



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Basil Equipment Corporation
File: B-237335
Date: February 13, 1990

Gracia Berg, Esq., Steptoe & Johnson, for the protester.
Wm. Bruce Michael, for the interested party, Girton Mfg.,
Co., Inc.
James F. Trickett, Deputy Assistant Secretary for Management
and Acquisition, Department of Health & Human Services, for
the agency.
John Van Schaik, Esq., and John Brosnan, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

1. The award of a contract under a solicitation for sealed bids must be made on the same terms as were offered to all bidders by the solicitation. A bid which includes a provision requiring payment before delivery when the delivery is delayed and which was not included in the solicitation is nonresponsive.
2. A provision included in bid which renders the bid nonresponsive cannot be cured as a mistake, waived or deleted since a nonresponsive bid cannot be made responsive after bid opening.
3. Protest filed after bid opening and award that the terms of the solicitation were vague and ambiguous is untimely since a protest concerning an alleged impropriety which is apparent on the face of a solicitation must be filed before bid opening.

DECISION

Basil Equipment Corporation protests the rejection of its bid by the National Institutes of Health (NIH) under

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invitation for bids (IFB) No. 263-89-B-(48)-0404, for two tunnel cage washers and two cage and rack washers.^{1/}

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

The solicitation included separate line items for the two types of washers and a third line item which called for a price for "[s]torage of the four (4) Washers prior to being set in place for a maximum of approximately 6 months." NIH reports that it included the third line item to allow the contractor to recoup any costs it incurs as a result of having to temporarily store the washers if NIH is not ready for installation on the delivery date. The solicitation also included a "desired delivery schedule" of 150 days after notice to proceed for the cage and rack washers and 180 days for the tunnel cage washers. The required delivery schedule was 180 days and 210 days, respectively. By each schedule the solicitation noted that "Storage Period Is NOT Included."

Three firms submitted bids in response to the solicitation-- Basil priced at \$339,440, Girton Manufacturing Co., Inc., at \$345,462 and a third offeror at \$373,600. Instead of including a dollar amount for storage in the third line item as did the awardee, Basil's bid included the following paragraph:

"B.E.C. will store on our premises the subject quoted equipment free of charge to the government for up to 6 months, provided that 90% of the total equipment price has been paid within 30 days of the original shipping date."

The contracting officer rejected Basil's bid as nonresponsive because he determined that, by inserting the storage provision, Basil had qualified its bid by not offering a firm, fixed price for storage. In this respect, NIH argues that it was not clear from Basil's bid what the price for storage would be if 90 percent of the total equipment price were not paid by the government within 30 days of the original shipping date. NIH also determined that Basil's storage provision contradicted the payments clause (Federal Acquisition Regulation (FAR) § 52.232-1) of the solicitation, which provides for payment after acceptance of the washers.

^{1/} Both types of washers are used for the cleaning of cages, debris pans and other items used in the care of laboratory animals.

Basil argues that its bid was fully responsive to the solicitation's requirements related to quality, quantity and delivery. The protester further states that the storage provision in its bid did not increase its price and, as the low bidder, it should have received the award. According to Basil, the purpose of the storage provision, besides conveying Basil's assurance that it would not charge for storage, was to set forth Basil's understanding that if delivery was delayed by NIH, the agency would accept the equipment in place and allow Basil to invoice NIH for the equipment prior to delivery. Basil says that this understanding is based on a previous contract under which NIH notified Basil that it would not be able to take delivery of equipment on the scheduled date and Basil stored the equipment at no charge for 9 months. According to Basil, NIH accepted the equipment by telephone and permitted Basil to submit its invoice well in advance of actual delivery and installation of the equipment.

Basil also argues that the contracting officer should have allowed the firm to remove the storage provision as a mistake under FAR § 14.406-1 or delete the provision under FAR § 14.404-2(e) as an objectionable condition which did not go to the substance of the bid or should have waived it as a minor irregularity under FAR § 14.405. Finally, Basil argues that if its bid is nonresponsive, the award should be set aside and the requirement be resolicited since the solicitation was ambiguous with respect to its delivery and possible pre-delivery storage requirements, so that bidders could not reasonably and intelligently compete.

The award of a contract under a solicitation for sealed bids must be made on the same terms that were offered to all bidders by the solicitation; an irregularity in a bid that results in benefits to only that one bidder renders the bid nonresponsive. Silvaseed Co., B-213900, May 22, 1984, 84-1. CPD ¶ 545. Here, Basil maintains that the storage provision in its bid is consistent with the terms of the solicitation, which, according to the protester, allows partial acceptance and partial payments under the contract. Specifically, Basil argues that the clause at FAR § 52.232-1, which is referenced in the solicitation, requires the government to pay for equipment based on "partial acceptance" by the government, if the government delays the delivery.

The clause at FAR § 52.232-1 provides in part:

"Unless otherwise specified in this contract, payment shall be made on partial deliveries accepted by the Government if-

- (a) The amount due on the deliveries warrants it; or
- (b) the Contractor requests it and the amount due on the deliveries is at least \$1,000 or 50 percent of the total contract price."

It is our view that this clause, which refers to "partial deliveries accepted by the Government," has nothing to do with a situation where the government delays the delivery and the contractor stores the equipment since in that situation there would have been no delivery at all. Further, although Basil argues that the government would partially accept the equipment in place at the contractor's facility if the government delayed the delivery, the solicitation specifies that inspection and acceptance would occur at NIH in Baltimore, Maryland. Thus, under the contract, other than at NIH in Baltimore, there could be no acceptance of the equipment, partial or otherwise.

Thus, we are aware of no provision of the solicitation, and Basil refers to none, that requires the government to pay any part, let alone 90 percent, of the equipment price before delivery and acceptance of the equipment.^{2/} We conclude that the condition in Basil's bid that it must receive partial payment on the items before it would store them at no charge would result in benefits to Basil not extended to all bidders by the invitation and renders the bid nonresponsive. Silvaseed Co., B-213900, supra.^{3/}

Further, the storage provision in Basil's bid cannot be cured as a mistake or waived or deleted as a minor irregularity since a nonresponsive bid cannot be made

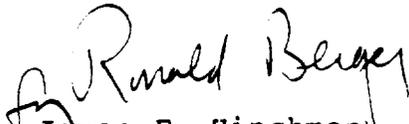
^{2/} We note that the solicitation included by reference the clause at FAR § 52.232-15 which specifically stated that the solicitation included no progress payments and none would be included in the contract.

^{3/} NIH's alleged previous payment for equipment prior to delivery does not preclude rejection of Basil's bid here; an agency's application of correct procedures in a procurement action cannot be challenged based upon its past practices. General Electric Co., B-228191, Dec. 14, 1987, 87-2 CPD ¶ 585.

responsive after bid opening. Lava Tap Cleaning Servs., Inc., B-234728, May 18, 1989, 89-1 CPD ¶ 479.

Finally, Basil's contention that the solicitation was ambiguous with respect to the delivery and storage requirements is untimely. A protest concerning an alleged impropriety in the solicitation which is apparent on the face of the solicitation must be filed before bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989). Thus, we will not consider this issue.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel