

DECISION



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

William
31244

FILE: B-216297

DATE: May 23, 1985

MATTER OF: GM Industries, Inc.

DIGEST:

A solicitation which on its face contains inconsistent delivery provisions is ambiguous and any protest based on these inconsistencies should have been filed prior to bid opening with either the contracting agency or GAO for consideration on the merits. Failure to do so results in dismissal by our Office as untimely.

GM Industries (GMI) protests the award of a contract to the Viereck Company by the Department of the Air Force (Air Force) for a multiple spindle drilling machine (gang drill) under invitation for bid (IFB) No. F34650-84-B-0253. The Air Force rejected GMI's bid as nonresponsive because it took exception to the invitation's delivery schedule.

We dismiss the protest as untimely.

The solicitation required delivery of one gang drill 270 days after receipt of order (ARO) and four sets of technical data in accordance with DD Form 1423 which was attached to and a part of the invitation. DD Form 1423 specified delivery of the technical data as follows--one set 30 days ARO for evaluation, the other sets 60 days prior to shipment of the equipment. The following additional provisions of the solicitation are relevant to the protest. Subparagraph b, page 2 of the IFB states:

"If the offeror is unable to meet the Required Delivery Schedule, he may set forth below the delivery schedule he is prepared to meet. However, should the offeror's proposed delivery schedule not meet the required Delivery Schedule, and should the Government determine such proposed delivery schedule to be unacceptable, the Government reserves the right to make an award to an offeror submitting other than the lowest offer as to price, if such action will provide an acceptable delivery schedule and is determined to be in the best interests of the Government. . . ."

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Subparagraph (a) of clause F-1 which also discusses delivery, states in pertinent part at page 4 of the invitation:

"The Government will evaluate equally, as regards time of delivery, offers that propose delivery of each quantity within the applicable delivery period specified above. Offers that propose delivery that will not clearly fall within the applicable required delivery period specified above, will be considered nonresponsive and rejected in the case of an IFB, and may be rejected in the case of an RFP. The Government reserves the right to award under either the required delivery schedule or the proposed delivery schedule, when an offeror offers an earlier delivery schedule than required above. . . ."

The contracting officer received three bids and, after preliminary review, rejected two as nonresponsive. GMI's low bid stated that delivery of all technical data would be made 90 days ARO. GMI admits that the delivery schedule required by DD Form 1423 "was overlooked by us on our bid." Nonetheless, GMI contends its bid was responsive because the invitation specifically allowed substitute delivery schedules and gave the contracting officer the discretion to consider alternate delivery of the technical data. GMI points to the language of subparagraph "b", quoted above, as support for its interpretation of the delivery requirement. Finally, GMI argues that the deviation in its bid was a minor technicality which could have been waived and would have resulted in monetary savings to the government.

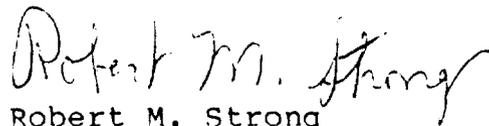
The Air Force generally agrees with GMI that subparagraph "b" allows bidders to propose alternate delivery schedules and the contracting officer could arguably consider such a proposal. However, in its report to our Office, the Air Force stated that subparagraph "b" is intended for use only in negotiated procurements and its inclusion in this advertised procurement was inadvertent error. The report noted that the contracting officer evaluated the bids as if the solicitation did not contain this subparagraph. The Air Force argues that the delivery requirements of subparagraph "b" conflict with the delivery requirements of F-1 (a), supra. The Air Force asserts that the solicitation was patently ambiguous with respect to delivery requirements; consequently, it argues that GMI had

a duty to inquire about the nature of the ambiguity prior to bid opening.

Subparagraph "b" allowed bidders to propose alternate delivery dates, but it did not establish any parameters which the contracting officer would use to evaluate any proposed alternate delivery schedule. This clause also reserved to the government the right to reject a bid proposing an unacceptable alternate delivery schedule. We have stated that clauses, such as this, which allow deviations from the specifications to some undefined extent have no place in formally advertised procurements since they do not generally permit free and equal competition. See 52 Comp. Gen. 815 (1973); 51 Comp. Gen. 518 (1972). Furthermore, subparagraph "b" was directly contradicted by the language of clause F-1(a) which stated that offers which propose delivery which clearly is not within the required delivery schedule will be rejected as nonresponsive in the case of an IFB.

The conflict between the delivery provisions is apparent from the face of the solicitation, and GMI should have known that the provisions were ambiguous from a reading of the invitation. The ambiguity here is so obvious that GMI was required to seek clarification from the contracting officer prior to bid opening or risk rejection of its bid. CFE Equipment Corp., B-203082, May 29, 1981, 81-1 C.P.D. ¶ 426. Section 21.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984), requires that protests based upon alleged solicitation improprieties which are apparent prior to bid opening must be filed with either the contracting agency or our Office prior to bid opening. GMI did not file a protest regarding these inconsistent delivery provisions until over a month after bid opening. Consequently, the protest is untimely and will not be considered on the merits. Solar Science Industries, Inc., B-214737.2, Apr. 6, 1984, 84-1 C.P.D. ¶ 390.

The protest is dismissed.



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