

DECISION

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

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FILE: B-209720

DATE: July 26, 1983

MATTER OF: Electronics West, Inc.

DIGEST:

1. Prompt-payment discounts should not have been considered in bid evaluation where provision in IFB permitting evaluation of discounts was manually crossed out by the contracting officer. Crossing out reasonably indicated that agency did not intend to evaluate discounts.
2. Where only evidence of record indicates bidder was owned or controlled by Government employee, award to that firm would be prohibited by DAR § 1-302.6.

Electronics West, Inc. (Electronics), protests the award of a contract to International Business Investments, Inc. (IBI), under invitation for bids (IFB) No. DAEA18-82-B-0049, issued by the Acquisition Management and Contracting Activity, United States Army Communications Command, Fort Huachuca, Arizona. The IFB was for guard services and included options for 2 additional years of services.

We deny the protest.

The contracting activity reports that bids were opened on June 18, 1982, and that IBI received the award on September 24, 1982. Electronics, the next lowest bidder, contends that the contracting officer improperly evaluated IBI's bid by using IBI's 3-percent, 20-day prompt-payment discount. Without this discount, Electronics' bid would have been low for the basic and option years.

The contracting activity reports that paragraph 9(a) of standard form (SF) 33-A (Rev. 1-75) was a part of the IFB when issued. That paragraph provides:

"9. Discounts

"(a) Notwithstanding the fact that a blank is provided for a ten (10) day discount, prompt payment discounts offered for payment

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within less than twenty (20) calendar days will not be considered in evaluating offers for award, unless otherwise specified in the solicitation. However, offered discounts of less than 20 days will be taken if payment is made within the discount period, even though not considered in the evaluation of offers."

The contracting officer subsequently "inadvertently" deleted paragraph 9(a) by manually crossing out the paragraph. Electronics contends that IBI's prompt-payment discount should not have been evaluated because of this deletion.

IBI contends that Electronics' post-bid-opening protest is untimely. In our view, as discussed below, the IFB, reasonably read, stated that discounts would not be evaluated. Consequently, there was no apparent IFB defect which was required to have been made the subject of a pre-bid-opening protest. Secondly, the Army states that Electronics did protest the award to IBI within 10 days of the protester's awareness of the award to IBI. Since it does not appear from the record that the protester could have been charged with notice of a basis of protest against the agency's bid evaluation earlier than the award date (September 24--when it was apparently on notice of the agency's bid evaluation), the protester's October 1 protest to the Army was timely. The protester's subsequent protest to our Office on November 2 was also timely as it was filed within 10 days of the protester's receipt (apparently about October 22) of the Army's denial of its protest. Contrary to IBI's position, moreover, we view the protester's November 2 letter to our Office to have been a sufficient protest since the letter specifically objected to the Army's evaluation of IBI's discount. Therefore, we will decide the protest.

The procuring activity refers to several decisions of our Office in support of its argument that an offered discount is required to be evaluated even where a solicitation is silent as to whether a discount will, in fact, be evaluated. See B-169679, June 19, 1970; B-167462, August 15, 1969; 48 Comp. Gen. 256 (1968); 40 Comp. Gen. 518 (1961). In our view, these decisions do not apply to this procurement.

In those cases, we concluded that the Government was entitled to consider a discount in evaluating bids since the consideration did not contravene any stated solicitation provision. In this case, however, the IFB was not silent regarding evaluation of discounts. The manual crossing out of the discount clause by the contracting officer was--from a reasonable reading of the IFB--a conscious act on the agency's part to indicate that discounts would not be considered. Whether this act was a mistake on the agency's part is immaterial since bidders would have had no reason to suspect that the agency had made a mistake. Consequently, the Army's consideration of IBI's discount was contrary to the IFB and contrary to the well-established principle that an award must be made in accordance with the terms of the solicitation. Geronimo Service Co., B-209613, February 7, 1983, 83-1 CPD 130. As to IBI's suggestion that the Army's error in deleting paragraph 9(a), above, should be seen as cured under the so-called "Christian doctrine," we have held that the doctrine is limited to incorporation of mandatory contract clauses into an otherwise validly awarded contract and does not stand for the proposition that mandatory provisions may or should be incorporated into an IFB. MET Electrical Testing Company, B-198834, November 28, 1980, 80-2 CPD 398.

However, even though Electronics would have been the low bidder under a proper evaluation, it is not clear from the present record that it was otherwise entitled to the award. The contracting officer reports that Electronics' bid was signed by a Government employee as president. Also, on July 1, 1982, there was a corporate reorganization under which a new president was designated and the Government employee became treasurer. Based upon this information, it is the contracting officer's opinion that Electronics would not have been eligible for award in view of the provisions of section 1-302.6 of the Defense Acquisition Regulation (1976 ed.), which provides:

"Contracts between the Government and its Employees or Business Organizations Substantially Owned or Controlled by Government Employees.

"(a) Contracts shall not knowingly be entered into between the Government and employees of the Government or business

organizations which are substantially owned or controlled by Government employees, except for the most compelling reasons, such as cases where the needs of the Government cannot reasonably be otherwise supplied."

Although the protester was furnished a copy of the contracting officer's position on this point, it has not responded.

The critical time for application of this provision is the date of award. The record indicates that on that date the treasurer of the protesting firm was a Government employee. The record does not indicate to what extent the Government employee owned or controlled Electronics. In the absence of any response from the protester on the contracting officer's position that award to the protester would have been prohibited, we conclude that award to the second low bidder was not improper.

Therefore, the protest is denied.

for 
Comptroller General
of the United States