

Herrington
PC-IT

DECISION



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

FILE: B-220162 **DATE:** November 22, 1985

MATTER OF: The Homer D. Bronson Company

DIGEST:

1. Under GAO Bid Protest Regulations, a protest based upon improprieties in the terms of an invitation for bids apparent on the face of the invitation must be filed prior to bid opening.
2. A bid that takes exception to the packaging specifications of a solicitation is non-responsive, since, in order to be considered responsive, a bid must be an unequivocal offer to provide the exact thing described in the invitation for bids, in total conformance with the material terms of the solicitation.
3. A bid that includes preprinted terms and conditions that vary from the terms and conditions in the solicitation is nonresponsive.
4. A nonresponsive bid may not be accepted, notwithstanding any savings it might represent to the government, since such acceptance would compromise the integrity of the competitive bidding system.

The Homer D. Bronson Company (Bronson) protests the use of allegedly improper specifications in Defense Logistics Agency (DLA) solicitation No. DLA500-85-C-4021 and protests the rejection of its bid as nonresponsive under the solicitation.

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

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The Defense Industrial Supply Center (DISC), a field activity of DLA, issued the invitation for bids (IFB) for a supply of brass hinges, identified by stock number. Packaging instructions in the IFB required that the hinges be packaged individually and marked with a bar code label.

Bronson submitted the apparent low bid. However, its bid contained the following notation:

"Please note we are taking exception to your packaging specifications which call out wrap and label one each with bar code marking. We are quoting on wrap and label 6 each with bar code marking, as supplied to you on previous orders. If favored with your order in this instance be sure this deviation to wrap and label 6 each with bar code marking is noted."

The Agency concluded that Bronson's intention was to package and label the hinges in units of six per package and determined the bid to be nonresponsive to the terms of the IFB on this basis. The Agency also noted that on the reverse of a cover letter or letterhead accompanying Bronson's bid, there appeared terms and conditions "repugnant" to other solicitation clauses. These terms were considered to be an additional basis for the determination that Bronson's bid was nonresponsive. The Agency therefore rejected Bronson's bid and awarded the contract to the next low responsive, responsible bidder.

Although Bronson admits its bid can be considered to be technically nonresponsive, it nonetheless argues that the reference in its bid to the packaging requirements was simply an attempt to clarify an incorrect and misleading packaging specification in the solicitation. The protester contends that it would be impossible to wrap and label each hinge with a bar code marking, since the size of the label exceeds the size of the individual package. According to Bronson, the instructions should have indicated that while each hinge must be individually wrapped, the units could then be bundled in an intermediate container to accommodate the required bar code label.

To the extent Bronson is contending that the specifications should have been written to permit packaging and labeling the hinges in bundles of six, Bronson's protest is essentially against a solicitation impropriety apparent from the face of solicitation. Our Bid Protest Regulations require that a protest based upon an alleged impropriety in

an IFB be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1985). Here, Bronson contends that the notation in its bid was intended to bring this alleged oversight in the solicitation to the contracting officer's attention. However, a protester's objection to specifications, first presented by means of a notation in its bid, cannot be considered. International Shelter Systems, Inc., B-220750, Oct. 17, 1985, 85-2 CPD ¶ ____.

Bronson's protest concerning the impropriety of the packaging requirements is therefore untimely and will not be considered on the merits. See Tonka Equipment Co., B-215724, Dec. 11, 1984, 84-2 CPD ¶ 647. This portion of the protest is dismissed.

Regarding Bronson's contention that the DLA acted improperly in rejecting its bid as nonresponsive, we note that in order to be considered responsive, a bid must be an unequivocal offer to provide the exact thing described in the IFB, in total conformance with the material terms of the solicitation. Buckeye Pacific Corp., B-212183, Aug. 30, 1983, 83-2 CPD ¶ 282. Under the Federal Acquisition Regulation, section 14.404-2(a), any bid that fails to conform to the essential requirements of the invitation for bids must be rejected. 48 C.F.R. § 14.404-2(a) (1984). We have held that this applies also to bids that are ambiguous with respect to a material requirement. Southwest Boat Corp., B-216016, Sept. 10, 1984, 84-2 CPD ¶ 276.

Bronson argues that its bid complied in all material respects with the terms of the IFB, but was misconstrued. It alleges that its offer to "wrap and label 6 each with bar code marking" was incorrectly interpreted as eliminating the individual wrapping of each piece, as well as eliminating the individual labeling. In this regard, the firm contends that its further notation "as supplied to you on previous orders" should have made clear its intention to wrap the hinges individually and then bundle six of these in intermediate containers of sufficient size to accommodate the bar code label. However, the responsiveness of a bid must be determined from the bid itself; the agency is not required to research references made in the bid. Pioneer Industrial Products, B-209131, Mar. 22, 1983, 83-1 CPD ¶ 286. Furthermore, a bidder may not explain the meaning of its bid after bid opening because to permit such action would be tantamount to granting an opportunity to submit a new bid. Southwest Boat Corp., B-216016, supra. In this regard, we find it evident from the wording of Bronson's bid that the firm was notifying DLA that it specifically intended to "take exception" to the packaging specifications. Thus,

Bronson's bid was not an unequivocal offer in total conformance with the material terms of the IFB. See Military Service of Monterey, B-207704, Aug. 24, 1982, 82-2 CPD ¶ 175. Consequently, we find that the Agency's determination that Bronson's bid was nonresponsive was proper.

Regarding the protester's claim that DLA is allowing the awardee to deviate from the packaging requirements in the same way, and its assertion that the requirement was therefore minor and waivable, the Agency states that this allegation is not true. The Agency reports, rather, that the awardee is providing the hinges in individual wrappers that are large enough to accommodate the required labels. Where the only evidence on an issue of fact is the conflicting statements of the protester and the contracting officials, the protester has not carried its burden of affirmatively proving its case. See Xerox Special Information Systems, B-215557, Feb. 13, 1985, 85-1 CPD ¶ 192.

Finally, we note that the preprinted terms and conditions included with Bronson's bid, whether actually intended to modify the solicitation's terms or conditions or not, plainly rendered the bid nonresponsive. For example, Bronson's form expressly made its terms and conditions a part of its bid. Among the terms and conditions at variance with those included in the solicitation were those relating to sales and use taxes, payment terms, delivery dates and termination. Thus, even if its reference to the packaging specifications somehow could be considered to be acceptable, the bid would nonetheless be nonresponsive because of the nonconforming terms and conditions of its bid. Redifon Computers Limited--Reconsideration, B-186691, June 30, 1977, 77-1 CPD ¶ 463.

Bronson also stresses that its own bid was low by 25 percent, and that the potential savings to the government should outweigh what it characterizes as "a technical ambiguity in semantics." However, we have consistently held that a nonresponsive bid may not be accepted, notwithstanding any savings it might represent to the government, since such acceptance would compromise the integrity of the competitive bidding system. See Eclipse Systems, Inc., B-216002, Mar. 4, 1985, 85-1 CPD ¶ 267.

The protest is dismissed in part and denied in part.

for 
Harry R. Van Cleve
General Counsel