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**DECISION**



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

**FILE:** B-218597; B-218597.2 **DATE:** August 15, 1985

**MATTER OF:** Aviation Specialists, Inc.;  
Aviation Enterprises, Inc.

**DIGEST:**

Solicitation requirement that bidder own or have a legal right to sublease offered aircraft relates to bidder responsibility, not responsiveness; agency cannot change a matter of responsibility into one of responsiveness merely by the terms of the solicitation.

Aviation Specialists, Inc. (ASI) protests the Federal Aviation Administration's (FAA) rejection of its low bid as nonresponsive under invitation for bids (IFB) No. DTFA06-85-B-30042, a small business set-aside for the lease of one Cheyenne I (or later model) aircraft. Aviation Enterprises, Inc. (AEI), the second-low bidder, protests the rejection of its bid as unreasonably exceeding the government's estimated cost.

We sustain ASI's protest and dismiss that of AEI.

The IFB provided that the bidder must own or have the legal right to sublease the offered aircraft at the time of bid submission. The IFB also required that each bidder represent either (a) that "he is the owner of the [offered] aircraft which is duly registered with the FAA in the bidder's name," or (b) that "he does not own the . . . aircraft, but holds the lease rights to it and has the right thereunder to sublease the aircraft to the FAA." In the latter instance, the bidder had to submit a certified copy of the lease along with its bid; the IFB provided that the "absence of . . . [the lease copy] shall render the bid nonresponsive." ASI checked (a), but also added the statement, "have deposit on aircraft will purchase." The agency determined that merely having placed a deposit on the aircraft was not sufficient to constitute ownership and found ASI nonresponsive because it did not own or have a right to sublease the offered aircraft at the time of bid submission, as required by the IFB. ASI protests this

determination and maintains that, under commercial law, it was deemed to be the owner of the airplane, although the plane was not registered with the FAA in ASI's name.

The agency contends that ASI's protest is untimely because ASI was informed on April 16 that its bid was nonresponsive but did not protest to our Office until May 1, which was 11 working days later. Our Bid Protest Regulations require that protests such as this be filed with this Office or the contracting agency within 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1985). If a protest is filed initially with the contracting agency, a subsequent protest to this Office will be considered if filed within 10 working days of notification of adverse agency action on the initial protest. 4 C.F.R. § 21.2(a)(3). Here, ASI states that it sent a mailgram to the agency on April 19 protesting the nonresponsiveness determination and that the agency received the mailgram on April 22. The protester has supplied a copy of this mailgram for the record. Since ASI's protest to this Office was filed prior to any adverse agency action on ASI's initial protest to the agency, we find that its protest is timely.

Regarding the FAA's action in finding ASI's bid nonresponsive, we find that the determination was incorrect. We reach this conclusion because we consider the IFB requirement that the bidder own or have a legal right to sublease the offered aircraft to be a matter of responsibility rather than responsiveness.

Responsiveness deals with a bidder's unequivocal promise, as shown on the face of its bid, to provide the items or services called for by the material terms of the IFB. A-1 Pure Ice Co., B-215215, Sept. 25, 1984, 84-2 CPD ¶ 357. Material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services offered. Mobile Drilling Co., B-216989, Feb. 14, 1985, 85-1 CPD ¶ 199. On the other hand, the issue of a bidder's responsibility concerns whether the bidder has the ability to fulfill the obligations that it offers to assume, i.e., to perform as promised in the bid, Bullock Associates Architects, Planners, Inc., B-214716.4, Mar. 25, 1985, 64 Comp. Gen. \_\_\_\_, 85-1 CPD ¶ 340, and involves such matters as the bidder's facilities, equipment, and financing. See A-1 Pure Ice Co., supra.

We believe that the issue of a bidder's ownership and registration, or lease with the right to sublet, of the aircraft in this case involves a matter of responsibility. For example, as required by the solicitation, ASI specifically identified the aircraft it intended to furnish by make, model, registration number and serial number. Thus, from the bid document itself, the agency could determine the acceptability of the aircraft to be provided in the performance of the contract. In other words, ASI's bid was an unqualified offer to provide the exact thing called for in the solicitation without reservation. The only question that remained was ASI's ability to provide the aircraft it identified in its bid in time for contract performance. Since the contract here is for the rental of an aircraft, whether the bidder owns or has a right to sublease the offered aircraft in time for performance concerns its apparent ability and capacity to perform the contract, rather than the responsiveness of its bid. See Bullock Associates Architects, Planners, Inc., B-214716.4, Mar. 25, 1985, 64 Comp. Gen. \_\_\_\_, 85-1 CPD ¶ 340. The fact that the IFB characterized the clause dealing with the bidder's proprietary interest in its aircraft as a matter of responsiveness does not change this result, since it is well-settled that a contracting agency cannot change a matter of responsibility into one of responsiveness merely by the terms of the solicitation. D.J. Findley, Inc., B-215083, July 24, 1984, 84-2 CPD ¶ 106.

Responsibility is measured not at the time of bid opening, but at the time of contract award, and a bidder may be allowed an opportunity after bid opening within which to cure a problem related to its responsibility. Right Away Foods Corp., B-216199, Jan. 3, 1985, 85-1 CPD ¶ 15. Therefore, we sustain ASI's protest and recommend that the FAA investigate ASI's responsibility to perform this contract. Since ASI is a small business, if a negative finding of responsibility is made, the matter must be referred to the Small Business Administration for consideration under its Certificate of Competency procedures. See Consolidated Maintenance Co., B-216350, Sept. 18, 1984, 84-2 CPD ¶ 324.

In view of this conclusion, the question of the reasonableness of AEI's bid price is academic, since AEI is not in line for award. A&C Building and Industrial Maintenance Corp., B-218035, Feb. 13, 1985, 85-1 CPD ¶ 195.

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ASI's protest is sustained, and AEI's protest is dismissed as moot.

*for* *Milton J. Rowan*  
Comptroller General  
of the United States