

DOCUMENT RESUME

02715 - [A1872898]

[Untimely Bid Protest]. B-189136(1). June 28, 1977. 4 pp.

Decision re: Deere & Co.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Department of the Army: Corps of Engineers.

Authority: A.S.P.R. 2-208(c). A.S.P.R. 2-211(b). A.S.P.R. 2-404.2(c). 4 C.F.R. 20.2. B-187591 (1977). B-181242 (1974). B-185515 (1976). 55 Comp. Gen. 100. 55 Comp. Gen. 654. 54 Comp. Gen. 271. 54 Comp. Gen. 275.

The protester objected to the rejection of its low bid for construction equipment, alleging that the invitation for bids included an outdated specification which the agency did not change. The protest was received more than 10 days after bid opening and was untimely. A bid based on a 90-day delivery schedule was properly rejected as nonresponsive, since the invitation for bids specified a 60-day delivery schedule.
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DECISION



M.P.

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-189136 (1)

DATE: June 28, 1977

MATTER OF: Deere & Company

DIGEST:

1. Protest received more than 10 days after bid opening alleging that IFB included outdated specification which procuring agency did not change is untimely and will not be considered on merits.
2. Bid based on 90-day delivery schedule was properly rejected as nonresponsive, because IFB specified 60 days and was not amended to increase time for delivery. Bidder relied at own risk on oral advice, if any, that bid for 90-day delivery would be considered.

Deere & Company (Deere), by letter received in this Office on May 20, 1977, protests rejection of its low bid on invitation for bids (IFB) No. DACW56-77-B-0056, issued by the Tulsa District of the Army Corps of Engineers. The solicitation covered construction equipment for three projects in the Tulsa district. Bid opening was May 4, 1977; award has not yet been made.

Deere states that on April 18, 1977, by telex, it advised the Corps of Engineers that the Federal specification for loader/backhoe units, IFB item 2, was outdated. Deere requested a change to the current specification and also sought an amendment making 52-inch track gauge acceptable in lieu of 54-inch for a crawler type dozer, IFB item 4. In addition, on April 28, 1977, by mailgram, Deere requested an increase in delivery time from 60 to 90 days for all items.

On April 28, 1977, Deere states, procurement officials informed the firm by telephone that its request for a change in specification for item 4 had been denied. The request for use of the new specification for item 2 was discussed by telephone on more than one occasion, and Deere apparently believed the matter was being investigated. The Corps of Engineers indicates that the referenced specification reflected the Government's minimum needs, and because all parties agreed that no change was presented by the new specification, no further action was taken.

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The issue with regard to this portion of the protest is timeliness. According to Armed Services Procurement Regulation (ASPR) § 2-208(c) (1976 ed.), a change in specification requires amendment of the IFB:

"(c) Any information given to a prospective bidder concerning an invitation for bids shall be furnished promptly to all other prospective bidders, as an amendment to the invitation, whether or not a pre-bid conference is held, if such information is necessary to the bidders in submitting bids on the invitation or if the lack of such information would be prejudicial to uninformed bidders. No award shall be made on the invitation unless such amendment has been issued in sufficient time to permit all prospective bidders to consider such information in submitting or modifying their bids."

It probably should have been apparent to Deere by April 28 that the specification for item 2 would not be amended. In any event, by bid opening date, Deere clearly knew that the specification had not been changed. Under our procedures, 4 C.F.R. 20.2 (1977), an alleged impropriety which is apparent before bid opening must be protested by that date. Deere's protest that item 2 was incorrectly advertised should have been received prior to bid opening on May 4, 1977. Therefore, the protest is untimely and will not be considered on the merits. By the same rule, Deere's protest that evaluation factors were ambiguous and indefinite should have been filed before bid opening.

Deere was informed by letter dated May 10, 1977, that its low bids for item 1, tilt deck trailers, and items 2 and 4 had been rejected as nonresponsive because 90-day delivery had been proposed. In addition, Deere's bid for 52-inch track gauge for item 4 was considered nonresponsive. Deere also protests this determination.

Deere contends that procurement officials had advised the firm by telephone that a bid based on 90-day delivery would be considered. The Corps of Engineers disputes this, stating that although numerous phone conversations took place, no inferences were ever made that 90-day delivery would be allowed. We need not determine whether such advice actually was given. An increase in delivery time also would have required amendment of the IFB. ASPR § 2-211(b) states:

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"* * * Discussions with prospective contractors regarding a potential procurement and the transmission of technical or other information shall be conducted only by the contracting officer or his superiors having contractual authority or by others specifically authorized. Such personnel shall not furnish any information to a potential supplier which alone or together with other information may afford him an advantage over others. However, general information which would not be prejudicial to other bidders may be furnished upon request, e.g., explanation of a particular contract clause or a particular condition of the schedule in the invitation for bids. When necessary to clarify ambiguities, or correct mistakes or omissions, an appropriate amendment to the solicitation shall be furnished in a timely manner to all to whom the solicitation has been furnished. See 2-208."

Completion dates and delivery schedules are regarded as material and may have a substantial effect on the competitive position of bidders. Memory Display Systems Division of the EdnaLite Corporation, B-187591, January 28, 1977, 77-1 CPD 74. Thus, any information given Deere regarding an increase in delivery time was contrary to regulation.

Moreover, paragraph 3 of standard form 33A, Instructions and Conditions, included in the IFB, specifically states that oral explanations given before award of a contract are not binding. See generally Young Engineering Systems, 55 Comp. Gen. 654 (1976), 76-1 CPD 96; George C. Martin, Inc., 55 Comp. Gen. 100 (1975), 75-2 CPD 55; Sheffield Building Company, Incorporated, B-181242, August 9, 1974, 74-2 CPD 108. Erroneous advice given by procurement officials cannot estop an agency from rejecting a bid as nonresponsive when required to do so by law. A.D. Roe Company, Inc., 54 Comp. Gen. 271, 275 (1974), 74-2 CPD 194; CFE Air Cargo, Inc., B-185515, August 27, 1976, 76-2 CPD 198. ASPR § 2-404.2(c) requires rejection of any bid which fails to conform to the delivery schedule listed in the IFB.

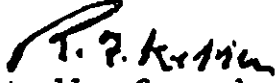
Thus, Deere's bid offering 90-day delivery was properly rejected. However, we recommend that the Corps of Engineers deny in writing requests for amendments to prevent similar difficulties in the future.

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Deere's initial protest was concerned only with the responsiveness of its own bid and the propriety of a portion of the specifications. The Corps of Engineers has withheld award on the items for which Deere was the low bidder pending our decision. However, award was made on other items, including item 3, a motor grader, for which Bert Smith Road Machinery, Inc. was the low bidder and Deere was the only other bidder.

In submitting its comments upon the agency report, Deere for the first time argued that Smith's bid upon item 3 should have been rejected as nonresponsive because Smith did not complete the Buy American certification even though it was offering a Canadian product. We are proceeding with the pre-award portion of Deere's protest in this decision so as to not delay the procurement. A separate decision concerning the Buy American issue will follow our receipt of the Corps of Engineers' report and Deere's comments, if any, upon it.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States