

Kiback



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Outdoor Venture Corporation

File: B-235056

Date: June 16, 1989

DIGEST

Federal Acquisition Regulation § 14.404-2(d)(4) (FAC 84-39) specifically requires rejection of a bid where the bidder conditions or qualifies the bid by stipulating that it is to be considered only if, before the date of award, the bidder does not receive the award under a separate solicitation. Thus, the protester's bid was properly rejected where, on the day of bid opening, protester sent a facsimile copy of the letter which stated that the firm could not accept the award on the solicitation if awarded a contract under another solicitation.

DECISION

Outdoor Venture Corporation (OVC) protests the rejection of its apparent low bid as nonresponsive under invitation for bids (IFB) No. DLA100-89-B-0039, issued by the Defense Logistics Agency (DLA) for the acquisition of a quantity of hexagonal tents. OVC argues that DLA erroneously rejected its bid on the basis of a letter which the firm sent to DLA.

We deny the protest.

The IFB was issued on November 22, 1988, and set bid opening for 2 p.m. on December 27. At the time of bid opening four firms, including the protester, had submitted bids; however, at 11:42 a.m. on the day of bid opening, OVC transmitted a facsimile copy of a letter to DLA's "buyer" which used the address specified in the IFB to which offers were to be mailed. The letter contained the following statement:

"If Outdoor Venture Corporation is awarded a contract on solicitation DLA100-88-B-0642, Outdoor Venture Corporation will be unable to accept award for solicitation DLA100-89-B-0039."

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The letter was delivered to the bid room sometime before bid opening. At bid opening, the bid opening official noted the terms of the letter on the bid abstract. DLA contracting officials discussed the matter with agency counsel and, in late February, resolved that the bid had to be rejected as nonresponsive. The letter was treated by DLA as a timely, but impermissible condition to OVC's bid in accordance with Federal Acquisition Regulation (FAR) § 14.404-2(d)(4) (FAC 84-39). The award under this IFB was made on March 23, 1989. Award was made to another bidder under IFB No. 100-88-B-0642 on March 13.

OVC argues that its bid was responsive and that DLA should not have considered the letter in connection with its bid. DLA argues that the bid was properly rejected as nonresponsive. Specifically, the agency relies on FAR § 14.404-2(d)(4), which requires rejection of a bid where, when not authorized by the invitation, the bidder conditions or qualifies a bid by stipulating that it is to be considered only if, before the date of award, the bidder receives or does not receive award under a separate solicitation.

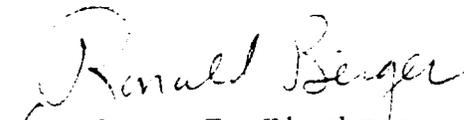
Initially, we conclude that the OVC letter, as submitted, clearly contains the precise type of condition or qualification of its bid that is contemplated by the FAR provision. Thus, we think, based on the statement in the letter, that the agency was required to reject OVC's bid. See 47 Comp. Gen. 453 (1968). The protester does not dispute the applicability of this FAR provision. Rather, its contention is that the letter was not intended to be part of the bid since it was sent to the buyer, not the contracting officer. The protester also argues that since the letter was sent by facsimile transmission, which was not authorized by the IFB and thus, the transmission should have been disregarded.

A bidder's intention is established at the time of bid opening from all the bid documents, which may include any cover letter or extraneous documents submitted in connection with the bid, since such documents are a part of the bid for purposes of determining responsiveness. See Winsar Corp. of Louisiana, B-226507, June 11, 1987, 87-1 CPD ¶ 585; HBH, Inc., B-225126, Feb. 26, 1987, 87-1 CPD ¶ 222. In this latter regard, we have previously noted that bidders have an affirmative obligation to prepare their bids in such a fashion that the agency's contracting officer may accept the bid with full confidence that an enforceable contract will result. In this respect, we have concluded that the fact that bid materials may not have been submitted in strict accordance with a solicitation's bidding instructions

is immaterial to the question of whether or not the materials may properly be considered as part of a firm's bid. See John C. Grimberg Co., Inc.--Request for Reconsideration, B-218231.2, Apr. 26, 1985, 85-1 CPD ¶ 478, where we rejected the protester's argument that a telegram which was sent to the agency should be disregarded because it had not been sent in accordance with the IFB's instructions.

The letter, although written to the attention of the buver (an authorized representative of the activity), used the address specified for the submission of bid materials and was received in the bid room prior to the time for bid opening. The mere fact that the letter reached the bid room in a manner which was not authorized by the IFB is immaterial. Id. Simply stated, we think DLA acted properly in considering the letter's contents in deciding whether OVC's bid was responsive.^{1/}

We deny the protest.


for James F. Hinchman
General Counsel

^{1/} OVC argues that the terms of the letter were "moot" by the time the agency finally concluded that the bid was nonresponsive because the first contract had been awarded. We disagree since a bid's responsiveness must be determined as of the time of bid opening. Winsar Corp. of Louisiana, supra.