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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Hughes/Smith, Inc.

File: B-243204

Date: June 5, 1991

Carl W. Smith for the protester.
Lt. Col. William J. Holland, Department of the Air Force, for
the agency.
Richard P. Burkard, Esq., and Andrew T. Pogany, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Protest alleging that solicitation provision requiring bidders to include applicable taxes in their bid prices was ambiguous and confusing is dismissed as untimely where the protest is not filed prior to bid opening.

DECISION

Hughes/Smith, Inc. protests the award of a contract to Swinerton & Walberg Co. under invitation for bids (IFB) No. F50611-91-B-0001, issued by the Air Force for construction of a commissary at the Air Force Academy. The protester alleges that the IFB contained an ambiguous and confusing requirement.^{1/}

We dismiss the protest.

The IFB was issued on November 16, 1990, and six amendments were issued prior to the bid opening date of February 22, 1991. The IFB stated that "except as otherwise provided in

^{1/} The protester also initially alleged that the agency should not allow the awardee to adjust its price upward based on the awardee's assertion that its bid contained a mistake. (The record shows that the asserted mistake was a clerical error which was unrelated to the IFB provision which is at issue in this protest.) The agency did not, in fact, allow the protester to adjust its bid price. Thus, the matter is academic.

this contract, the contract price includes all taxes, duties, or other public charges in effect and applicable to this contract." Amendment No. 1 to the IFB, which was issued in response to questions received by the agency, provided that no exceptions had been made to exempt the proposed contract from any taxes, duties, or public charges. Prior to the 2 p.m. bid opening on February 22, a representative of Hughes/Smith called the contracting officer to ask whether the project was exempt from any taxes. The contracting officer advised that no exemptions or exceptions from payment of applicable taxes existed, as stated in amendment No. 1 of the IFB.

The Air Force received twelve bids; Swinerton & Walberg was the apparent low bidder, while Hughes/Smith submitted the third low bid. The protester filed this protest on March 7.

The protester argues that the IFB did not clearly state whether the project was exempt from certain taxes which the contractor would be obligated to pay in performing the contract and that bidders therefore did not compete on an equal basis. For example, Hughes/Smith asserts that one of the bidders "did not include sales tax" in the preparation of its bid.^{2/} The protester points out that there was a rumor relating to the requirement to include taxes in the bid price which prompted three phone calls from prospective bidders. Thus, the protester concludes, the validity of the bids is in question, and the agency should issue a new solicitation for the requirement.

Concerning the protester's argument that the IFB was confusing and that it did not provide adequate detail regarding the specific taxes which were applicable to the contract, we find the protest to be untimely. Our Bid Protest Regulations require that a protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1991). Here, as stated, the protester called the contracting officer to request clarification regarding the applicability of taxes to the contract, and the contracting officer confirmed what was stated in the IFB. If Hughes/Smith still believed that the IFB was confusing and ambiguous or that it did not contain

^{2/} Contrary to the protester's assertion, this bidder has submitted comments on this protest which state that it did not find the IFB ambiguous with respect to the "inclusion or exclusion of taxes associated with the project."

adequate information regarding the applicability of taxes, it was required to raise those protest issues prior to bid opening. See Pennsylvania Printed Prod. Co., Inc., B-239579, Aug. 29, 1990, 90-2 CPD ¶ 179.

The protest is dismissed.

Michael R. Golden

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Assistant General Counsel