

31268

DECISION



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

FILE: B-216068 **DATE:** May 24, 1985
MATTER OF: Grumman Aerospace Corporation

DIGEST:

1. GAO Bid Protest Procedures encourage protesters to seek resolution of their complaints initially with the contracting agency. Where protest was timely filed initially with the contracting agency and subsequent protest to GAO was filed within 10 working days of the contracting agency's initial adverse action on the protest, protest to GAO is timely.
2. Bidders may elect not to charge the government for certain services, and when they have indicated that they are aware of and willing to commit themselves to furnishing the item in question--as by inserting a zero, "no charge," or "not separately priced,"--the bid is responsive and the bidder may be considered for award notwithstanding agency's desire for dollar amount entry to serve as incentive to perform the service.

Grumman Aerospace Corporation (Grumman) protests the award to Burnside-Ott under solicitation No. N61339-84-B-0031 issued by the Naval Training Equipment Center, Orlando, Florida, as a two-step, formally advertised procurement of services under the Contractor Operation and Maintenance of Simulators (COMS) program. The COMS program was developed to provide contractor operation and maintenance of training equipment formerly operated and maintained by civilian employees and military personnel. Grumman submitted its technical proposal in the first step, was found to be technically acceptable, and was invited to submit its bid under the second step. Grumman's apparent low bid was rejected as nonresponsive because Grumman failed to include a positive dollar amount for a specific line item as directed by an oral amendment to the solicitation. Grumman protests that it was improperly disqualified for failing to follow a purported telephonic directive which it contends it did not understand and never received in writing, thereby prejudicing its ability to compete and rendering the procurement defective.

032116

We sustain the protest.

On June 20, 1984, the invitation for bids (IFB) was issued to the three firms that had submitted technically acceptable offers under the first step of this two-step procurement. Under the terms of the IFB, the contract would include a mobilization or preparation period of 2 months, a 1-year base period, four 1-year option periods, and a 2-month transition phase^{1/} to take effect at the end of the basic performance period (or at the end of the last option period for which the option was exercised). Bid opening was scheduled for July 23.

The IFB initially contained spaces for the price for the transition phase at the end of the base performance period and at the end of each option period, although only one transition period would be performed. The IFB indicated that the average price of all five transition period prices would be used to evaluate the total price to the government.

On July 12, 1984, the Navy issued amendment 0002, which revised the solicitation to require only one price for the transition phase work and to eliminate from the evaluation of prices the averaging concept with regard to the transition period. The Navy reports that amendment 0002 did not convey the Navy's intent that all bidders place a positive dollar amount (as opposed to "no charge (NC)" or "not separately priced (NSP)") in the space provided for pricing the transition phase line item.

This perceived deficiency in the solicitation became apparent to the Navy when a Grumman official called the contracting officer on July 18, 1984, to discuss pricing aspects of the mobilization phase line item for which Grumman contemplated submitting a "0" bid to reflect its ability to assign trained maintenance personnel from an existing contract with another government activity on the site. The Navy deferred answering the Grumman official's

^{1/} The "transition phase" describes the 60-day period of time at the end of a contract when the incumbent COMS contractor is turning over the operation and maintenance of specified training devices to a successor contractor or to the government. The incumbent contractor will be tasked, via a priced option in the existing contract, to provide transitional support while the successor contractor is preparing for COMS takeover coincident with the successor contractor's mobilization phase.

inquiry and sought advice of legal counsel concerning the manner by which offerors were required to price independent services for the mobilization and transition periods.

The Navy determined that offerors were required to enter a positive dollar amount in their bids on each of the contract line items for the mobilization phase and the transition phase. The Navy reasoned that if the "transition phase" item entry contained expressions such as "no charge (NC)," "not separately priced (NSP)," or "\$0" as the consideration for the effort, the government would not be able to enforce performance of that transition effort.

According to the Navy, on July 19, 1984, a Navy contracting official contacted each offeror to inform them that some positive dollar amount was required for the mobilization line item and the transition line item and that bid entries of "no charge," "not separately priced," or "\$0" would render a bid nonresponsive. The Navy did not provide confirming written notification of this telephonic amendment.

Bid opening on July 23, 1984, revealed that Grumman's overall bid was the lowest of the three offers by approximately \$150,000. However, Grumman's bid included an "NC" (no charge) bid entry for the transition phase line item. Accordingly, Grumman's bid was declared nonresponsive for failing to include a positive dollar amount in accordance with the telephonic amendment of July 19, and the Navy awarded the contract to the next low bidder, Burnside-Ott, on July 23. Grumman was notified of the award to Burnside-Ott on July 24 and, on July 25, protested the award to the contracting officer. By letter of July 27, received by Grumman on July 30, the contracting officer denied Grumman's protest. Grumman filed its protest with this Office on August 10.

The Navy contends that Grumman's protest is untimely under section 21.2(b)(2) of our Bid Protest Procedures (4 C.F.R. part 21 (1984), because it was filed with our Office 17 days after Grumman knew that the contract had been awarded to Burnside-Ott. Citing our decision in TSI, Inc.--Reconsideration, B-202171, May 6, 1981, 81-1 C.P.D. ¶ 357, the Navy points out that a protester's continuing to pursue its protest at the contracting agency level after initial adverse agency action on its protest does not toll the running of the 10-day filing requirement. The Navy considers notification that award was made to Burnside-Ott to be the initial adverse agency action on Grumman's protest

to the Navy. Thus, the Navy concludes that Grumman's protest is untimely and not for consideration on the merits by this Office.

