

DECISION



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

[Protest of Bid Being Rejected by Veterans Administration]

FILE: B-194722

DATE: May 14, 1979

MATTER OF: Sunoptic, Inc.

DIGEST:

- 1. Bidder's insertion of footnote on bid indicating belief that solicitation's required delivery schedule is unreasonable and offering different delivery schedule in lieu thereof is tantamount to protest against required delivery schedule. Such protest of alleged impropriety in solicitation is untimely where presented at the earliest as part of protester's bid.
- 2. Bid offering delivery schedule different from delivery schedule required in solicitation was properly rejected as nonresponsive, since such offer constitutes deliberate and material deviation from solicitation's requirements which cannot be waived as trivial or minimal. *+ was properly rejected*
- 3. Where initial submission reveals protest has no legal merit, decision will be rendered without obtaining agency report and request for conference is denied.

*DLG 01587*

Sunoptic, Inc. (Sunoptic), protests the rejection of its bid as nonresponsive under Veterans Administration (VA) solicitation No. M3-6-79. VA rejected the bid on two grounds: failure to strictly conform to the 14-day delivery schedule; and failure to submit a price on each item. Since, for the reasons that follow, we find Sunoptic's bid to be nonresponsive under the first ground, we need not consider the second ground. *ABC 00016*

The pertinent facts are as follows.

Sunoptic submitted the bid "NA\*" for Item No. 40 of the solicitation's schedule of prices. The asterisk referred to a footnote which indicated that Sunoptic

*005293*

would require 4 to 6 weeks to deliver item No. 40. The solicitation required a 14-day delivery. Sunoptic urges that its footnote was only intended to specify the commercial availability of item No. 40. It reports that there are only two manufacturers of item No. 40 and both had advised Sunoptic that item No. 40 could only be provided on the basis of a 4- to 6-week delivery schedule. Sunoptic is therefore of the view that the solicitation contains a "latent defect" in that its specified delivery time "was commercially impossible of performance." Sunoptic concludes that:

"The inescapable fact is that no other bidder, whether it realized it or not, was in a position to submit a bid in which it could accurately claim to deliver Item No. 40 within fourteen days. \* \* \*"

We believe that Sunoptic's asterisk/footnote and its explanation of it is tantamount to a protest against what it believed to be an unreasonable delivery schedule. A protest of an apparent impropriety in a solicitation is untimely when it is first submitted with a protester's bid. See American Can Company - Reconsideration, B-186974, August 19, 1976, 76-2 CPD 178; Emerson Electric Co., B-184346, September 9, 1975, 75-2 CPD 141. Consequently, Sunoptic's arguments supporting its use of the asterisk to qualify its bid are untimely and not for consideration on the merits.

This leaves for our resolution only the issue of whether Sunoptic's bid, thus qualified, was properly rejected as nonresponsive. We believe that it was. In a similar case we observed that:

"\* \* \* Our Office has held many times that in formal advertising the contract awarded to one bidder must be the contract offered to all bidders and only those deviations which are immaterial and do not go to the substance of the bid so as to prejudice the rights of other bidders may be waived. See, e.g., Edmund Leising Building Contractor, Inc., B-184405, October 29, 1975, 75-2 CPD 263. Federal Procurement Regulations (FPR) § 1-2.404-2~~(4)~~ and ~~(5)~~ (1964 ed. amend 121) provide that any bid which fails

to conform to the essential requirements of the IFB, such as delivery schedule, shall be rejected as nonresponsive and that a bid shall be rejected where a bidder imposes conditions which would modify the IFB. This Office has long acknowledged the materiality of completion schedules and dates and the substantial effect they may have on the competitive position of bidders. See 53 Comp. Gen. 320 (1973); 53 id. 32 (1973); 51 id. 518 (1972). Memory Display Systems Division of the EdnaLite Corporation, B-187591, January 28, 1977, 77-1 CPD 74.

We are of the view that the cited decision is dispositive of the issue presented here.

Sunoptic urges us to consider the fact that item No. 40 constitutes "a miniscule 1/10 of 1 % of all orders under the contract." We are of the view, however, that the magnitude of item No. 40 is irrelevant to our consideration of the protest since Sunoptic took deliberate exception to the stated delivery schedule. It has long been our position that deliberate exceptions to invitation requirements cannot be waived as trivial or minimal. Abbott Power Corporation, B-192792, April 30, 1979.

Because we believe that Sunoptic's initial submission to our Office clearly reveals that the protest has no legal merit, this decision has been rendered without obtaining an agency report pursuant to our Bid Protest Procedures, 4 C.F.R. § 20.3(c) (1978). Inflated Products Company, Inc., B-190877, May 11, 1978, 78-1 CPD 362. Consequently, Sunoptic's request for a conference is also denied.

The protest is dismissed in part and summarily denied in part.

  
Deputy Comptroller General  
of the United States