

6287

L. Crowley

DECISION



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

PL II

FILE: B-191390

DATE: May 8, 1978

MATTER OF:

Hemet Valley Flying Service Co., Inc.

DIGEST:

1. Where bidder is informed that its bid is nonresponsive but that contracting officer would investigate to determine if bid could be accepted, grounds for protest arise when contracting officer subsequently advises bidder that decision has been made to reject bid. Protest filed with GAO within 10 days of agency's rejection of timely protest filed with it in response to its decision is timely.
2. Where solicitation contains standard provision permitting bidders to insert acceptance period of less than 50 days with notation, however, to "See Attached Supplement" which contains provision entitled "BID ACCEPTANCE PERIOD" stating that bids offering less than a 30-day acceptance period would be rejected as nonresponsive, solicitation is not misleading in regard to the minimum bid acceptance period and bid offering 20-day period is properly rejected as nonresponsive.
3. Bidder's failure to offer required 30-day bid acceptance period may not be waived since bid as submitted does not meet Government's requirements and allowing bidder to correct deficiency after bid opening would give bidder unfair advantage and would be prejudicial to other bidders.

4. Bid which includes signed copies of Amendments to solicitation contains appropriate acknowledgment of Amendments and bid is not rendered non-responsive by bidder's insertion of date of issuance of invitation, instead of dates of Amendments, in space provided in bid form for acknowledging amendments.

Hemet Valley Flying Service Co., Inc. (Hemet Valley) of Hemet, California protests the rejection of its bid in response to invitation for bids (IFB) 808-01 issued on December 22, 1977, by the Office of Aircraft Services, Department of the Interior (Interior), Boise, Idaho for the rental of 14 air tankers with pilots.

Seventeen bids were received and opened on February 3, 1978. Hemet Valley was the apparent low bidder on 3 of the 14 bid items; however, Hemet Valley only provided a 20-day bid acceptance period instead of the 30-day period required by the IFB, and the bid was rejected as nonresponsive for that reason. Hemet Valley alleges that the IFB was misleading in regard to the 30-day minimum bid acceptance period, and that in any event, the listing of a 20-day bid acceptance period was a minor irregularity which should be waived.

At the outset, we are faced with Interior's contention that the protest may be untimely. Our Bid Protest Procedures, Part 20, Title 4, Code of Federal Regulations, set forth time limits within which protests must be filed with this Office. 4 C.F.R. 20.2 (1977) provides as follows:

"(a) Protesters are urged to seek resolution of their complaints initially with the contracting agency. If a protest has been

filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of actual or constructive knowledge of initial adverse agency action will be considered provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (b) of this section * * *

"(b) * * * (2) In cases other than those covered in subparagraph (1) bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier."

Interior contends that Hemet Valley initially protested to it, that the contracting officer orally rejected the protest on February 10, 1978, and that consequently the March 1, 1978 protest filed here is untimely.

Hemet Valley, on the other hand, contends that it did not learn of the basis for protest until February 16, 1978, with the consequence that its protest filed here on March 1 is timely.

The record indicates that on February 3, 1978, directly after the bid opening, the contracting officer approached the representative of Hemet Valley present at the bid opening and informed him that Hemet Valley's bid was nonresponsive. Hemet Valley's representative offered to give a written extension of its bid acceptance period to comply with the IFB requirement. The contracting officer advised Hemet Valley that he didn't believe it would do any good, but that he would fully investigate the situation to ascertain if there was any possibility of accepting the bid. The representative then extended Hemet Valley's bid acceptance period 30 calendar days.

Counsel for Hemet Valley contacted the contracting officer on February 4, 1978, and made an oral presentation in an attempt to support award to Hemet Valley on Bid Items 1, 2 and 4 on which Hemet Valley was the apparent low bidder. As a result of the conversation, counsel sent the contracting officer letters dated February 6, and February 8, 1978, outlining Hemet Valley's contention that it was responsive.

Subsequently, a telephone conversation between the contracting officer and a representative of Hemet Valley took place although the parties do not agree on the date of the conversation or on its substance. According to a memorandum of the contracting officer, the conversation took place on February 10, 1978, and in it Hemet Valley was advised that the material submitted by Hemet Valley's counsel had been reviewed and that Interior had concluded that Hemet Valley's bid would have to be rejected as nonresponsive. Hemet Valley was also informed that a copy of Interior's decision would be mailed as soon as it was typed. In response to a query as to whether there would be "any problems" if a protest was submitted to GAO, the representative of Hemet Valley was advised by the contracting officer that "he certainly should avail himself of a review by the GAO if he felt my decision was not sound or did not consider all avenues. I suggested he wait until he had a chance to review my decision prior to making his decision on entering a protest with the G.A.O." Hemet Valley, by affidavit, contends that the telephone conversation occurred on February 13, 1978, and during the "conversation there was no discussion on the question of the responsiveness of Hemet Valley's bid." Rather, Hemet Valley states it was advised by the contracting officer that a letter detailing the reasons for the rejection of Hemet Valley's bid was being sent.

