

DECISION

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

Cohen

FILE: B-210578

DATE: February 14, 1983

MATTER OF: Ames Construction, Inc.

DIGEST:

1. A bid that offers a bid acceptance period less than that required in the invitation for bids is nonresponsive, and cannot be changed after opening to conform to the invitation's requirement, since a nonresponsive bid cannot be corrected.
2. Where a bid is nonresponsive because it offered an acceptance period shorter than the invitation for bids required, the fact that award was made to another, responsive firm within the shorter period is irrelevant. A bid's non-responsiveness is determined at bid opening, and cannot depend on the fortuity that the Government completes the selection process sooner than anticipated in the invitation.

Ames Construction, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 3-SB-60-00020/DC-7520 issued by the Department of the Interior for certain construction work. Interior rejected Ames' bid because the firm stipulated a bid acceptance period of 30 calendar days, instead of the 60-calendar day period required by the IFB. Ames claims it actually intended that the bid be available for acceptance the full 60 days, and points out that the contract in fact was awarded within 30 days after bid opening.

We summarily deny the protest.

The IFB stated that bids offering acceptance periods of less than 60 days would be rejected as non-responsive, and provided an underscored space for a bidder to indicate the number of calendar days its bid would remain open for acceptance. On the same page,

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the IFB provided that the bidder must agree, if awarded the contract, to begin work within 30 calendar days after receipt of a notice to proceed; the number "30" was preprinted in an underscored space. Ames mistakenly inserted "30" in the bid acceptance period underscored space because it noted the preprinted "30" in the other underscored space on the page. After bid opening, the firm realized its mistake and advised the contracting officer that it intended that the bid remain open for acceptance the full 60 days.

We consistently have held that a provision in an IFB which requires that a bid remain available for acceptance by the Government for a prescribed period of time in order to be considered for award is a material requirement, and that a failure to meet that requirement thus renders the bid nonresponsive. See, e.g., 48 Comp. Gen. 19 (1968). To hold otherwise affords the bidder that limited its bid acceptance period an unfair advantage over its competitors because that bidder has the option to refuse the award after the time set in its bid has expired in the event of, for example, unanticipated increases in costs. On the other hand, bidders complying with the required acceptance period would not have that option but would be bound by the Government's acceptance any time within the period required in the invitation. See Miles Metal Corporation, 54 Comp. Gen. 750 (1975), 75-1 CPD 145. In this respect, the nonresponsive bidder's price presumably reflects its limitation of the period the bid price will be subject to the risk of the marketplace. See Hild Floor Machine Co., Inc., B-196419, February 19, 1980, 80-1 CPD 140.

Ames, while recognizing the above-stated rule, contends that the bid nonetheless can be considered in view of our decision in Esko & Young, Inc., 61 Comp. Gen. 192 (1982), 82-1 CPD 5. That case involved an IFB which required a 30-day bid acceptance period, and a single bidder, who offered only a 10-day acceptance period. We permitted consideration of the bid because the rationale for considering compliance with a required acceptance period to be a material bidding requirement did not apply. The reason is that no bidding advantage accrues to the single bidder since there are no competitors who, in contrast, subjected

themselves to the risks of maintaining their bid prices for the longer period. Ames argues that it also enjoyed no advantage over its competitors since it advised the contracting officer after bid opening that it would keep the bid open for 60 days, and since the contract in fact was awarded within the 30-day period.

We find no legal merit to Ames' position. The test of responsiveness is whether the bid, at the time of bid opening, represents an unequivocal offer to conform to the IFB's material terms and conditions. See Timberland Paving & Construction Co., B-205179, June 21, 1982, 82-1 CPD 608. In Esko & Young, the bid acceptance period was not a material term at bid opening, since the lack of any bidders other than the protester rendered inapplicable any rationale for considering the requirement material. Here, however, Ames was not the only firm that bid in response to the IFB, so at bid opening the required bid acceptance period was a material term for the reasons expressed above.

Moreover, the fact that the firm subsequently explained that the 30-day period it offered was a mistake, and that it actually intended to keep the bid open for 60 days, is irrelevant to the responsiveness of the bid. A bid which is nonresponsive on its face may not be changed, corrected or explained by the bidder after bid opening. To allow the bidder to do so would permit the firm to accept or reject a contract after bids are exposed by correcting or refusing to correct its bid. See Vin Construction Company, Inc., B-206526, June 30, 1982, 82-1 CPD 637.

Finally, the fact that the Government actually awarded the contract within 30 days after bid opening also is not relevant to the bid's responsiveness. The purpose of requiring a particular bid acceptance period is to insure the Government adequate time after bid opening for bid evaluation and other preaward processing. See Federal Procurement Regulations § 1-2.201(a)(15) (1964 ed.). Again, however, responsiveness is a matter of a bid's acceptability as submitted and opened. It cannot depend on the subsequent fortuity that the Government completes the selection process sooner than anticipated by the invitation as issued. The firm's bid price still reflects the bidder's limitation of its risk through the offer of a

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shorter acceptance period than its competitors offered in their proper responses to the IFB. See Hild Floor Machine Co., Inc., supra.

Ames has requested a conference on the protest pursuant to section 21.7 of our Bid Protest Procedures, 4 C.F.R. § 21.7 (1982). We have decided the protest based only on the firm's initial submission, however, since it is clear from the submission that the protest lacks legal merit. A conference therefore would serve no useful purpose. Medical Gas & Respiratory Services, Inc., B-207360, June 2, 1982, 82-1 CPD 529.

The protest is denied.

Milton J. Aroslaw
for Comptroller General
of the United States