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**DECISION**



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

FILE: B-203397

DATE: July 1, 1981

MATTER OF: Ven-Tel, Inc.

**DIGEST:**

1. Protest of alleged improprieties in solicitation filed with bid is untimely since GAO Bid Protest Procedures require filing prior to bid opening, 4 C.F.R. § 20.2 (1980).
2. Bid taking exception to IFB requirement for interchangeability of circuit cards is nonresponsive notwithstanding bidder's offer to provide free spare circuit cards since requirement was material and not waivable.
3. Where protester's initial submission indicates protest is without merit, GAO will render decision on matter without requesting report from procuring activity.

Ven-Tel, Inc. (VTI), protests the Army, Corps of Engineers (Army), rejection of its bid as nonresponsive under invitation for bids (IFB) No. DACW63-81-B-0052. VTI's bid was rejected (1) for failure to offer data sets (modems) that were interchangeable between rack mounted and stand alone units and (2) for failure to offer modems "manufactured under license from Western Electric." Both requirements were clearly set out in the IFB. VTI elected to bid but took exception in its bid to the two requirements. This caused the rejection of its offer.

To the extent VTI's statement of exception in its bid may have been intended as a protest, it is directed against the restrictiveness of the specifications and is untimely and not for consideration on the merits. We also agree with the Army's determination that VTI's bid was nonresponsive since at least one of the two grounds for rejection of the bid was material.

*[Protest of Bid Rejection as Nonresponsive]*  
*Exhibit* *017-443* **115676**

Our Bid Protest Procedures, 4 C.F.R. part 20 (1980), require that protests based on alleged improprieties in the solicitation, which are apparent prior to bid opening, be filed prior to bid opening. 4 C.F.R. § 20.2(b)(1) (1980). Bids were opened on May 1, 1981. VTI's bid was rejected on May 14, 1981, and VTI's protest was filed at GAO on May 22, 1981. Therefore, VTI's protest against the requirements was raised, at the earliest, at the time of bid opening, if its exceptions are construed as a protest to the contracting agency. We have held, however, that a protest of an apparent impropriety in a solicitation is untimely where the protest is first submitted with the 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. A bidder who participates, without objection, in a procurement through the point of bid opening is deemed to have acquiesced in the terms and conditions set out in the solicitation. Patterson Construction Co., B-180290, February 28, 1974, 74-1 CPD 113.

The IFB required modems in both a rack mounted and a stand alone configuration. It further provided:

"\* \* \* The circuitry of the data set [modem] must be identical and interchangeable in the stand alone and rack mounted models such that spare data sets [modems] could be used in either."

VTI's bid took exception to this requirement as follows:

"In lieu of this capability, \* \* \* [VTI] will maintain a quantity of not less than 10% of the rack mount cards on site, as \* \* \* [VTI] owned spares."

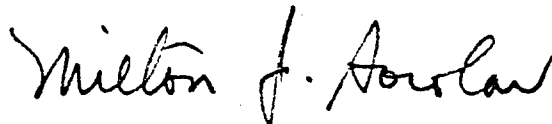
We understand that the circuitry, referred to above, is usually placed on printed circuit cards (cards) which are in turn plugged into the modem. VTI's stand alone modem cabinet is so small that it will not accommodate the standard cards which fit into a standard 19-inch rack mount. Consequently, VTI could not offer the required interchangeability unless it redesigned its stand alone modem to accommodate the larger rack mount cards.

In formal advertising the contract awarded to one bidder must be the same contract that was offered to all bidders; therefore, an agency may only waive those deviations which are immaterial and do not go to the substance of the bid so as to prejudice the rights of other bidders. A deviation which affects price, quality, quantity, or delivery goes to the substance of the procurement and may not be waived. See Edmund Leising Building Contractor, Inc., B-184405, October 29, 1975, 75-2 CPD 263. Since VTI's exception to the interchangeability requirement clearly goes to the quality of the item sought, its bid was non-responsive and properly rejected.

In view of the above, we need not consider whether VTI's bid was also nonresponsive for failure to offer modems manufactured under a Western Electric license.

Where a protester's initial submission indicates the protest is without legal merit, we will decide the matter on the basis of the protester's submission without obtaining a report from the procuring activity. Fire & Technical Equipment Corp., B-192408, August 4, 1978, 78-2 CPD 91.

Accordingly, the protest is summarily denied in part and dismissed in part.



Acting Comptroller General  
of the United States