In addition, counsel for Hemet Valley, also by affidavit, states that a telephone conversation was held with the contracting officer on February 13, 1978, and that he was advised that a letter on whether the bid of Hemet Valley would be accepted had been

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prepared and would be sent to counsel shortly. Counsel avers that the contracting officer did not inform counsel as to the contents of the letter nor did he inform counsel as to whether or not he would accept Hemet Valley's bid.

In any event, the letter referred to was sent to counsel for Hemet Valley by the contracting officer on February 13, 1978, and was received on February 16, 1978. On that date, counsel telephonically contacted an Assistant Solicitor, Department of the Interior, "protested" the contracting officer's rejection of Hemet Valley's bid, and requested review of the matter on an expedited basis. A letter was also sent to the Assistant Solicitor on the 16th, which was delivered on February 17. The letter stated as follows:

"Enclosed please find copies of the correspondence between our Office and the Contracting Officer concerning the acceptability of Hemet Valley's bid in response to the subject solicitation. As I advised you in our telephone conversation, we believe the position expressed by the Contracting Officer in this matter is wrong and that Hemet Valley's bid is acceptable.

"We very much appreciate your looking into this matter on an expedited basis."

On February 23, 1978, the Assistant Solicitor orally advised counsel that award would not be made to Hemet Valley in light of Comptroller General decisions on the effect of failing to comply with bid acceptance provisions. Hemet Valley's protest letter dated March 1, 1978 followed.

Generally, a bidder becomes aware of grounds for protest when it is informed by the contracting agency that its bid is considered to be nonresponsive and

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the reason therefor. See, e.g., Southwest Aircraft Services, Inc., B-188483, April 1, 1977, 77-1 CPD 227. However, in this case it appears that the contracting officer did not definitively state on February 3 that the Hemet Valley bid had to be rejected; rather, he indicated that he would see if there was a possibility that the bid could be accepted. Accordingly, we view the Hemet Valley submissions of February 4, 6 and 8 as efforts to convince the contracting officer that the bid could be accepted, and not as a formal protest in response to its becoming aware of grounds for protest. We think Hemet Valley's grounds for protest arose when it was informed either on February 10, 13 or 16, that the agency's consideration of the matter had resulted in a decision that the bid could not be accepted. On that basis, the protest is timely, since regardless of whether Hemet Valley received oral notification on February 10 or 13 or written notification thereafter, it protested to the agency on February 16 and 17 (within 10 days of February 10) and to this Office within 10 days of the Assistant Solicitor's February 23 advice that award would not be made to Hemet Valley. Therefore, we will consider the case on the merits.

The initial contention by Hemet Valley is that the IFB was misleading in regard to the required bid acceptance period, and that Hemet Valley therefore shouldn't be penalized for relying on the IFB provisions.

The IFB was issued on Standard Form (SF) 33, Solicitation, Offer, and Award, which contained the standard language concerning bid acceptance periods as follows:

"In compliance with above, the undersigned offers and agrees, if this offer is accepted within ___* calendar days (60 calendar days unless a different period is inserted by an offeror) from the date for the receipt of offers specified above, to furnish any or all items

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upon which prices are offered, at the price set opposite each item, delivered at the designated point(s), within the time specified in the Schedule. *See Attached Supplement"

The Schedule set forth on the front of SF 33 indicated that the IFB contained a Supplement to SF 33 and a Supplement to SF 33A. Page 3 of the IFB is entitled "Supplement Sheet To Standard Form SF 33." At the top of the page is an unnumbered paragraph entitled "BID ACCEPTANCE PERIOD" which states as follows:

"Bids offering less than thirty (30) days for acceptance by the Government from the date set for opening will be considered nonresponsive and will be rejected."

