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The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Servidyne, Incorporated

File: B-231944

Date: August 8, 1988

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### DIGEST

Protest of rejection of bid as nonresponsive is untimely where filed more than 10 working days after protester was orally advised that bid could not be accepted because of failure to include required bid bond; contracting officer's advice to delay filing protest does not alter untimeliness of protest.

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### DECISION

Servidyne, Incorporated, protests the rejection of its low bid, and the award of a contract to Carrier Building Services, under invitation for bids (IFB) No. DAKF23-88-B-0050, issued by the Department of the Army, Fort Campbell, Kentucky for the replacement of tubing in air conditioner systems. We dismiss the protest as untimely.

When bids were opened on May 27, 1988, Servidyne's bid did not contain the required bid guarantee in the amount of 20 percent of its bid, and therefore was rejected as nonresponsive. The protester was notified by telephone on May 31 that its bid was nonresponsive because of the failure to include a bid guarantee. Although the contracting officer informed Servidyne that the bid guarantee could not be accepted after bid opening, Servidyne subsequently telefaxed a 10 percent bid guarantee to the Army. On June 1, Servidyne telephoned the contracting officer to inquire about the acceptability of the telefaxed bid guarantee and again was informed that the guarantee could not be accepted after bid opening. By letter of June 24, Servidyne was notified of the contract award to Carrier.

Servidyne contends that the contracting officer erred in rejecting its bid as nonresponsive because the solicitation stated at one place that failure to submit a bid guarantee "will" be cause for rejection, but at another place said

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"may," and thus was unclear. Servidyne also notes that the bid guarantee was only inadvertently omitted from its bid, and that acceptance of its bid would result in cost savings to the government.

Our Bid Protest Regulations provide that a protest must be filed within 10 working days after the basis of the protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1988). Servidyne was informed by telephone on May 31 and again on June 1 that its bid was unacceptable because of its failure to submit a bid guarantee with its bid. Oral notification is sufficient to place a protester on notice of its protest bases, and a protester may not delay filing its protest until receipt of written notification confirming the existence of protestable issues. See Aztek, B-229788, Dec. 30, 1987, 87-2 CPD ¶ 648. As Servidyne's protest was not filed until July 11, more than 10 working days after the May 31 and June 1 conversations during which Servidyne was told that its bid was nonresponsive, the protest is untimely.

Servidyne states it protested when it did because it was advised by the contracting officer on June 1 "to await notification of results (rejection on the ground that we were nonresponsive) before protesting in writing." The apparently contemporaneous agency memorandum documenting this conversation, however, states that the contracting officer, after advising Servidyne of its right to protest to our Office, merely suggested that the firm first read the provisions of the Federal Acquisition Regulation, part 33, dealing with protests, disputes and appeals. In any case, the fact that a protester may be misled by the agency in this regard does not alter the untimeliness of a protest; prospective contractors are on constructive notice of our Regulations, since they are published in the Federal Register and Code of Federal Regulations, and the timeliness requirements of our Regulations may not be waived by the contracting agency. See Pacific Properties, Inc., B-229868, Dec. 30, 1987, 87-2 CPD ¶ 649.

Further, the alleged ambiguity in the guarantee requirement was apparent on the face of the solicitation itself, and as such had to be protested prior to bid opening in order to be timely. 4 C.F.R. § 21.2(a)(1); Automated Marketing Systems, Inc., B-230014, Mar. 18, 1988, 88-1 CPD ¶ 289. In fact, however, the IFB was not ambiguous; we have held that the word "may" is used in such a clause only because there are some limited regulatory exceptions to the requirement that a bid accompanied by an inadequate bid guarantee bid be rejected, and that it does not give the contracting officer discretion to waive a bid guarantee requirement by accepting




a bid without a guarantee. Such a bid is nonresponsive. See McLemore Pump Inc., B-230031, Jan. 27, 1988, 88-1 CPD ¶ 83.

We also point out that Servidyne's submission of a bid guarantee after bid opening cannot cure the failure to submit a guarantee with its bid, since a nonresponsive bid cannot be made responsive after bid opening, General Electric Co., et al., B-228140, et al., Jan. 6, 1988, 67 Comp. Gen. \_\_\_\_\_, 88-1 CPD ¶ 6, and that a possible cost savings from acceptance of a nonresponsive bid is outweighed by the importance of maintaining the integrity of the competitive bidding system. See Heritage Medical Products, Inc., 65 Comp. Gen. 783 (1986), 86-2 CPD ¶ 159.

Servidyne also protests other alleged deficiencies in the procurement process and the solicitation. As these allegations were not raised, however, prior to bid opening or within 10 working days after alleged procurement deficiencies arose, they too are untimely and will not be considered. 4 C.F.R. §§ 21.2(a)(1), 21.2(a)(2).

The protest is dismissed.



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