



DECISION

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

[Protest of Marine Corps. Proposed termination of Contract 10,471]

FILE: B-193826

DATE: June 15, 1979

MATTER OF: Instant Replay Equipment Company; DLG 01818
Recording Center Service Company DLG 01819

DIGEST:

1. While GAO recognizes that administration of properly awarded contract--including decision to terminate for convenience of Government--is responsibility of cognizant procurement officials, where alleged impropriety in award process is basis for Government's decision to terminate, GAO will review propriety of award to determine if termination is justified.
2. "+" bid is ambiguous and nonresponsive. To extent nonresponsiveness is result of oral advice allegedly provided by contracting agency personnel, bidder acted at its peril.
3. Determination of contracting agency to readvertise requirement-type IFB which did not provide estimate of repair parts is sustained, since bidders are not competing on equal basis when not apprised before submission of bids of what may be required under contract.

Recording Center Service Company has refused the request of the United States Marine Corps *AGC00098* (Marine Corps) that it voluntarily accept cancellation of the contract awarded under invitation

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for bids (IFB) No. M00243-79-B-0002 and has protested the Marine Corps' proposed termination of the contract under the termination for the convenience clause in the contract.

BACKGROUND

IFB No. M00243-79-B-0002 for maintenance services for closed circuit instructional television systems was issued November 27, 1978, by the Contracting and Purchasing Branch, Marine Corps Recruit Depot, San Diego, California. *DLG 01820* The IFB solicited prices to maintain the individual components of the systems under three lots, representing systems at three locations. The principal focus of the present review involves the following IFB provision:

"Repair parts prices will be quoted at the Manufacturer's list price. Bidders shall quote a plus or minus percentage to manufacturer's list price. Failure to indicate either 'plus' or 'minus' will be interpreted as a 'minus' bid. Repair parts furnished by the contractor will be billed as a separate item on the invoice."

Bids were opened on December 15, 1978. The four bids were as follows:

<u>OFFEROR</u>	<u>LOT I</u>	<u>LOT II</u>	<u>LOT III</u>	<u>TOTAL</u>	<u>PARTS DISCOUNT</u>
Instant Replay Equipment Co.	\$26,649.00	\$14,505.12	\$16,646.68	\$57,800.80	+ 15%
Recording Center Service Co.	19,272.00	16,890.00	23,526.00	59,688.00	- 10%
Video-Com Inter- national Corp.	36,650.00	23,860.00	27,400.00	87,910.00	+ 10%
Video Equip- ment Corp. of America	22,600.00	19,550.00	26,350.00	68,500.00	Net %

Instant Replay Equipment Company was rejected as nonresponsive because it bid both "plus and minus" instead of either "a plus or minus" percentage as required by the IFB provision for repair parts bidding. The contract was awarded to Recording Center Service Company on December 20, 1978.

Instant Replay Equipment Company protested the rejection of its bid in a letter to the Marine Corps dated December 22, 1978. The protest stated in part:

"It should be pointed out that no specific dollar amount relating to repair parts was mentioned in the text of this [IFB]. Moreover, no bidder was ever asked * * * to provide * * * any list of the manufacturers with which he is factory-authorized or from which he can purchase parts at a discount from manufacturer's price list. Thus the discount percentage called for on page 27 of the bid gave informational data only--not a tangible dollar figure which could be directly used in evaluating the overall desirability of any bidder's offer, since there was no reference list of manufacturers from which repair parts could be purchased at a discount by any given contractor."

Instant Replay Equipment Company's protest also alleged that, as a result of questions raised at the prebid conference which was held on December 7, 1978, it had been orally advised by a Marine Corps representative that both a plus and minus figure could be quoted for the repair parts. In this way the contractor could extend a discount on parts from manufacturers with which it was factory authorized and recover its costs for parts obtained from manufacturers with which it was not factory authorized.

By letter of December 27, 1978, Instant Replay Equipment Company also protested to our Office.

Upon initial review of the Instant Replay Equipment Company protest, Marine Corps Headquarters concluded that an illegal award had been made under the IFB and that the award should have been made to Instant Replay Equipment Company. The contracting officer was advised to seek voluntary acceptance of a cancellation of the contract from Recording Center Service Company. *The protesting company.*

Upon further detailed review, Headquarters concluded that the IFB ~~was defective~~ ^{found} in the following respects:

"First with regard to the evaluation of repair parts, since the IFB did not assign an estimated dollar amount for parts based on prior experience and future projections against which a discount could be applied, it is impossible to determine the overall low bid.

"Secondly, it was the intention of the Contracting Office to award the contract in the aggregate to the overall low bidder rather than by lot as set forth in the IFB. It was not believed to be cost effective to administer more than one contract for this requirement.

"Third, the IFB was unclear as to whether an annual or monthly price for maintenance was being solicited and which would be the basis of evaluation.

"Fourth, although this is a requirement for routine maintenance, the IFB's work statement (page 28) required 'training/instruction' and 'engineering services' both of which were unquantified. The potential of such requirements could mislead offerors who were not familiar with the prior performance of the requirements and might have affected their pricing."

