

D. B. ...

DECISION



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

7611

FILE: B-192595

DATE: September 12, 1978

MATTER OF: Peter J. Giordano

DIGEST:

1. Bid, clearly nonresponsive for failure to comply with bid acceptance period of IFB, does not raise genuine mistake for application of mistake-in-bid rules.
2. Request of procuring agency to obtain review by GAO of bidder's objection to agency's determination of nonresponsiveness is not a filing in GAO within meaning of Bid Protest Procedures.
3. Error by agency in instructing apparent low bidder to follow mistake-in-bid procedures in pursuing objection to agency's determination of nonresponsiveness, and delay in forwarding bidder's request for review to GAO not prejudicial where protest clearly is without legal merit.

By letter dated August 8, 1978, the Department of the Interior, sent here the administrative record concerning an alleged mistake in bid by Peter J. Giordano (Giordano) under Fish and Wildlife Service solicitation (IFB) No. FWS1-78-22, and requested our determination pursuant to section 1-2.406-4(g) of the Federal Procurement Regulations (FPR).

Bid opening was held on February 14, 1978. On that date the Department informed Giordano of a determination that his bid was nonresponsive because it did not comply with the required bid acceptance period.

On the face sheet of the IFB, bidders were advised that bids were subject to various provisions and instructions, including Instructions and Conditions, Standard Form 33-A, which were either attached to the IFB or incorporated by reference in the schedule. In addition, the face sheet carried standard printed language relative to the period during which bids could be accepted reading, in part, as follows:

"In compliance with the above, the undersigned offers and agrees, if this Bid be accepted within _____ calendar days (60 calendar days unless a different period is inserted by the bidder) from the date of opening, to furnish any or all of the items upon which prices are quoted * * *."

Paragraph 1 of the "General Clauses and Conditions" of the IFB is titled "BID ACCEPTANCE PERIOD" and states that "Bids offering less than twenty (20) calendar days for acceptance by the Government from the date set for opening of bids will be considered nonresponsive and will be rejected."

Giordano inserted "5" days in the blank on the face sheet of the IFB which resulted in the contracting officer determining his bid nonresponsive. Orally, on February 14th and 15th Giordano explained alternatively that he misinterpreted the IFB provisions or that an error was committed and that he intended to insert in the blank "50" rather than "5."

Based on a written assertion from Giordano that a clerical error was made, the contracting officer instructed Giordano to submit statements and pertinent evidence, such as original work-sheets and other data, substantially following the requirements of the mistake-in-bid procedures contained in section 1-2.406 of the Federal Procurement Regulations (1964 ed.). Papers submitted by Giordano supporting the mistake-in-bid theory were forwarded to the appropriate agency authority, who, with the concurrence of counsel, made a determination on April 26, 1978, adverse to Giordano.

When informed by telephone of the determination on May 10, 1978, Giordano requested the contracting officer to submit the matter to the Comptroller General for review. On May 24, 1978, the request was forwarded to the Director, Office of Administrative and Management Policy; it was submitted here with the agency's letter of August 8, 1978.

Section 1-2.406-4(g) of the FPR, cited by the agency as authority for review of the agency's determination by the Comptroller General, reads:

"Nothing contained in this § 1-2,406-4 shall deprive the Comptroller General of his statutory right to question the correctness of any administrative determination made hereunder nor deprive any contractor of his right to have the matter determined by the Comptroller General should he so request."

When the General Accounting Office delegated authority on correction of mistakes in bid to procuring agencies, the Office retained the right to review administrative determinations. 51 Comp. Gen. 1, 3 (1971). Where a determination is made by a procuring agency of a genuine mistake, this Office will exercise its retained authority of review. However, the rules permitting correction of bids apply only when the bid as submitted is responsive. Miles Metal Corporation, B-182838, March 11, 1975, 75-1 CPD 145.

We have ruled on several occasions that the bid acceptance period in an invitation is a material requirement and that failure to meet such a requirement renders a bid nonresponsive. 40 Comp. Gen. 432 (1961); 46 Comp. Gen. 418, 422 (1966); see Perry C. Herferd, B-187666, December 6, 1976, 76-2 CPD 465, involving identical bid acceptance period provisions.

The Department was in error in treating the bidder's failure to comply with the invitation's bid acceptance period--submitting a clearly nonresponsive bid--as a mistake, regardless of what the bidder may have labeled the nonresponsiveness. In effect, Giordano, as apparent low bidder, protested the determination of nonresponsiveness and, as such, is subject to our Bid Protest Procedures. See Hemet Valley Flying Service Co., Inc., B-191390, May 8, 1978, 78-1 CPD 344.

Section 20.2(a) of our Bid Protest Procedures, provides in part that "If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered provided the initial protest to the agency * * *" is timely.

The initial adverse agency action in this case was taken on April 26, 1978, and the telephone notice on May 10, 1978, of the adverse determination was formal notification within the rules, starting the 10-day period to protest: B-191715, August 9, 1978. Although Giordano requested the procuring agency on May 10, 1978, to submit the matter to the Comptroller General for review such a request to the agency would not constitute the filing of a protest here even if timely. See Graphic Litho Corporation, B-190028, January 9, 1978, 78-1 CPD 18; E. C. DeYoung, Inc., B-186539, July 26, 1976, 76-2 CPD 84; Karl Doll GmbH, B-187109, August 30, 1976, 76-2 CPD 205; and Energy Piping Systems, Inc., B-185573, January 27, 1976, 76-1 CPD 64.

Under these principles it is immaterial that the procuring agency failed to forward the request to this Office until three months after the protester requested it to do so. Further, although the agency may have misled the protester by directing application of the mistake-in-bid procedures, no prejudice to the protester resulted because it is clear that the protest is legally without merit. See Western Branch Diesel, Inc., B-190407, December 21, 1977, 77-2 CPD 494.

William J. Acosta

Acting Comptroller General
of the United States