



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Forbes Manufacturing Inc.

File: B-237806

Date: March 12, 1990

Robert L. Ambrose, Esq., for the protester.
Michael Malone, Esq., Office of the General Counsel,
Defense Logistics Agency, for the agency.
Robert A. Spiegel, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

A bid on a sale of surplus metal must be rejected as nonresponsive when accompanied by a bid deposit in the form of an uncertified company check with no supporting bid bond or irrevocable letter of credit, even if the check is erroneously cashed by the agency after bid opening.

DECISION

Forbes Manufacturing Inc. protests the rejection of its bid and any subsequent contract award by the Defense Logistics Agency (DLA) for line item 101 under sale No. 41-0001 for the purchase of surplus scrap metal.

Forbes submitted the highest bid on line item 101 with a bid deposit in the form of a company check.^{1/} Although it cashed the check, the DLA rejected Forbes' bid as nonresponsive because the solicitation required a bid deposit to accompany the bid and to be in the form of a guaranteed instrument (cash, a money order, a bank draft, or a cashier's check), or be supported by an irrevocable letter of credit or an approved bid bond on file. The award of this sale contract is pending our decision.

^{1/} Although Forbes states the check was drawn on a "guaranteed line of credit" account, the record shows that the check was not certified, and was drawn on a simple checking account.

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Forbes protests that its bid was erroneously rejected as nonresponsive. The protester argues that the bid guarantee requirement is a mere technicality which may be waived by the DLA, and that in any event the government accepted the firm's offer by virtue of its having cashed the subject check.

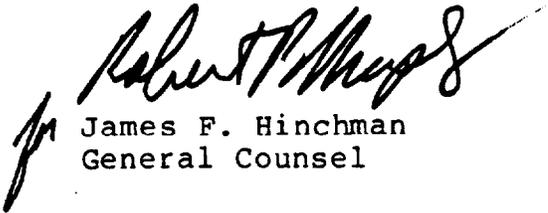
The solicitation specifically incorporated by reference instructions, terms and conditions applicable to the sale, including the requirement that a proper bid deposit be in the possession of the contracting officer at the time of bid opening, or else the bid would be rendered nonresponsive. Although Forbes questions whether this is adequate notice, the incorporation by reference of material solicitation provisions is sufficient to put bidders on notice of their contents. Tiernay Mfg. Co., B-209035, Dec. 20, 1982, 82-2 CPD ¶ 552. Forbes was thus on notice that an acceptable bid guarantee was a material condition of the sale and what constituted an acceptable bid guarantee.

The protester proffered an uncertified company check from a standard bank account. Such checks are not only contingent upon sufficient funds in the account, but the instrument itself is susceptible to a stop payment order and does not provide the type of firm commitment necessary to form a binding contract. Hintz and Hintz Logging, B-225124, Nov. 18, 1986, 86-2 CPD ¶ 583. Thus, the submission of an uncertified check as a bid deposit, rather than one of the firm commitments required by the solicitation, rendered the bid nonresponsive. Such violations of the material bid guarantee requirements cannot be waived after bid opening. Id. The reason, in part, is that a bidder that failed to submit an acceptable bid deposit could decide after bid opening whether or not to cause its bid to be rejected by stopping payment on the check. See A.D. Roe Co., Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194.

Forbes argues the cashing of its check in some way estops the government from rejecting its bid. However, given that bid responsiveness must be determined from documents that have already been submitted at the time of bid opening, a bid cannot be made responsive by actions of either the government or the bidder taken after bid opening. Hintz and Hintz Logging, B-225124, supra. Thus, notwithstanding DLA's error in cashing Forbes' check, its bid, unaccompanied by an acceptable bid deposit, was required to be rejected as nonresponsive. Id.

Finally, Forbes argues that its bid should not be rejected as nonresponsive because government officials assisted it in preparing its bid, and Forbes relied on this advice when it submitted an uncertified check as a bid deposit. While DLA denies giving any wrong advice in this matter, a bidder may not rely upon oral advice regarding the bid deposit which is in direct conflict with the terms and conditions of the solicitation. Douglas M. Andrews, B-218687, May 17, 1985, 85-1 CPD ¶ 571. Similarly, such erroneous advice, even if given, does not estop the government from rejecting a nonresponsive bid. Id.

The protest is denied.


James F. Hinchman
General Counsel