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**DECISION**



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

FILE: B-189275

DATE: November 29, 1977

MATTER OF: Borg Warner Corporation, York Division

**DIGEST:**

1. Both IFB's "Schedule" and "Storage Facilities" provisions clearly provided that Air Force might award under "storage credits" pricing option notwithstanding lack of mention of pricing option in IFB clause entitled "Evaluation Factors For Award."
2. Contrary to protester's insistence, storage-time related costs could not be considered as evaluation standards because they were not listed in IFB.
3. Protest against alleged solicitation defect is untimely filed under GAO's Bid Protest Procedures notwithstanding protester's asserted lack of knowledge of defect, and issue is not considered under exception as "significant" because it does not affect class of procurements.
4. Protester was not prejudiced by Air Force's failure to disclose that award under "storage credits" pricing option might be decided, in part, by results of "storage credits" bids under other solicitations. Moreover, since Government could not disclose Government's cost estimate of construction of storage facility to be built by use of offered storage credits, and given clear right of Government to determine reasonableness of submitted bids by appropriate information, use of separate bidding results to determine award is not objectionable. Analogy made to "stepladder" bidding procedure.
5. Failure of selected bidder to quote early delivery dates under "storage credits" pricing option is not significant since blanks provided for insertion of dates applied only to "non-storage credits" bidders and procuring agency did not need early delivery dates to evaluate bids. Further, IFB contained no indication of relative preference of bid depending on date of early delivery. Moreover, in absence of dates bidder is obligated to deliver at an indefinite date prior to required delivery dates which is still most advantageous to the Government.

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On June 7, 1977, a protest was received from Borg Warner Corporation, York Division (York), against award of a contract to any company other than York under IFB F40650-77-09022, issued by the Department of the Air Force for procurement of a "Brine Chiller System" for the "Aeropropulsion Systems Test Facility" located at Arnold Air Force Station, Tennessee. York later specifically insisted that award should not be made to Carrier Corporation, the only other bidder under the IFB.

Part II, Section E, of the IFB (the "Schedule") consisted of 2 pricing schedules. The first was a list of 8 bid items for each of which the bidder was required to insert unit and extended prices. The second part of the Schedule was called "storage credits" and was described as follows in the IFB:

"The bidder offers to the Government the following credits for deletion of the requirement that items shall not be delivered earlier than a specified date in paragraph H-1 -- TIME OF DELIVERY and storage under the conditions specified in paragraph F-4 of any or all items to be delivered hereunder."

Immediately under this note 6 blank spaces were provided for bidders to insert storage credits for 6 of the 8 bid items.

The required delivery schedule for each bid item was set forth under Section H-1 "TIME OF DELIVERY." For the first 6 bid items it was expressed as a time period bracketed by early and late delivery dates. Bidders were to compute their prices on the assumption that delivery of the items could be made no earlier than the early date and no later than the late date unless bidders proposed "storage credits" as described below.

Following the schedule of storage credits for bid items, this statement was listed:

"The Government reserves the right to award a contract with or without the storage credits whichever is deemed by the Contracting Officer to be in its best interests at the time of award."

Section F-4, STORAGE FACILITIES, of the IFB also provided:

"In the event the Government awards a contract at a price arrived at by deducting the storage credits from the bid prices in Section E, the Contractor is authorized to deliver any or all of Item Nos. 1 through 6 at any time prior to the delivery schedule specified in Paragraph H-1. The Government agrees to receive and store until installation all items so delivered. \* \* \* "

As of the date of bid opening (May 31, 1977) there had been an amendment to the IFB that affected the wording of Section H-1. Section H-1 as amended read, in pertinent part, as follows:

"H-1 TIME OF DELIVERY

"Delivery is REQUIRED by the Government in accordance with the following schedule:

- "a. Two complete brine chillers \* \* \* shall be delivered not earlier than 10 March 1980 and not later than 8 June 1980.
- "b. Two complete brine chillers \* \* \* shall be delivered not earlier than 23 April 1980 and not later than 22 July 1980.
- "c. Two complete brine chillers \* \* \* shall be delivered not earlier than 3 June 1980 and not later than September 1980.
- "d. The balance of all equipment under Items Nos. 1 through 6 shall be delivered not earlier than 17 July 1980 and not later than 18 October 1980.

\* \* \* \* \*

"Bids offering delivery of quantity under such terms or conditions that delivery will not clearly fall within the applicable REQUIRED delivery period specified above will be considered non-responsive and will be rejected. However, the requirement that items shall not be delivered earlier than a specified date may be deleted pursuant to the STORAGE CREDITS provision under Section E - Supplies/Services and Price. If the bidder offers no other delivery schedule, the delivery schedule stated above shall apply.

"BIDDER'S PROPOSED DELIVERY SCHEDULE

- "a. Two complete brine chillers \* \* \* shall be delivered \_\_\_\_\_.
- "b. Two complete brine chillers \* \* \* shall be delivered \_\_\_\_\_.
- "c. Two complete brine chillers \* \* \* shall be delivered \_\_\_\_\_.
- "d. The balance of all equipment under Items Nos. 1 through 6 shall be delivered \_\_\_\_\_."

