



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Viereck Company

**File:** B-256175

**Date:** May 16, 1994

Don Roeder for the protester.  
Walker L. Evey, National Aeronautics and Space Administration, for the agency.  
David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Rejection of proposal which did not show compliance with the required delivery schedule was proper since delivery is considered to be a material term of a solicitation, and award cannot generally be made on the basis of a proposal that takes exception to a required delivery schedule.

### DECISION

Viereck Company protests the rejection of its proposal by the Lewis Research Center, National Aeronautics and Space Administration, under solicitation No. 3-489890, issued for the procurement of four items: an infeed centerless grinder, documentation, testing and checkout, and training. Viereck's proposal was rejected after its grinder was determined not to comply with certain requirements of the specifications. Viereck maintains that the specifications were defective since they were improperly written as design rather than performance specifications and that, in any event, its offered grinder did comply with all the required specifications. Thus, it maintains that its offer was improperly rejected and that it should receive the award.

We deny the protest.

The IFB was originally issued on June 9, 1993, as a small business set-aside. Bidders were required to submit prices for each of the four items being acquired and descriptive literature establishing that the grinder being offered complied with various requirements of the specifications. The pertinent requirements for which bidders had to submit literature were expressly listed along with the salient characteristics of each requirement. Bidders also had to

indicate compliance with the required delivery dates of 60 and 90 days after the date of award for items 1 through 3 and for item 4, respectively. The solicitation provided that the offeror should compute the time available for performance beginning with the actual date of award, rather than the date the written notice of award is received from the contracting officer through the ordinary mails. It also provided that the government would evaluate the offeror's proposed delivery based on the contractor's date of receipt of the award by adding 5 days for delivery of the award through the ordinary mails. If, as so computed, the offered delivery date was later than the required delivery date, the offer would be rejected as nonresponsive. Thus, as we understand it, if the solicitation required delivery within 60 days after the date of contract, a firm had to agree to delivery within 60 days of the contract date, regardless of when the contractor received its notice of contract award.

Two bids were received as of the July 16 bid opening date. Viereck's bid was rejected as being nonresponsive since the bidder's descriptive literature failed to show compliance with all of the required specifications. Royal Master Grinding, Inc.'s bid was rejected because it was a large rather than a small business.

As a result of the rejection of both bids, the IFB was reissued on an unrestricted basis on September 15. Only Viereck and Royal submitted bids. Viereck's bid was rejected again for failing to meet various requirements of the specifications and for failing to show compliance with the required delivery schedule. Royal's bid, which was determined to be technically acceptable, was also rejected for failing to show compliance with the required delivery schedule. In view of the above, the agency decided to cancel the IFB to conduct negotiations with Viereck and Royal. Accordingly, by letters of November 8, each bidder was advised of the specific reasons for the rejection of its bid and was requested to submit a proposal for the purchase of the four items. Both responded to the letters. Royal's offer was determined to be in compliance with all requirements of the specifications and the delivery schedule. It was determined that Viereck's offer did not comply with various requirements of the specifications, or with the 60-day requirement in the delivery schedule. Accordingly, award was made to Royal.

We conclude that Viereck's offer was properly rejected. Award must be based on the requirements stated in the solicitation, Falcon Carriers, Inc., 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96, and an agency does not have the discretion to disregard an offeror's failure to satisfy a

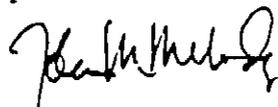
material solicitation requirement in its proposal. Loqitek, Inc., B-238773, July 6, 1990, 90-2 CPD ¶ 16, aff'd, Loqitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401. A delivery schedule is a material term of a solicitation; therefore, award cannot generally be made on the basis of a proposal that takes exception to a required delivery schedule. Ford Aerospace Corp., B-239676, Sept. 20, 1990, 90-2 CPD ¶ 239.

Viereck stated in its offer that it could not begin to manufacture the grinder until after the receipt of a firm order and that a 60-day delivery requirement was a short period for production of a nonstock machine. Viereck stated that it was aware that a lapse of 2 or more weeks can occur between the date of award and the date the contract was received and if the award notice was delayed, it would be unable to meet the required 60-day delivery date. It stated that "if the cover page of the contract is faxed the same day as awarded, we will agree to the specified delivery of 60 days after date of award." As stated above, the solicitation required delivery within 60 days of contract award and provided that the agency could mail the notice. The solicitation effectively required offerors to agree to a 60-day delivery schedule from the contract date, regardless of when the award notice was received.

We think that Viereck's bid did not obligate the firm to the required 60-day delivery schedule. Viereck promised to meet the 60-day delivery requirement only if the cover page of the contract were faxed to it on the date of award, a condition which the agency did not agree to.

In other words, Viereck chose to limit its risk in a manner not permitted by the solicitation. If the agency failed to fax the notice for award on the day of award, Viereck's bid did not obligate the firm to meet the 60-day delivery schedule from the contract date. Since Viereck did not unequivocally obligate itself to meet the 60-day delivery requirement, its proposal was properly rejected. (In contrast, the awardee agreed to meet the agency's delivery terms--delivery within 60 days of the contract date. Thus, the awardee agreed to accept the risk, and any additional costs, of a shorter performance period if the agency's notice of award was delayed for any length of time.)

The protest is denied.



Robert P. Murphy  
Acting General Counsel