

117117

20335

PL-1  
Harde II

**DECISION**



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

FILE: R-204742

DATE: December 21, 1981

MATTER OF: 1010 Incorporated of Alamogordo

**DIGEST:**

1. Where bid is reasonably susceptible of two interpretations, one of which makes the bid nonresponsive, the bidder is foreclosed from providing any clarification of the ambiguity to establish that the bidder intended to be responsive.
2. Bid was properly rejected as nonresponsive even though the contracting officer disclosed the price at bid opening contrary to the restriction against disclosure in bid.
3. Nonresponsiveness of bid may not be cured through bid correction.
4. Award of small business set-aside must be made to lowest responsive, responsible bidder, and there is no authority to apply different rules simply because small business concerns are involved.
5. Possibility that Government might realize monetary savings in particular procurement if material bid deficiency is waived is outweighed by importance of maintaining integrity of competitive bidding system.
6. Even if an award was made, a later determination that award was made to a nonresponsive bidder would not preclude the termination of the award to correct that situation.

1010 Incorporated of Alamogordo (1010) protests the rejection of its low bid as nonresponsive to invitation for bids (IFB) No. DAADO7-81-B-0034, issued by the Department of the Army, White Sands Missile Range, New Mexico.

We have decided that the protest has no merit.

The 1010 bid was accompanied by a cover letter which contained two legends. The contracting agency contends that the legends restricted the public disclosure of the bid price and, therefore, the bid was nonresponsive under the rationale of Sperry-Univac, B-200378, January 22, 1981, 81-1 CPD 38; Motorola, Inc., B-188813, December 23, 1977, 77-2 CPD 498; and Computer Network Corporation, B-183639, November 12, 1975, 75-2 CPD 297. The latter decisions hold that a bid which restricts the disclosure of price is nonresponsive.

The first legend is on the bottom of the first page of the cover letter. The legend appears after a blank space of about 2 inches following a line which states: "Enclosure; Completed Solicitation DAAD07-81-B-0084." The legend states:

"THE INFORMATION CONTAINED IN THIS DOCUMENT IS PROPRIETARY TO 1010 INCORPORATED OF ALAMOGORDO. REPRODUCTION OR OTHER USE OF THE INFORMATION CONTAINED HEREIN REQUIRES THE EXPRESS ADVANCE WRITTEN PERMISSION OF 1010 INCORPORATED OF ALAMOGORDO."

1010 points out that the body of the cover letter merely discusses the advantages of making an award to 1010 and does not contain any prices. 1010 contends that the restriction in the legend does not go beyond the cover letter since it refers to the information "IN THIS DOCUMENT."

While the space separation in the cover letter between the reference to the IFB and the legend may be an indication that it does not pertain to the IFB, the reference to "THIS DOCUMENT" appearing as it does right after the reference to the IFB is reasonably susceptible of another interpretation--that it applies to the information in the IFB. Therefore, the reference to "THIS DOCUMENT" could be referring to either the cover letter or the bid itself. Where a bid is reasonably susceptible of two interpretations, one of which makes the bid nonresponsive, the bidder is foreclosed from providing any clarification of the ambiguity to establish that the bidder intended

to be responsive. Hoyer Construction Company/K. D. Hoyer, a Joint Venture, B-183096, March 18, 1975, 75-1 CPD 163. Moreover, it is not material that 1010 withdrew the legend when the contracting agency objected to the legend about a couple of weeks after the bid opening. It is a fundamental rule of advertised bidding that a bidder may not be allowed to change its bid after bid opening. S. Livingston & Son, Inc., 54 Comp. Gen. 593 (1975), 75-1 CPD 24. Thus, the contracting agency was correct in considering the bid to be nonresponsive. Since the bid was nonresponsive because of the quoted legend, it is unnecessary to consider the effect of the second legend.

1010 contends that, even if the bid was nonresponsive because of the restrictive legend, the bid should not have been considered nonresponsive because the contracting officer ignored the legend and disclosed the price. However, in 53 Comp. Gen. 24 (1973), we upheld a determination of nonresponsiveness, notwithstanding that the contracting officer displayed a bid and accompanying literature for 20 minutes before noticing the restriction and finding the bid nonresponsive. Since the responsiveness of a bid must be determined at the time of bid opening, 1010's bid was nonresponsive as submitted because it restricted public disclosure as required by law and regulation. 53 Comp. Gen. 24, supra. Because the bid was nonresponsive, it was required to be rejected notwithstanding the subsequent disclosure. Moreover, to permit 1010 to decide after all prices, including its own, were exposed, notwithstanding the restrictive legend, would give 1010 an option not afforded any other bidder--to accept or reject award.

1010 argues that the restrictive legend was a mistake and that it should have been allowed to correct the mistake under the mistake-in-bid procedures. However, a nonresponsive bid may not be cured through bid correction. Sperry-Univac, supra; W. S. Jenks & Son, B-195861, November 26, 1979, 79-2 CPD 373. The fact that 1010 is a small business does not make any difference. The procurement was a small business set-aside under the small business restrictive advertised procedures. The award procedures for small business

set-asides are the same as those for formally advertised procedures except that the award is restricted to small business concerns. Kamex Construction Corporation, B-196346, February 20, 1980, 80-1 CPD 148. Consequently, award must be made to the lowest responsive, responsible bidder and there is no authority to apply different rules simply because small business concerns are involved. L. T. Photographic Reproductions, Inc., B-203952.2, October 26, 1981, 81-2 CPD \_\_\_\_\_.

1010 contends that, since its bid was the lowest received and the objective of the competitive bidding process is to select the lowest bid, its bid should have been accepted in any event. However, the importance of maintaining the integrity of the competitive bidding system outweighs the possibility that the Government might realize a monetary savings in a particular procurement if a material deficiency is waived. Kari-Vac, Incorporated, B-194202, July 3, 1979, 79-2 CPD 4; A. D. Roe Company, 54 Comp. Gen. 271 (1974), 74-2 CPD 194.

Finally, 1010 suggests that the rejection of its bid is no longer possible because the contracting officer made an oral award to it despite the nonresponsiveness. Nowhere in the record does the contracting agency corroborate that an award was made to 1010. However, even if an award was made to 1010 as it contends, that would not preclude the termination of the award to correct the situation. Fink Sanitary Service, Inc., 53 Comp. Gen. 502 (1974), 74-1 CPD 36.

Accordingly, the protest is denied.

*Harry D. Van Cleve*  
For Comptroller General  
of the United States