In contrast to York's bid which specified early delivery dates, Carrier's bid did not contain any early delivery dates in the "Bidders Proposed Delivery Schedule" provision of the Section H-1 IFB clause; nevertheless, Carrier proposed substantial "storage credits" for each of the items as noted below.

York and Carrier submitted the following prices:

	Total Without Storage Credit	With Storage Credit*
York:	\$5,079,000	\$5,027,000
Carrier:	\$5,380,485	\$4,625,900

Thus, York was the apparent low bidder without storage credit and Carrier, the apparent low bidder if the storage credit is

\* York's total storage credit of \$52,000 applied only to Item 1; Carrier's total storage credit of \$754,585 was distributed among each of the 6 required items.

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considered. York's bid was, however, declared nonresponsive immediately after opening on the grounds that York filled in the "Bidder's Proposed Delivery Schedule" with dates earlier than the early dates listed in the required schedule. When the Air Force announced its intention to award the contract to Carrier at the price with storage credit, York filed a formal protest here.

York's initial protest contended that: "The bid cannot legally be awarded except on the basis of \* \* \* shipment in 1980, per specs. Storage credits cannot be used in determining the successful bidder." York further explained:

"The base price was requested for delivery in 1980. Storage credits were also requested based on shipment prior to 1980. [Carrier's] net price, based on deducting storage credits from their base price, is lower than YORK's net after storage credits. YORK's base bid, however, is lower than Carrier's base bid. YORK's contention, is that the total cost to the government will be greater if [Carrier's] 'early delivery' date is accepted over YORK's base bid. In other words, the total cost to the government for accepting and storing the equipment prior to 1980 will more than offset the difference between York's 'early shipment' net price and YORK's on-time shipment base price, for shipment in 1980."

York further contended that the Air Force improperly determined that its bid was nonresponsive for "provid[ing] shipping schedule dates on page 18 and 21 of the IFB."

#### Background of "Storage Credits" Provisions

The Air Force has explained its reasoning for adopting the provisions in question, as follows:

"During the course of the industry briefings [preceding the issuance of the IFB] the potential bidders expressed unanimous support for a means to allow early \* \* \* equipment delivery for purposes of assuring timely installation and

production economy which could be passed on to the Government. This resulted in the adoption and insertion into the IFB of an early delivery storage credit provision to be allowed potential bidders (Clauses E and F-4). This early delivery credit storage provision allowed bidders to submit, as part of their bid, credits for the privilege of delivering the equipment as early as they desired. This provision was inserted on the premise that the Government would have to construct such temporary storage facilities at Arnold AFS since there are no Government storage facilities currently available \* \* \*. The Government acceptance of the offered storage credit is predicated on the cost effectiveness of the bidders offerings. That is, the temporary facility would be constructed by the Army Corps of Engineers if the credits exceeded the probable costs of the storage facilities. It was recognized that the decision to accept storage credit bids and to construct the facilities could be based on the total of such bids for three separate solicitations to be opened within a short period of time of one another. The solicitation specifies that the Government reserves the right to award a contract with or without the storage credits, whichever is deemed by the contracting officer to be in its best interests at the time of award. \* \* \*

Further, Air Force reasoning as to why Carrier's "storage credits" bid was considered advantageous has been provided by the contracting officer as follows:

"The net total bid of Carrier Corporation is the lowest bid received (regardless of the issue of responsiveness of the York bid). It offers storage credits (to permit early delivery) in the total amount of \$754,585, which amount substantially exceeds the Government's estimate of costs of constructing temporary storage facilities. \* \* \*

[I]f the amount of storage credits [is] determined by deducting the amount of the Carrier bid after credits from the amount of the York bid [after] credits, the net difference [is still] \$401,100. This amount when added to the credits offered under two other solicitations (F40650-77-09018 and F40650-77-09020) exceeds the Government estimate of costs for construction of storage facilities. Pursuant to ASPR 18-108.1 the amount of the Government estimate for the storage facilities may not be released prior to bid opening. However, the magnitude of the construction project may be described as between \$100,000 and \$500,000, pursuant to ASPR 18-109."

York's initial argument that award could not be made to Carrier based on its "storage credits" bid has since been expanded. The initial and expanded arguments may be summarized as follows: (1) The IFB did not in any way permit award to be made on the basis of storage credits for early delivery since the IFB's Section D, "Evaluation Factors For Award," clause does not mention a "storage credit" evaluation method but only that prompt payment discounts would not be considered; (2) Even if the IFB permits award to be made on the basis of storage credits for early delivery, Carrier's "storage credit" bid is not low because the Air Force failed to evaluate the effect of storage-time related costs of the early-delivered Carrier items; (3) The IFB was deficient in failing to provide other "storage-time" related costs as evaluation factors; however, York did not perceive this deficiency until after bid opening; (4) The Air Force improperly used the bidding results of two other solicitations in deciding whether it was in the Government's best interests to award under the "storage credits" pricing scheme; (5) Carrier's "storage credits" bid did not contain early delivery dates and thus it was impossible to determine if the bid was actually more advantageous than York's "non-storage credits" bid.