The protester contends that there was no "Attached Supplement" but only a "Supplement Sheet to Standard Form SF 33" and, on page 6 of the IFB, a "Supplement Sheet to Standard Form 33A" and that the page 3 Supplement Sheet did not reference the offer acceptance period language on page 1 of the IFB, SF 33. According to Hemet Valley, page 1 of the IFB clearly invited acceptance periods of less than 60 days and did not state that acceptance periods could not be less than 30 days; otherwise, Hemet Valley points out, one of its executives would not have traveled from California to Boise, Idaho, to deliver the bid and be present at the Interior bid opening if it knew that it had submitted a nonresponsive bid by virtue of offering only a 20-day acceptance period.

In support of its position for its bid acceptance period, Hemet Valley argues as follows:

"Although the language on the first page of the IFB is a part of Standard Form 33 (Nov. 1969), the phrase in question had been a constant source

of trouble to bidders on Government contracts, procuring agencies, and your Office. For a representative list of the cases involving the subject provision, see Intercontinental Mfg. Co., B-180784, 74-I CPD 300; 52 Comp. Gen. 842 (1973); 49 Comp. Gen. 761 (1970); 54 Comp. Gen. 750 (1975); and 46 Comp. Gen. 418 (1966). This provision would not be the subject of protests year after year if it were not misleading. And the Government would not alienate contractors or expend extra moneys to contract with other than low bidders if it did not reject the bids of contractors which clearly intended to submit completely responsive bids but were misled by faulty contract language.

* * * * Notwithstanding the fact that bidders are expected to carefully scrutinize solicitation packages, your Office has stated that 'the Government has initial responsibility for stating that what is required in a reasonably clear fashion.' See 52 Comp. Gen. 842, 846 (1973) * * *

*That the IFB is defective is further evidenced by the fact that bid acceptance period language appearing on page three failed to reference the bid acceptance period language on the first page of the solicitation. In the past, your Office has faulted procuring agencies which have failed to cross-reference provisions such as these. For example, see 52 Comp. Gen. 842 (1973), where the Comptroller General, on page 845 declared: 'Our Office has previously recommended that where an invitation contains language specifying a bid acceptance period and another separate

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provision located elsewhere in the invitation sets forth a minimum bid acceptance period, the two provisions should be cross-referenced. * * * [Emphasis supplied.] Here the two relevant provisions did not cross-reference each other."

Hemet Valley also argues that the misleading nature of the solicitation is further supported by the fact that the contracting officer had to advise one of the bidders prior to bid opening that a contemplated 20-day acceptance period by that bidder would make its bid nonresponsive.

We find nothing misleading about the bid acceptance provisions. SF 33 referenced a supplement, the IFB contained a sheet prominently captioned "Supplement Sheet To Standard Form SF 33" and the first provision on that sheet, also set forth in bold type, was entitled "BID ACCEPTANCE PERIOD" and specifically required a 30-day bid acceptance period in order for a bid to be considered responsive.

We also find nothing in the cases cited by Hemet Valley which suggests a contrary result. Although we did recommend a cross-referencing between the SF 33 provision and any other provision establishing a particular minimum acceptance period, see 52 Comp. Gen. 842 (1973); Intercontinental Manufacturing Company, Incorporated, B-180784, June 4, 1974, 74-1 CPD 300, we believe the reference on SF 33 to the supplement was sufficient to alert bidders to the existence of the supplemental provision and that the latter provision clearly advised bidders that a minimum acceptance period of 30 days was required. In this regard, we note that although one of the bidders apparently had to be advised by the contracting officer that a 30-day period was required, 17 bids were received and only one bid had an acceptance period of less than the required 30 days. In short, we find that the solicitation was not misleading. See Cam Industries, Inc., B-184542, November 11, 1975, 75-2 CPD 292.

Hemet Valley's next argument is that the listing of a 20-day bid acceptance period was a minor irregularity which should be waived. Counsel for Hemet Valley acknowledges that this Office has consistently held that a provision in an invitation which requires that a bid remain available for acceptance by the Government for a prescribed period of time in order to be considered for award is a material requirement and that failure to meet such a requirement renders a bid nonresponsive. See Perry C. Herford, B-187666, December 6, 1976, 76-2 CPD 465; Miles Metal Corporation, 54 Comp. Gen. 750 (1975), 75-1 CPD 145; 48 Comp. Gen. 19 (1968); 46 Comp. Gen. 418 (1966). Counsel, however, suggests that in this case the protester's noncompliance with the bid acceptance period requirement may be waived in light of recent decisions by this Office in which we permitted acceptance of a bid which did not comply in all material respects with invitation requirements. See Union Cart. Co. Corporation, 56 Comp. Gen. 487 (1977), 77-1 CPD 243; Keco Industries, Inc., 54 Comp. Gen. 967 (1975), 75-1 CPD 301; Thomas Construction Company, Inc., B-184810, October 21, 1975, 75-2 CPD 248. In the limited circumstances represented by those cases, bid acceptance was permitted because it resulted in the Government's actual needs being satisfied and because no other bidder was prejudiced as a result. Hemet Valley asserts that those tests are satisfied here.

