70POC13
PL-II

29999

DECISION

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

FILE: B-215497 **DATE:** December 13, 1984

MATTER OF: Penn Microwave Devices

DIGEST:

1. A bid offering delivery based on days after receipt of order must be evaluated by adding five (5) days for delivery through the ordinary mails. If, as so computed, the delivery date offered is later than the date required, the bid is nonresponsive.

2. A determination concerning price reasonableness is a matter of administrative discretion which GAO will not question unless shown to be unreasonable or in bad faith. The mere fact that the contract was awarded to a bidder whose price was more than that offered by a nonresponsive bidder does not establish that the contracting officer improperly found the award price reasonable.

Penn Microwave Devices (Penn) protests the award of a contract under invitation for bids (IFB) No. N00421-84-B-0095 issued by the Naval Air Station (NAS), Patuxent River, Maryland. Penn disputes NAS's determination that Penn's low bid was nonresponsive, and challenges the reasonableness of the award price.

We deny the protest.

The solicitation was for 25 Bandpass High Power Waveguide Filters, which are used to block excess radar signals. The solicitation's Time of Delivery clause stated a desired delivery time, and a more generous required delivery schedule, both computed based on number of days after date of contract. The clause required delivery of item 0001, the first article unit, 75 days after date of contract, and delivery of item 0002, the remaining 24 units, 120 days after first article acceptance.

NAS received four bids. Eastern Microwave Corporation was the low bidder at $21,330; however, its bid was mistaken and was withdrawn.

030792

Penn, the second low bidder at $34,611, was informed that its bid was determined to be nonresponsive. Penn's bid provided for items 0001 and 0002 to be delivered "75 DARO" and "120 DARO," respectively. The contracting officer interpreted "DARO" to mean "days after receipt of order" and, pursuant to Defense Acquisition Regulation (DAR) § 1-305.3, reprinted in 32 C.F.R. pts. 1-39 (1984) and clause F-11 of the solicitation, evaluated Penn's bid by adding 5 days to the offered delivery date to reflect delivery of the award through the ordinary mails. Penn's delivery schedules therefore were evaluated as 80 and 125 days, and the bid was rejected as nonresponsive. The contract was awarded to Coleman Microwave Company (Coleman), the next lowest bidder at $49,663. There was a fourth bid higher than Coleman's.

Penn alleges that its proposed delivery schedule did not extend the required delivery schedule.

In Railway Specialties Corp., B-212535, Oct. 31, 1983, 83-2 C.P.D. ¶ 519, we noted that "ARO" may be interpreted as "after receipt of order," which in turn is equivalent to "after receipt of notice of award or contract." The Time of Delivery clause in NAS's solicitation clearly states the effect of citing a delivery date in terms of notice of award rather than contract date. The clause provides:

> "[A] bid/proposal offering delivery based on date of receipt by the contractor of the contract or notice of award (rather than the contract date) will be evaluated by adding five (5) days for delivery of the award through the ordinary mails. If, as so computed, the delivery date offered is later than the delivery date required in the solicitation, the bid will be rejected and the offer may be considered unacceptable."

DAR, § 1-305.3(d), which provides the authority for the clause, includes similar language, specifying that the bid must be rejected as nonresponsive. Further, the holdings in our Office's decisions in the area, recognizing that where an IFB requires delivery within a stated period, time must be regarded as of the essence, are consistent with

NAS's Time of Delivery clause and the cited regulation. E.g., Instrumentation Marketing Corp., B-211099, Mar. 29, 1983, 83-1 C.P.D. ¶ 324; Environmental Tectonics Corp., B-195882, Sept. 19, 1979, 79-2 C.P.D. ¶ 204.

Penn has offered no argument in support of its claim that its proposed delivery schedule should be found acceptable. The solicitation, the DAR and our cases all indicate that Penn improperly extended the delivery period. We therefore find this unsubstantiated claim to be without merit and the bid to be nonresponsive.

Penn also alleges that award to Coleman was at an unreasonable price.

We have held that a determination concerning price reasonableness is a matter of administrative discretion which we will not question unless the determination is unreasonable or there is a showing of bad faith or fraud. Introl Corp.; Forster Enterprises, B-209096, B-209096.2, June 9, 1983, 83-1 C.P.D. ¶ 633. Here, NAS reports that this procurement is a first-time purchase of a new item with attendant costs and risks associated with producing and testing a new item. The new specifications and the requirement for first-article approval caused both the contracting officer and the technical personnel to expect divergent prices from the bidders. The solicitation also required a short time for delivery. In light of these factors, the contracting officer determined that Coleman's bid was reasonable.

Penn, which has the burden of proof, has not alleged bad faith or fraud, and offers nothing but the submitted bids as evidence of unreasonableness. While there is a $15,052 price difference between Penn's bid and Coleman's bid, the mere fact of award to a bidder whose price is higher than that offered by a bidder whose bid was properly rejected as nonresponsive does not itself establish that the contracting officer acted unreasonably in accepting the higher bid price. Kaiser Aerospace & Electronics Corp., B-189326, Aug. 2, 1977, 77-2 C.P.D. ¶ 73. On the basis of the record before us, therefore, we cannot conclude that the contracting officer made award at an unreasonable price.

29999

The protest is denied.

Milton J. Socolar
for Comptroller General
of the United States