

DECISION

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

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FILE: B-218309 **DATE:** June 12, 1985
MATTER OF: Lavelle Aircraft Company

DIGEST:

A "request" for progress payments is precatory in nature and does not render a bid nonresponsive in the absence of circumstances which indicate that the request is more than a mere wish or desire.

Lavelle Aircraft Company (Lavelle) protests the rejection of its bid, the lowest-priced bid received, to supply certain aircraft parts under invitation for bids (IFB) No. DLA500-85-B-0350, issued by the Defense Logistics Agency (DLA). DLA determined that Lavelle's bid was non-responsive because its pricing schedule included the notation "WE REQUEST PROGRESS PAYMENTS," whereas the IFB incorporated by reference a clause providing that bids conditioned upon the receipt of progress payments would be rejected as nonresponsive. Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.232-15 (1984). DLA therefore rejected Lavelle's bid and awarded a contract to the second lowest bidder, Land-Sea-Air Machined Products, Inc. The protester argues that the notation in its bid should be construed not as a condition of acceptance rendering the bid nonresponsive, but as mere request lacking any legal effect.

We sustain the protest.

To be considered for an award, a bid must be responsive--that is, it must offer to comply, without exception, with those terms of the IFB having more than a trivial effect on price, quality, quantity or delivery. FAR, 48 C.F.R. §§ 14.301(a) and 14.405; Valley Forge Flag Co., Inc., B-216108, Sept. 4, 1984, 84-2 C.P.D. ¶ 251. An IFB provision prohibiting the submission of bids that condition an award on the contractor's receipt of progress payments is a material provision affecting price, so that any exception to the provision would render the bid nonresponsive and require its rejection. Canadian Commercial Corp., 62 Comp. Gen. 113 (1983), 83-1 C.P.D. ¶ 16, aff'd, Defense Logistics Agency--Reconsideration, B-207777.2, Mar. 18, 1983, 83-1 C.P.D. ¶ 275.

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We have held, however, that a notation containing a "request" for progress payments ordinarily must be construed as being precatory in nature, and does not render the bid nonresponsive unless circumstances indicate that the request is something more than a wish or desire. Canadian Commercial Corp., supra. That decision noted that some of our prior decisions, while recognizing that the word "request" ordinarily was precatory, nonetheless held that a bid requesting progress payments was nonresponsive since under some circumstances the word could be construed as something more than a mere wish or desire, and result in the government's being obligated to make progress payments if it accepted the bid. Id., citing 47 Comp. Gen. 496 (1968); 46 Comp. Gen. 368 (1966); and 45 Comp. Gen. 809 (1966). We held in Canadian Commercial Corp., however, that to the extent those prior cases permitted the rejection of bids without a showing of circumstances indicating a request actually was more than precatory, those cases should not be followed.

Since nothing in the record indicates that Lavelle's request for progress payments was anything more than the expression of a wish or desire, we think it is clear that DLA would not have been obligated to make such payments if it had accepted the bid. Thus, as a legal matter, Lavelle's bid should not be viewed as taking exception to the IFB provision prohibiting progress payments, and DLA should not have rejected the bid as being nonresponsive.

The protest therefore is sustained. By separate letter to DLA, we are recommending that the agency terminate the current contract for the government's convenience and award a contract to Lavelle. In this respect, we note that delivery of the procured items is specified to be within a desired time of 370 to 430 days after the award, which was on January 21, 1985. It therefore appears that termination for convenience still is feasible.

for 
Comptroller General
of the United States