We do not agree. In the cited cases the procuring activity's actual needs were satisfied by acceptance of the bid as submitted. Here, Interior indicates that its actual need is for a bid acceptance period of 30 days, not 20 days.

Moreover, although Hemet Valley asserts that it had no advantage over other bidders because it extended its bid acceptance period immediately after bid opening, we point out that one reason bid acceptance period provisions are regarded as material is that a bidder may obtain an advantage over other bidders when it does not agree to the same minimum acceptance period required of and complied with by the other bidders. As we said in Perry C. Herford, supra:

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"When a bidder limits its bid acceptance period, it has the option to refuse the award after that time in the event of unanticipated increases in cost, or by extending its acceptance period to accept an award if desired. Bidders complying with the required acceptance period would not have that option but would be bound by the Government's acceptance."

Here, although the protester did not wait until the end of the 20-day period to extend its bid acceptance period, it did seek to modify its bid by doing so after bid opening. To permit such a modification would give Hemet Valley "two bites at the apple," that is, the option to decide after bid opening and exposure of competitor's bid prices whether to have its bid rejected. This obviously would be prejudicial to other bidders who did not have that opportunity and would subvert the purposes of the competitive bidding statutes. See Veterans Administration re Welch Construction, Inc., B-183173, March 11, 1975, 75-1 CPD 146; 38 Comp. Gen. 532 (1959).

Accordingly, we find no basis for objecting to the rejection of Hemet Valley's bid.

Hemet Valley also protests any award to Black Hills Aviation, Inc. (Black Hills), under the IFB. Hemet Valley maintains that "the bid submitted by Black Hills is nonresponsive to the IFB because such bid did not acknowledge amendments to the IFB dated 1/10/78 and 1/13/78," and that "the bid of Black Hills Aviation is nonresponsive to the IFB because it incorporated two documents which were not included in the Department of the Interior's IFB or amendments thereto." For the reasons set forth below, we also find this protest to be without merit.

There were two amendments to the IFB. Amendment No. 1 was dated January 10, 1978, and Amendment No. 2

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was dated January 13, 1978. Amendment No: 2, among other things, changed the date of bid opening from January 31, 1978 to February 3, 1978. For the purposes of this protest we will consider that both amendments contained material changes to the IFB and thus required acknowledgment for the bid to be responsive. Cibro Petroleum, B-189330, B-189619, September 23, 1977, 77-2 CPD 221 and cases cited therein. The bid submitted by Black Hills had copies of the Amendments, duly signed, attached to it. However, in the space on the bid form itself for the "Acknowledgment of Amendments," Black Hills acknowledged Amendments Nos. 1 and 2 with dates of December 22, 1977. It is noted that while the amendments were issued in January, the IFB issue date was December 22, 1977.

Paragraph 4, Solicitation Instructions and Conditions, SF 33A of the IFB provides as follows:

"4. ACKNOWLEDGMENT OF AMENDMENTS TO SOLICITATIONS. Receipt of an amendment to a solicitation by an offeror must be acknowledged (a) by signing and returning the amendment, (b) on the reverse of Standard Form 33, or (c) by letter or telegram. Such acknowledgment must be received prior to the hour and date specified for receipt of offers."

Black Hills clearly complied with subparagraph (a) of paragraph 4, SF 33A, by signing and returning copies of Amendments Nos. 1 and 2 with its bid. Thus there was a proper acknowledgment of the Amendments and Black Hills' bid is not nonresponsive for failure to acknowledge the Amendments. The insertion of the incorrect date of the Amendments on the reverse of SF 33 we view as a minor irregularity which may be waived by the contracting officer under Federal Procurement Regulations 1-2.405(d) (1964 ed.) since it is clear that the proper Amendments were acknowledged and there appears to be no reasonable basis to believe that Black Hills intended to incorporate into its bid some

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other documents as suggested by Hemet Valley. Cf. Cuthbert Construction Company, B-186511, July 28, 1976, 76-2 CPD 89; Tennessee Valley Service, Inc., B-186380, June 25, 1976, 76-1 CPD 410; but Cf. United McGill Corporation and Lieb-Jackson, Inc., B-190418, February 10, 1978, 78-1 CPD 119.

The protest is denied.


Deputy Comptroller General.
of the United States