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Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** High Country Equipment, Inc.

**File:** B-248426; B-248427

**Date:** August 11, 1992

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Leonard Stephenson for the protester,  
R. Joseph Milburn, Department of Agriculture, for the  
agency.  
Barbara C. Coles, Esq., and Christine S. Melody, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

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### DIGEST

Protest that agency should have awarded contract to the protester after terminating previously awarded contract for convenience of the government, rather than opting to resolicit the requirements in the future, is denied where the protester's proposal is unacceptable because it fails to conform to the material terms of the solicitation.

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### DECISION

High Country Equipment, Inc. protests the award of a contract to WDTC Auto Rental, Inc. under invitation for bids request for proposals (RFP) R2-09-92-07, after the cancellation of invitation for bids (IFB) No. R2-09-92-02, both issued by the Department of Agriculture for rental vehicles.

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

The IFB, issued on February 21, 1992, called for 26 rental vehicles and required bidders to submit descriptive literature with their bids. Two bidders, High Country and WDTC, submitted bids in response to the IFB; however, both bidders failed to submit the required descriptive literature. As a result, the contracting officer found both bids nonresponsive.

By letter dated April 3, the contracting officer notified the two bidders that their bids were found nonresponsive and that, therefore, the agency had canceled the IFB and was proceeding with the procurement under negotiated procedures. The contracting officer also advised the bidders that the new RFP did not contain a descriptive literature requirement; that the agency's requirement for 26 vehicles in the

original solicitation had been reduced to 9 vehicles; and that they should be cautious about filling in unit prices for the revised solicitation. The RFP was issued the same day to High Country and WDTC with a closing date of April 9. WDTC offered a lower price than High Country, and the contracting officer made award to the firm on April 13. High Country's protest to our Office followed.

While the protest was pending at our Office, the Forest Service reviewed its decision to make award to WDTC. The agency found that the award to WDTC was improper because WDTC failed to comply with the requirements of the solicitation. Specifically, WDTC proposed to furnish vehicles with automatic transmissions in spite of the fact that the solicitation specifically called for manual transmissions; WDTC also offered a shorter acceptance than the 30 calendar days required by the solicitation.<sup>1</sup> As a result, the Forest Service terminated its contract with WDTC for the convenience of the government on May 21; the Forest Service plans to resolicit the requirements in the future.

High Country contends that the agency's rejection of the bids submitted in response to the IFB as nonresponsive was improper because the IFB's descriptive literature requirement was not necessary. The protester also argues that the agency's subsequent award to WDTC as the low offeror under the RFP was improper because the Forest Service advised High Country, prior to the submission of its offer under the negotiated procedures, that High Country only needed to verify the prices the firm submitted under the original IFB in order to receive award, and that the Forest Service failed to advise the firm that it would have to recompute for the award of the contract under the RFP. We will not consider these contentions.

To the extent that the protester challenges the agency's rejection of the two bids as nonresponsive and the resulting determination to cancel the IFB and to continue the procurement by converting from sealed bidding to negotiated procedures, the protester's challenge is untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1992), a protest based on other than an apparent solicitation impropriety must be filed within 10 working days after the protester knows or should know the protest basis. Here, High Country was informed that the procurement had been converted from a sealed bid procurement to a negotiated procurement by letter as well as the RFP that accompanied the letter; therefore, High Country should have protested the rejection of the bids, the subsequent cancellation of the IFB, and the

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<sup>1</sup>In its offer, WDTC inserted the words "at once" in the space provided for the acceptance period.

conversion within 10 days after receiving the letter and the RFP. See Moran Constr. Co., B-241474, Jan. 7, 1991, 91-1 CPD ¶ 16. Although we do not know the exact date that High Country received the Forest Service's April 3 letter, we do know that High Country signed and dated the revised solicitation on April 6; assuming that High Country did not receive notification about the conversion until this date, it should have challenged the conversion by April 20. High Country did not raise this issue, however, until its April 21 letter, which was received in our Office on April 27.

In addition, we will not consider the merits of the protester's contention that the award to WDTC as the low offeror under the RFP was improper. Since the Forest Service properly terminated the contract--on different, albeit unrelated, grounds than raised by the protester--High Country's protest that the award decision was improper is academic. See Bade Roofing & Sheet Metal Co., B-243496, June 25, 1991, 91-1 CPD ¶ 606.

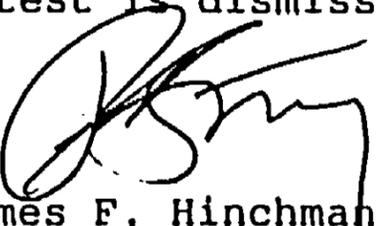
Finally, the protester contends that while the agency's decision to terminate WDTC's contract was correct, the agency's decision to resolicit the requirement was improper because the award should have been made to High Country. The Forest Service disagrees and argues that an award to the protester was not an option because High Country's offer, just like WDTC's, did not comply with the solicitation's requirements. In this regard, High Country's offer contained an asterisk in the section of the bid schedule calling for 1/2 ton 4x4 short-bed trucks which noted that "per your approval - we will probably furnish full size pickups."

In negotiated procurements, a proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and a contract award based on such an unacceptable proposal violates the procurement statutes and regulations. See Stocker & Yale, Inc., 70 Comp. Gen. 490 (1991), 91-1 CPD ¶ 460. The solicitation here specifically required short-bed trucks. Since High Country's notation that it planned to furnish full-sized pickups demonstrates High Country's intended noncompliance with this material solicitation requirement, award based on that proposal would be improper.

We do not find persuasive the protester's argument that the agency should be estopped from using the protester's noncompliance as a justification for resoliciting the requirement and avoiding award to the protester because, according to the protester, the contracting officer advised High Country--prior to the submission of its offer--that the firm could deviate from the solicitation's short-bed

requirement.<sup>2</sup> As discussed above, the solicitation specifically required short-bed trucks. Therefore, the protester's reliance on alleged oral advice which was inconsistent with the written terms of the solicitation was unreasonable and does not justify waiving the short-bed requirement. See Air Inc., B-236334, Nov. 13, 1989, 89-2 CPD ¶ 455.

The protest is dismissed in part and denied in part.



James F. Hinchman  
General Counsel

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<sup>2</sup>There is no evidence in the record to support this allegation, and the contracting officer who allegedly spoke with High Country about the firm's intended noncompliance resigned from the Forest Service before High Country filed this protest.