We conclude that Grumman's protest was timely filed with this Office. Grumman is protesting the rejection of its low bid as nonresponsive and award to the second low bidder. Grumman could not have known its basis for protest until July 24, when it was notified of the rejection of its bid and the award to Burnside-Ott. Our procedures encourage protesters to seek resolution of their complaints initially with the contracting agency. 4 C.F.R. § 21.2(a) (1984). This is what Grumman did with its letter of protest to the Navy on July 25, just 1 day after it learned the basis for its protest. Thus, Grumman's protest to the Navy was timely. 4 C.F.R. 21.2(b)(2) (1984). If a protest is filed initially with the contracting agency, as is the case here, any subsequent protest to our Office must be filed within 10 working days of the protester's learning of the initial adverse action by the agency on the protest. 4 C.F.R. § 21.2(a) (1984). Here, the Navy's denial of Grumman's protest was received by Grumman on July 30 and constituted the agency's initial adverse action on Grumman's protest. Accordingly, Grumman's filing of its protest with this Office 9 working days later, on August 10, 1984, was timely.

We turn next to the merits of Grumman's protest that its bid was fully responsive to the requirements of the IFB as written and that it should have been awarded the contract. Having indicated in the cover letter to its bid dated July 10, 1984, that "Grumman offers to provide the services as described within our Technical Proposal for a total Firm Fixed Price of \$2,101,247," and having specifically bid "NC" (or "no charge") on the transition phase item, Grumman argues that its bid was fully responsive to the written requirements of the IFB, because it clearly offered to provide all of the services called for at the total firm, fixed price offered. Grumman urges that the Navy's rejection of its "no charge" bid on the transition phase is unsupportable when viewed against evidence that the Navy would have accepted even a "\$1" bid on this item. As to the Navy's assertion that it issued a telephonic amendment making a positive dollar amount on the transition phase item a material matter of bid responsiveness, Grumman counters that although telephone conversations did take

place between Grumman personnel and a Navy contracting official, it was never Grumman's understanding that a "no charge" bid on the transition phase item would be considered unacceptable.

We find this purported telephonic amendment had no effect on the responsiveness of Grumman's bid. While the Navy contends that it made bidding a positive dollar amount on the transition phase a material matter of bid responsiveness by its telephone directives of July 19, 1984, the Navy also admits it did not comply with the requirement of Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.208 (1984) that such conversations be followed up in writing where they have a material effect on the solicitation's requirements. See I.E. Levick and Assoc., B-214648, Dec. 26, 1984, 84-2 C.P.D. ¶ 695. Since there were no mitigating circumstances offered by the Navy to justify its failure to provide a written amendment confirming the telephonic change to the alleged material pricing provision as required by FAR, 48 C.F.R. § 14.208, the bidders would not be bound by the ostensible requirements of the failed amendment. Cf. Porta-Fab Corp., B-213356, May 7, 1984, 84-1 C.P.D. ¶ 511, where we held that oral amendments to a written solicitation are authorized--even if not subsequently confirmed--where exigent circumstances and urgent requirements would not permit the delay attendant to the processing of written amendments. However, in any event, we do not agree that the inclusion of a positive dollar amount on the transition phase could be construed as a material matter of bid responsiveness in this case.

The Navy's stated reason for requiring a positive dollar amount to be entered for the transition phase work, instead of allowing bids of "no charge" or "not separately priced" for this item, was to allow it to enforce performance of the transition effort. We point out, however, that we have specifically held that a bidder may elect not to charge the government for certain work and still have its bid be responsible. See National Mediation Board--Request for Advance Decision, B-209037, Oct. 8, 1982, 82-2 C.P.D. ¶ 323. All that is necessary is some affirmative indication in the bid--such as inserting a zero, the words "no charge," dashes, etc.--that the bidder is aware of and intends to furnish the services required. Id. at 4.

We view the test of a bid's responsiveness as whether the bid as submitted complies with the IFB's material

provisions without exception. Lusardi Construction Co., B-210276, Sept. 2, 1983, 83-2 C.P.D. ¶ 297, at 6. We find Grumman has committed itself to perform and is therefore contractually bound to perform all services, including the transition phase, required by the solicitation. Where the bidder is thus obligated to perform the required service the entry of a positive price for that line item simply serves as an incentive without changing the nature of the existing legal obligation. Practically, the Navy's concern that Grumman might fail to perform in the transition phase is a matter of hypothetical hesitancy obviated by its own finding that Grumman is a responsible bidder. Thus, this incentive or informational line item figure was not in itself material and the failure to submit it could not render Grumman's bid nonresponsive in these circumstances.

In view of our conclusion, we recommend that the Navy consider the feasibility of terminating Burnside-Ott's contract for convenience and awarding Grumman a contract for this requirement. Alternatively, if the Navy determines that termination is not feasible, we recommend that the Navy not exercise the options in the Burnside-Ott contract and recompetete those requirements among the three technically acceptable firms which competed here. By letter of today, we are advising the Secretary of the Navy of our findings and recommendation.

Since this decision contains a recommendation for corrective action, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and to the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendations.

for 
Comptroller General
of the United States