

DOCUMENT RESUME

08136 - [C3426553]

[Protest concerning Handwritten Note Accompanying Bid].
B-192580. December 5, 1978. 4 pp.

Decision re: B.P.O.A. Contractors; by Robert F. Keller, Deputy
Comptroller General.

Contact: Office of the General Counsel: Procurement Law II.
Organization Concerned: Department of the Army: Fort Richardson,
AK.

Authority: 49 Comp. Gen. 649. Defense Acquisition Regulation
2-404.2. Defense Acquisition Regulation 2-405. Defense
Acquisition Regulation 1-703. B-181739 (1974). B-186691
(1977). Prester Inc. v. United States, 162 Ct. Cl. 620
(1973). Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380
(1947).

A company which inserted a handwritten note into its
bid prior to bid opening protested award of the contract to any
other contractor. The note accompanying the bid could not be
considered since it limited the time for acceptance of the bid
contrary to a material provision of the solicitation. The
contracting officer lacked the authority to permit the bidder to
delete the limiting language from the bid; the bid could not be
considered. (RRS)

2010
PK-11
9553

DECISION



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

FILE: B-192580

DATE: December 5, 1978

MATTER OF: Allen Wilson d/b/a B.P.O.A. Contractors

DIGEST:

1. Note, accompanying bid for painting work, which states "Bid price reduced \$3,000 if notice to proceed is issued within 7 days or sooner in order for work to be completed this Fall" could not be given effect in evaluation of bids since by effectively limiting time for acceptance of bid, note conflicted with material provision of IFB.
2. Contracting officer lacks authority to direct or permit bidder to delete from bid, after bid opening, language which materially qualifies bid.

Allen Wilson, doing business as B.P.O.A. Contractors (Wilson), protests award of a contract to a contractor other than himself, under invitation for bids (IFB) No. DAKF70-78-B-0043 issued by the Department of the Army, Fort Richardson, Alaska, for the exterior painting of fourteen buildings at Fort Wainwright, Alaska, consisting of a base bid for 8 buildings and six additive items of one building each. The procurement was totally set aside for small business concerns.

Shortly before the scheduled bid opening, on July 25, 1978, Wilson asked the bid opening officer if he could repossess his bid. He was allowed to do so. He then opened the sealed envelope, inserted a hand written note, resealed the envelope with tape, signed the envelope and redeposited it.

At the announced time, the bid opening officer opened the bids and they were read. When she came to the Wilson bid it was \$82,810 for the base bid and \$5,249 for the additive items for a total of \$88,059. However, the note mentioned above read:

"Bid price reduced \$3,000 if notice to proceed is issued within 7 days or sooner in order for work to be completed this Fall."

After reading the bid and the note, the bid opening officer and Wilson had a discussion concerning the note. There is a conflict as to whether the bid opening officer told Wilson to cross off certain words of the note, or suggested that to him, or merely permitted him to take the action he took. In any event, after the bid with the enclosed note was read aloud, Wilson did line out the words "if notice to proceed is issued within 7 days".

It was later determined that an arithmetic error was made in the additive bid with the result that the original Wilson bid was \$88,000. The note reduced that bid by \$3,000 to \$85,000. There were two other bids that were between \$88,000 and \$85,000. Thus, if the note reducing the bid were considered, Wilson would become the low bidder.

During the bid evaluation the contracting officer determined that the bid opening officer should not have allowed Wilson to delete a portion of the note reducing the bid price and that the bid, before the deletion, put a restriction on the Government, i.e. required the award to be made within 7 days. Accordingly, Wilson was notified on August 4 (more than 7 days after bid opening) that he was not the low bidder because the crossed out condition must be read into the bid and the notice to proceed had not been furnished within 7 days.

Wilson contends that the condition imposed by the note was not of a substantive nature and that he was therefore properly authorized by the bid opening officer to delete the objectionable portion after bid opening as permitted by Defense Acquisition Regulation (DAR) § 2-404.2(d) (1976 ed.). Similarly, Wilson maintains that the condition was a minor informality or irregularity waivable under DAR § 2-405. In either event, Wilson states, the effect was to unconditionally reduce his bid by \$3,000. Accordingly, Wilson argues, he should be considered the lowest bidder and award should be made to him.

Wilson's note constituted an additive bid of \$85,000 conditioned upon the Government's issuance of a notice to proceed within seven days of the bid

B-192580

opening. However, a notice to proceed cannot be issued until a bid is accepted and payment and performance bonds are obtained. In this regard, the contracting officer advises he was not in a position to accept Wilson's bid until other bidders had had five working days within which to file size status protests (DAR § 1-703(b)(1)); and until a preaward survey of Wilson (who had not held a previous contract with Fort Richardson) had been completed. In short, the contracting officer states that he could not accept the bid and issue a notice to proceed within the seven-day period.

The note conflicts with the IFB in that the note effectively limits to seven days the period within which Wilson's bid was available for acceptance. Standard Form 21 (SF 21), made a part of the IFB, required bids to remain open for acceptance for a period of 60 days. In this regard, paragraph 15 of Standard Form 20, Invitation for Bids, advised all bidders:

"MINIMUM ACCEPTANCE PERIOD (1975 MAR). Bids allowing less than the number of calendar days specified on the reverse of the SF 21 for acceptance by the Government will be rejected as nonresponsive."

In 49 Comp Gen 649 (1970) at 651-52 we stated:

"When an invitation provision requires a bid to remain open for acceptance for a specified period to be considered for award, our Office has held that such provision is material and noncompliance therewith renders the bid nonresponsive * * *."

* * * * *

"* * * Further, such nonresponsiveness may not be waived as a minor informality * * *."

See also Infrared Industries Inc., B-181739, November 20, 1974, 74-2 CPD 272, and cases cited therein.

Since the note took exception to a material provision of the IFB, it follows that the bid opening

officer lacked the authority to either permit or direct the deletion of the conditional language in the bid after bid opening, or to waive that provision as a minor informality, pursuant to DAR §§ 2-404.2(d) or 2-405. As we stated in Redifon Computers Limited - - Reconsideration, B-186691, June 20, 1977, 77-1 CPD 463 at page 11:

"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."

See also Federal Crop. Ins. Corp. v. Merrill, 332 U.S. 380 (1947).

We believe Wilson submitted a responsive \$88,000 bid accompanied by a conditional, alternate \$85,000 bid, which could not be accepted by the Government for the reasons stated above. Wilson's bid price must therefore be evaluated as \$88,000.

R. M. K. 1972
Deputy Comptroller General