In view of these findings, the Marine Corps has concluded that it is impossible to make any award under the IFB as issued. Therefore, the Marine Corps has proposed that the contract be terminated for the convenience of the Government and readvertised under revised specifications.

Recording Center Service Company contends that the contract should be enforced as awarded.

SCOPE OF REVIEW

Once a contract is properly awarded, the administration of the contract--including the rendering of decisions as to whether the contract should be terminated--is the responsibility and within the authority of the cognizant procurement officials rather than this Office. Kaufman DeDell Printing, Inc.--Reconsideration, B-188054, October 25, 1977, 77-2 CPD 321. However, where ^{where} an alleged impropriety in the award process is the basis for the Government's decision to terminate, this Office will review the propriety of the contract award for the purpose of determining whether the termination is justified under the facts presented. Safemasters Company, Inc., B-192941, January 22, 1979, 79-1 CPD 38. Thus, for example, in Michael O'Connor, Inc., et al., B-183381, July 6, 1976, 76-2 CPD 8, we found under the facts presented that, where an agency's decision to terminate a

contract for the convenience of the Government arises out of a pending protest against the contract award, there was a sufficient connection between the termination and the subject matter of the protest to justify a review by our Office of the propriety of the initial award.

RESPONSIVENESS ISSUE

Instant Replay Equipment Company's "+" bid on repair parts is ambiguous. An ambiguous Bid is a nonresponsive bid. 50 Comp. Gen. 379 (1970). In Fire & Technical Equipment Corp., B-192408, August 4, 1978, 78-2 CPD 91, we stated:

"* * * Only material available at bid opening may be considered by the contracting officer when determining the responsiveness of the bid. To permit explanations after bid opening to render responsive a bid which is nonresponsive on its face would be tantamount to granting an opportunity to submit a new bid. 52 Comp. Gen. 602 (1973). Thus, a nonresponsive bid may not be corrected and it does not matter whether the failure to comply with the requirements of the IFB was due to inadvertence, mistake or otherwise. 45 Comp. Gen. 434 (1966)."

This is the rule despite the potential for gaining a lower price in a particular procurement. Tennessee Lithographing Company, B-188967, May 26, 1977, 77-1 CPD 371.

Also, in Fire & Technical Equipment Corp., supra, we stated:

"Furthermore, waiver of minor informalities or irregularities in bids is limited to conditions which do not go to the substance, as distinguished from the form, of a bid. A deviation goes to the substance of the bid when it affects price, quantity, quality or delivery of the items offered. Defense Acquisition Regulation § 2-404.2(d).
* * *"

In this case, the ambiguity cannot be considered a minor informality, since the IFB repair parts provision impacts on the price the Government is to pay for repair parts under the contract.

To the extent that Instant Replay Equipment Company bid nonresponsively as the result of oral advice allegedly provided by the contracting activity, it acted at its peril. The IFB instructions and conditions state in paragraph 3 that oral explanations or instructions given prior to award will not be binding. Erroneous advice given by Government officials cannot estop an agency from rejecting a bid as non-responsive when required to do so by law. Edward E. Davis Contracting, Inc., B-188986, November 29, 1977, 77-2 CPD 419.

In view of the foregoing, we conclude that the Instant Replay Equipment Company bid was nonresponsive and, therefore, not for consideration for award. Accordingly, we concur with the Marine Corps' initial determination to reject the bid.

CANCELLATION AND RESOLICITATION OF IFB ISSUE

The first basis advanced for cancellation of the IFB is that the failure to contain a repair parts estimate made it impossible to determine which bid was the overall low bid. A requirements-type IFB which fails to include estimated quantities is defective. Michael O'Connor, Inc., 56 Comp. Gen. 107 (1976), 76-2 CPD 456. Also, an IFB which does

not provide for the evaluation of bids on the basis of all the work to be let is defective. Lloyd Kessler, B-186594, September 3, 1976, 76-2 CPD 218. In this case, the bidders were not furnished all the information that would be important to arrive at an intelligent bid on a common basis. Bidders had to speculate on the amount of repair parts that would be required under the contract. Bidders are not competing on an equal basis when they are not apprised before the submission of bids of what may be required under the contract to be awarded. 43 Comp. Gen. 544 (1961) and 39 id. 570 (1960). It may very well be that the omission of the repair parts estimate contributed to the confusion which resulted in the nonresponsive bids. Further, the inclusion of an estimate in the readvertised IFB would be a significant difference from the original IFB.

In view of the foregoing, we conclude that the Marine Corps has provided an adequate basis for resoliciting the contract. Therefore, it is unnecessary for us to consider the other three bases advanced by the Marine Corps for resolicitation.

Accordingly, we believe it would be appropriate to terminate Recording Center Service Company's contract for the convenience of the Government.

two companies were denied
The protests of Recording Center Service Company and Instant Replay Equipment Company are denied.

R. F. Kessler
 Deputy Comptroller General
 of the United States