

DECISION

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

7-11-85
A II
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FILE: B-218948 **DATE:** July 29, 1985
MATTER OF: DSG, Ltd.

DIGEST:

1. Bid for meal services that fails to comply with a mandatory pricing formula set forth in the solicitation is properly rejected as nonresponsive, since formula affects price and quality of services and is therefore material. Moreover, the nonresponsive bid cannot be corrected under mistake in bid procedures.
2. Protest based on alleged solicitation improprieties is untimely where not filed before bid opening.

DSG, Ltd., protests the rejection of its bid as nonresponsive to invitation for bids (IFB) F01600-85-B-0004, a 100-percent small business set-aside issued on February 15, 1985, by the Department of the Air Force. The IFB was for meal services for a base and 2 option years for several facilities at Maxwell Air Force Base and Gunter Air Force Station, both in Alabama.

We deny the protest in part and dismiss it in part.

The primary reason for the Air Force's rejection of DSG's low bid was the bidder's failure to follow a mandatory pricing formula contained in the IFB. The formula required bidders to divide their total prices into two parts: under part "A," they were to insert a lump-sum monthly price for fixed costs (such as labor, equipment, profit, and overhead) that would be incurred regardless of the number of meals served; under part "B," they were to insert unit and extended prices per meal, based on the government's estimate of the number of meals to be served each month. The IFB specifically stated that the total bid price for part "B" for each year must be 25 percent (plus or minus 0.1 percent) of the total bid price for part "A" for the corresponding year. Bidders were warned that failure to comply with this requirement would render their bids nonresponsive.

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DSG acknowledges that it misunderstood the requirement and calculated its bid in a manner that caused its total price for part "B" actually to be more than 33 percent of its total price for part "A." After being advised on April 17 that this presented a problem, DSG, on April 18, contacted the contracting officer, claiming a mistake in bid. Without changing its overall price, evaluated at \$2,622,446 for the 3 years, the firm recalculated its fixed costs to arrive at part "A" and part "B" prices that were in the required ratio.

The Air Force, however, reviewed Kaydon Corp., B-214920, July 11, 1984, 84-2 CPD ¶ 41, and other decisions of our Office and concluded that the mistake in bid procedures could not be used to make DSG's nonresponsive bid responsive, even if acceptance of it would result in monetary savings to the government. On May 15, the agency awarded a contract to Food Services, Inc., whose evaluated price for the 3 years was \$2,654,196.

In its protest, DSG contends that the rejection of its bid as nonresponsive for failure to comply with the mandatory pricing formula of the IFB was improper, since the initial error in dividing its prices between parts "A" and "B" did not prejudice any other bidders. Alternatively, DSG requests that it be permitted to correct its mistake. Finally, the protester argues that the entire solicitation was defective because of the allegedly confusing pricing formula.

The Air Force responds that it frequently uses this type of pricing formula in requirements contracts for meal services. The agency states that our Office has approved use of such formulas when, as here, the same ratio between fixed costs and per-meal costs is imposed on all bidders, citing Maintenance Inc., et al., B-208036, June 9, 1983, 83-1 CPD ¶ 631. The contracting officer further states that the Air Force established this type of pricing formula in order to reimburse contractors equitably for fixed costs by providing that each month, the contractor will be paid a lump sum consisting of the fixed amount from part "A" plus the amount due for meals actually served from part "B." The effect of that formula, he adds, is to induce the contractor to provide quality service, since it will be recouping the majority of its fixed costs and will not be cutting corners when meal quantities fluctuate slightly. In addition, the contracting officer states, there is a reasonable assurance that the award will result in the lowest cost to the government.

The Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.301(a) (1984), provides that to be considered for award, a bid must comply in all material respects with the invitation for bids. Moreover, any bid that fails to conform to the essential requirements of an IFB must be rejected. See 48 C.F.R. § 14.404-2(a) (1984); J. T. Systems, Inc., B-213308, Mar. 7, 1984, 84-1 CPD ¶ 277. A material deviation is one that affects the price, quality, quantity, or delivery of the goods or services offered. Atco Surgical Supports Co., 63 Comp. Gen. 559 (1984), 84-2 CPD ¶ 247.

We agree with the Air Force that by failing to follow the mandatory pricing formula, DSG's bid materially deviated from the IFB. Clearly, the fact that DSG's proposed prices per meal in part "B" were 33 percent of its proposed fixed price in part "A," rather than the 25 percent required by the IFB, affects price. In addition, as the contracting officer points out, the formula is intended to provide an incentive to the contractor to serve quality meals, even if the actual quantity varies from the government's estimate. Thus, quality and quantity also are involved in the solicitation provision. We therefore find that the Air Force properly rejected the bid as nonresponsive. See Baker Co., Inc., B-216220, Mar. 1, 1985, 85-1 CPD ¶ 254.

DSG relies on our decision in Keco Industries, Inc., 64 Comp. Gen. 48 (1984), 84-2 CPD ¶ 491, in support of its contention that an award should be made to its firm. We do not believe that Keco is applicable here. That case concerns an IFB with a level pricing provision that was intended to prevent bidders from lowering prices that would be evaluated and inflating prices that would not be evaluated. Keco, the second low bidder, argued that the low bid was nonresponsive because it was not level. We held, however, that the bid should be accepted because it could not be shown that the second low bidder could have become low even if it also was permitted to unlevel its bid. Thus, the second low bidder was not prejudiced by the defect in the low bidder's pricing.

In the present IFB, there is no level pricing provision. Rather, the Air Force sought two bid prices, one for fixed costs and another for each meal served. Under these circumstances, it is not possible to apply an unlevel bidding test as in Keco. In addition, unless all bidders in this case apportion the same percentage of their

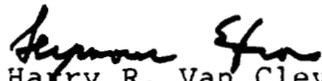
total prices to per-meal costs, slight deviations from the government's estimate may result in one bidder displacing another. See Maintenance, Inc., et al., B-208036, supra.

As for DSG's mistake in bid claim, we have held that only material available at bid opening may be considered in making a responsiveness determination and that post-opening explanations by the bidder cannot be considered. The Air Force here states that it could not determine, from the face of the bid or other evidence available at bid opening how DSG actually intended to divide its prices between parts "A" and "B," if indeed it made a mistake. Moreover, a nonresponsive bid may not be corrected, and it does not matter whether the failure to comply with the requirements of the IFB was due to inadvertence, mistake, or otherwise. See Amendola Construction Co., Inc., B-214258, Feb. 28, 1984, 84-1 CPD ¶ 255. Therefore, DSG's nonresponsive bid may not be corrected. United McGill Corp., et al., B-190418, Feb. 10, 1978, 78-1 CPD ¶ 119.

We deny DSG's protest on the above bases.

DSG finally contends that the IFB was defective and unduly restrictive of competition because of the allegedly confusing manner in which the pricing formula was stated. This part of DSG's protest is untimely. Where a protest is based on an alleged impropriety apparent on the face of the solicitation, our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), require filing with either the contracting agency or our Office before bid opening. See White Horse Associates, B-218872, May 21, 1985, 85-1 CPD § 581. Since DSG's protest against the pricing formula, which was set forth in the solicitation, was not filed until after bid opening, it is untimely.

The protest is denied in part and dismissed in part.

for 
Harry R. Van Cleve
General Counsel