraph A(iv) of the Redifon standard conditions [supra] clearly foresees that a separate agreement would supersede them.

Redifon asserts that a letter from the contracting officer dated September 13, 1976, constituted a "separate agreement." That letter, in pertinent part, states:

"With reference to our Solicitation No. B2-MA76-3 dated April 12, 1976 and Redifon Computers Limited, Radar Simulator Division response in bid dated May 4, 1976, the Government of the United States, represented by the U. S. Merchant Marine Academy, does hereby give notice by this letter of intent, for the procurement and installation of the subject system consisting of the equipment indicated in the Government specifications and Redifon's bid 'B' thereto.

* * * * *

Confirmation of the aforementioned procurement intent will be documented on Government order & will follow shortly."

A contract to be awarded by formal advertising procedures does not contemplate that a "separate formal agreement" will be concluded. It is fundamental in competitive bidding that only firm bids be considered so that the contract advertised is the contract awarded, incorporating the offer of the bidder, without further negotiation, clarification or the like. The terms and conditions are fixed by the offer, which is the agreement if accepted by the Government. In any event, even if the contracting officer's letter of September 13 can be construed as a "separate agreement" it is clear that Redifon's standard conditions are not to be superseded unless an express agreement to the contrary is effected. The September 13 letter does not so provide. Moreover, paragraph A(iii) of the Redifon standard conditions states that "Printed conditions included in the customer's order are binding only insofar as they are not at variance with Redifon's own terms and conditions." In addition, Redifon's bid stated that its quoted prices were based on its standard conditions of sale.

In our opinion, this expresses on its face the bidder's intent to include its own standard conditions in preference to the buyer's provisions in any contract awarded to it unless there is an express agreement to the contrary.

(IV) Notwithstanding the current protest, a binding order was issued to Redifon.

Redifon asserts that the September 13, 1976, letter (supra) was intended to be a "firm order with Redifon for the items set forth in the 'Procurement Letter' at the prices therein indicated". It argues that the letter constituted a contract award. Redifon also states that it was within the authority of the contracting officer to make an award during the pendency of the protest because such prompt action would be advantageous to the Government. MARAD denies that the September 13, 1976 letter was intended to be an award of the contract or that the letter had the "legal effect of an award," asserting among other things that the contracting officer had no authority to make such award, and that the letter included \$106,200 worth of supplemental equipment not covered by the solicitation. Redifon disputes the facts surrounding the issuance of this letter and the legal effect of the contracting officer's alleged representations of his authority. Redifon asserts that the contracting officer, "by words and actions often affirmed his authority to make the award" even during the pendency of the protest, and they were assured by the contracting officer that the \$106,200 worth of supplemental equipment "would not have to be the subject of a new solicitation."

Our original decision in this case was issued without the knowledge of the so called "Procurement Letter." We believe, however, that it is not essential to the resolution of this reconsideration to decide whether an offer and acceptance was effected. In our opinion an award, in any event, would have been palpably illegal resulting in a contract which was null and void.

If a bidder uses its own form or a letter to submit a bid, the bid may be considered only if (1) the bidder accepts all the terms and conditions of the invitation, and (2) award on the bid would result in a binding contract, the terms and conditions of which do not vary from the terms and conditions of the invitation. FPR § 1-2.301(c). It is a basic principle of Federal procurement law that to be considered for award, a bid must comply in all material respects with the invitation for bids so that all bidders will stan

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on an equal footing and the integrity of the competitive bidding system will be maintained. 41 Comp. Gen. 721 (1962); Thomas Construction Company, Inc., B-184810, October 21, 1975, 75-2 CPD 245. Material deviations may result from statements on a letterhead accompanying a bid (36 Comp. Gen. 535 (1957)) or from references in such letters to a bidder's standard conditions of sale. 37 Comp. Gen. 110 (1957).

The authority of contracting officers to bind the United States in contravention of the applicable procurement statutes and regulations was discussed by the Court of Claims in Prestex Inc. v. The United States, 162 Ct. Cl. 620 (1973). The Court stated:

" * * * It is a well recognized principle of procurement law that the contracting officer, as agent of the executive department, has only that authority actually conferred upon him by statute or regulation. If, by ignoring statutory and regulatory requirements, he exceeds his actual authority, the Government is not estopped to deny the limitations on his authority, even though the private contractor may have relied on the contracting officer's apparent authority to his detriment, for the contractor is charged with notice of all statutory and regulatory limitations."

This Court further refined the Prestex holding in John Reiner & Company v. The United States, 325 F.2d 438; 163 Ct. Cl. 381 (1963), where it stated that:

"In testing the enforceability of an award made by the Government, where a problem of the validity of the invitation or the responsiveness of the accepted bid arises after award, the court should ordinarily impose the binding stamp of nullity only when the illegality is plain."

Consequently, the Court has been reluctant to consider contracts void in factual situations wherein the contractor was determined to be an innocent victim of circumstances over which he had no control or notice. John Reiner & Company v. The United States, *supra*; Brown & Son Electric Company v. The United States, 320 F.2d 367, 162 Ct. Cl. 620 (1962).

However, Federal bidding statutes require that "award shall be made * * * to the responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered." (Emphasis added.) 41 U.S.C. § 253 (1970). This requirement is restated in the regulations in FPR § 1-2.407-1(a), as well as in the solicitation (Standard Form 33A, para. 10). We believe the Redifon bid was patently non-responsive, such that Redifon cannot be considered to be an innocent victim. To the extent there is any doubt that bidder's terms and conditions apply to its bid, they were created by the bidder, not the Government. This is neither a case of subtle, easily overlooked deviations which would have no effect on contract terms after award (as a bid acceptance period at variance with IFB requirements, 49 Comp. Gen. 761 (1970)), nor a matter of the interpretation of an ambiguous IFB evaluation provision, as in Reiner, supra. The deviations in the Redifon bid were so gross and contrary to the basic terms and conditions of the invitation, as to meet the test in Reiner, supra. The contracting officer could not ignore the statutory and regulatory limitations to his authority and knowingly bind the Government to a plainly non-responsive and thus illegal contract. Consequently, any purported award in this case would, in our opinion, be void. We therefore believe that the newly presented information regarding the September 13, 1976 letter from the contracting officer does not alter our original conclusion that the procurement be resolicited.

In view of the above discussion, we see no reason to discuss Redifon's additional arguments concerning the adequacy of the solicitation.

V. Redifon has been prejudiced in any future resolicitation.

Finally, Redifon additionally asserts that it did not authorize disclosure of its bid and that disclosure results in its inability to "submit a new bid on this specification competitive with Arnessen's [the protester] bid," irreversibly violating the integrity of the competitive bidding system "to Redifon's extreme prejudice."

It is the essence of formal advertising that sealed bids be opened in public with public examination permitted. FPR § 1-2.402 (1976). There are only certain limited restrictions on the disclosure of descriptive literature permitted under circumstances not relevant here. It should be noted, also, that the

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Arnessen bid would have been available for inspection if Redifon had sought opportunity to do so.

For the reasons set forth above, the decision is affirmed.


Deputy Comptroller General
of the United States