

TRANS

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DECISION

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

[Protest of IFB Cancellation]

FILE: B-196419

DATE: February 19, 1980

MATTER OF: Hild Floor Machine Co., Inc. DLG03927

DIGEST:

Award may be made under defective IFB if Government's actual needs would be met and other bidders would not be prejudiced.

Hild Floor Machine Co., Inc. (Hild) protests the proposed cancellation by the General Services Administration (GSA) of invitation for bids (IFB) No. 9FCE-OLE-A-A125/79 for numerous items of cleaning equipment. The solicitation is to be canceled because of an ambiguity with respect to the required minimum bid acceptance period. Although we agree that the IFB is misleading in that regard, we believe that contracts may be awarded to the protester and other bidders for certain of the items, since under the circumstances those awards would meet the Government's needs and would not prejudice any other bidders. The protest is sustained to that extent.

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Bids were invited on 93 items, each for delivery to 13 different zones. Award was to be made on an item-by-item basis. Page 1 of Standard Form (SF) 33, the Solicitation, Offer and Award, advised bidders that the bid acceptance period would be 60 calendar days from bid opening unless the bidder inserted a different period in the space provided. However, clause 55 on page 4 of SF 33 stated that bids offering acceptance periods of less than 90 days after bid opening would be rejected as nonresponsive. The provisions were not cross-referenced so as to direct a bidder's attention to the fact that either leaving blank the acceptance period space on page 1 of SF 33 or inserting a period shorter than 90 days would cause the rejection of a bid.

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Upon noting that the failure to cross-reference the two provisions could mislead bidders into inadvertently submitting nonresponsive bids, the contracting officer prepared an amendment to the IFB deleting clause 55. However, the amendment was not distributed before bids were opened.

Twenty three bidders responded to the solicitation. Eight, including Hild, offered acceptance periods of 90 days or more; four offered 60-day acceptance periods; and 11 left blank the space on page 1 of SF 33. Thus, 15 of the bids were nonresponsive under clause 55.

GSA contends that the determination to cancel the IFB is proper in that it is "reasonably founded" on our decision in 52 Comp. Gen. 842 (1973), which involved three invitations with bid acceptance provisions identical to those here that also were not cross-referenced. There, 10 of the 13 bidders responding to the solicitations left blank the space on SF 33 for indicating a bid acceptance period of other than 60 days, and their bids therefore were nonresponsive for failure to comply with the 90-day bid acceptance period. We stated:

"* * * where an invitation contains language specifying a bid acceptance period and another separate provision located elsewhere in the invitation sets forth a minimum bid acceptance period, the two provisions should be cross-referenced in such manner as to specifically direct bidders' attention to the fact that insertion of a shorter period will cause the bid to be rejected. * * *

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"* * * the Government has the initial responsibility of stating what is required in reasonably clear fashion. Communication of the minimum bid acceptance period under the instant solicitations * * * was clearly

inadequate, as exemplified by the overwhelming number of bidders who obviously either failed to appreciate the 90-day requirement or failed to take proper steps to establish responsiveness to that requirement.

"We have observed that a sense of fairness and impartiality should imbue the Federal procurement effort. These solicitations reasonably must be viewed as having contained a trap to ensnare the average bidder into a state of nonresponsiveness as to the bid acceptance period imposed. We must assume that only a grossly misleading invitation would have caused almost all bidders--who expended considerable time and money to compete for the Government's business--to fail to hold their bids open as required."

Accordingly, we recommended that the two solicitations under which award had not been made be canceled and the procurements resolicited with clear bid acceptance period requirements stated.

Although the instant solicitation is misleading in the same manner as were the ones in 52 Comp. Gen., supra, we nonetheless believe that in view of certain other considerations the IFB need not be canceled in its entirety.

Federal Procurement Regulations § 1-2.404-1(a) (1964 ed. circ. 1) provides that "the preservation of the integrity of the competitive bid system dictates" that once bids have been opened, award must be made to the low responsive, responsible bidder, unless there is a "compelling reason" for cancellation. The primary basis therefore is that the rejection of all bids after opening tends to discourage competition because it publicly discloses bids without award and causes bidders to have expended manpower and money in bid preparation without

the possibility of acceptance. A&C Building and Industrial Maintenance Corporation, B-193047, April 13, 1979, 79-1 CPD 265, at p. 11. Accordingly, absent a showing of competitive prejudice the cancellation of a defective IFB after bids have been opened may be inappropriate if award would serve the Government's actual needs. GAF Corporation; Minnesota Mining and Manufacturing Company, 53 Comp. Gen. 586 (1974), 74-1 CPD 68.

In 52 Comp. Gen., supra, the low bid under each solicitation was a nonresponsive one, i.e., a bid with an acceptance period of less than 90 days. As a general rule, the longer a bid must be exposed to the uncertainties of the marketplace, the greater the risk and thus the higher the bid must be. Hemet Valley Flying Service Co., Inc. - Reconsideration, B-191390, July 26, 1978, 78-2 CPD 73. Accordingly, those bids may have been higher if they had been based on a 90-day acceptance time, and the 90-day bids may have been lower if a 60-day acceptance period had been considered. Clearly, award under those circumstances would prejudice the higher bidders, since the results of the competition could have been different if all bidders had competed on a common basis.

In contrast, the low bids on 40 percent of the 93 items listed in the instant IFB were submitted by the eight bidders (including Hild) who offered bid acceptance periods of 90 days or more. It follows from the above that even if the two bid acceptance periods noted on SF 33 had been cross-referenced and all bidders had bid on the basis of a 90-day acceptance period, the results of that part of the competition would have been the same, since we can assume that the 15 nonresponsive bidders would have submitted either the same or higher bids. Therefore, we do not see how any bidder could be prejudiced by an award on items where the low bidder was a firm such as the protester that indicated an acceptance period in conformance with clause 55 of SF 33. 52 Comp. Gen., supra, distinguished. See Tennessee Valley Service Company, B-188771, July 20, 1977, 77-2 CPD 40. Accordingly, and while all bids presumably have expired,

awards should be made where the low bidders offered 90-day acceptance periods, if otherwise appropriate, and the firms are still willing to accept awards at the bid prices. Tennessee Valley Service Company, 57 Comp. Gen. 125 (1977), 77-2 CPD 442.

We recognize that the above discussion suggests that cancellation of those items nonetheless may be in the Government's interest since GSA evidently overstated its needs with respect to the bid acceptance period (the agency did attempt to delete the 90-day provision before bid opening). Thus, GSA may have received even lower bids from the low 90-day bidders if bids properly had been solicited on a 60-day basis. However, we point out that bids under the IFB were opened on October 3, 1979, and in view of the general inflationary economy presently being experienced in the United States, we do not believe that cancellation on that basis would be in the best interest of the Government.

With respect to the remaining 60 percent of the items, on which the low bidder was a nonresponsive firm, we agree that 52 Comp. Gen., supra, is controlling, and that the procurement should be canceled and resolicited to that extent.

The protest is sustained.


Deputy Comptroller General
of the United States