The Air Force's replies (keyed to the above-numbered arguments) to these positions are, as follows: (1) Both the "Schedule" and the "Storage Facilities" provisions of the IFB clearly stated that the Air Force might award under a "storage credit" pricing option if it were in the interests of the Department to do so; (2) The Air Force could not consider the effect of "storage-time" related costs in evaluating bids because they were not mentioned in the

IFB as costs that would be used in selecting the successful bidder; (3) This ground of protest relates to an alleged solicitation defect which, under GAO's Bid Protest Procedures (4 C.F.R. § 20 (1977)), should have been protested before bid opening. Since it was not so protested, it is untimely raised and must be rejected; (4) (no reply since not raised until York commented on the Air Force protest report); (5) The Air Force was not interested in how early the end items would be shipped; thus the IFB did not require any bidder to provide information regarding how early he would deliver if given the opportunity under the "storage credits" award option. Based on its knowledge of the complexity of the equipment to be purchased, the Government concluded, prior to issuance of the IFB, that temporary storage facilities could be constructed earlier than any of the end items or components could be fabricated and delivered. Thus, Carrier's failure to quote "storage credits" early delivery dates is of no importance.

#### ANALYSIS

We consider the Air Force's positions on above-numbered arguments (1), (2), (3), and (5) to be correct except for position (5) with which we disagree in part. We offer the following additional comments which are also keyed to York's above-numbered arguments.

(1) The absence of a reference to the "storage credits" pricing option in Section D, Evaluation Factors For Award, of the IFB is not significant in view of the clear notice of the option conveyed by other IFB provisions.

(2) It is improper to use an evaluation factor for award which is not listed in a solicitation. Three D Enterprises, Inc., B-185745, February 20, 1976, 76-1 CPD 117.

(3) Since the alleged defect was clearly apparent in the solicitation, York's alternative argument that it was not aware of the defect prior to bid opening is irrelevant. York's additional argument that issue (3) should be considered within the "significant issue" exception (4 C.F.R. § 20.1 (c)) to the timeliness requirements of our Bid Protest Procedures because the "storage credits" pricing option is considered "lovet" and "illegal" does not support a "significant issue" finding because "significant" -- insofar as bid protest issues are concerned -- generally applies to issues affecting a class of procurements, unlike the case here. Singer Company, 56 Comp. Gen. 172, 76-2 CPD 481.

(4) Although York is of the opinion that "[i]t seems a lot to ask bidders to allow their bids to be evaluated on the basis of [the] outcome of other bids" (a reference to the contracting officer's position that the outcome of "storage credits" bid on other related solicitations prompted, in part, the decision to award on Carrier's "storage credits" bid here), York in no way claims that it was prejudiced by the Air Force's failure to disclose this part of the award scheme. Moreover, since an applicable procurement regulation prohibited the disclosure of the Government's dollar estimate of constructing the storage facility for any early-delivered items, bidders here could not have been told the precise dollar amount (that is, the Government's estimate of the storage facility's construction cost) that would have prompted selection of a storage credit option bid even if the general outlines of the Air Force's intent to rely, in part, on the bidding results of other solicitations had been revealed. Further, we view the scheme as being analogous to the "stepladder" method of bidding (described, for example, in Chemical Technology, Inc., B-187940, February 22, 1977, 77-1 CPD 126), in which the Government reserves the right after bid opening to determine the lowest bidder by considering its then existing quantity requirements. Manifestly, under this analogous award scheme bidders are also unaware as to what extraneous factors will prompt the selection of the lowest bidder after bid opening. Given these facts and the clear right of the Government to determine the reasonableness of submitted bids by appropriate information, we cannot question the use of the other bidding results complained of here.

(5) Carrier's failure to quote "storage credits" early delivery dates otherwise obligates it under the wording of the IFB provisions involved to deliver at an indefinite time before the required delivery dates. We so conclude because it is our opinion that the blanks contained in the "Bidder's Proposed Delivery Schedule" clause of the IFB were only for bidders to insert specific delivery dates within the "not earlier-not later" required delivery dates set forth in the IFB clause entitled "Time of Delivery." Thus, Carrier's "storage credits" bid effectively deleted the application of these two clauses to its bid. Moreover, Carrier's "storage credits" bid is most financially advantageous under the IFB scheme, since the IFB contained no indication that a "storage credits" bid would be considered more acceptable depending on the bidder's precise early delivery dates. Therefore, Carrier's failure to quote early delivery dates is not objectionable.

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In light of our conclusions that Carrier's lower-priced, "storage credits" bid is otherwise for acceptance, it is unnecessary to consider the responsiveness of York's higher-priced bid without "storage credits."

Protest denied.

*R. F. Keenan*  
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of the United States