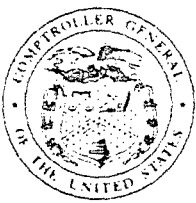


DECISION



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

10,656

FILE: B-194202

DATE: July 3, 1979

MATTER OF: Kari-Vac, Incorporated

DLG 02038
01991

DIGEST:

[Protest Alleging Latent Ambiguity in IFB]

1. Issues raised by bidder's protest after bid has expired will be decided on merits as filing of protest evidences intention to accept award if protest is sustained.
2. Where bid includes condition--1-1/2-percent service or interest charge for payments made after 30 days--which materially affects price, bid must be rejected as nonresponsive.
3. Possibility that Government might realize monetary savings in particular procurement if material bid deficiency is waived, is outweighed by importance of maintaining integrity of competitive bidding system.

General Services Administration, Federal Supply Service (GSA), issued invitation for bids (IFB) No. 9PN-155-78/LE which solicited floor and carpet supplies for a 1-year period.

Kari-Vac, Incorporated's (Kari-Vac), bid included a 1-1/2-percent service or interest charge (service charge) for Government payments made after 30 days. Kari-Vac was advised by GSA that the service charge could not be allowed, and the bid was rejected as non-responsive, even though Kari-Vac had requested that such charge be deleted from its bid.

Kari-Vac protests that the IFB contains a latent ambiguity because the IFB did not advise that the inclusion of a service charge would violate GSA's procurement policy or that such inclusion was prohibited as a matter of law. Also, Kari-Vac argues that it was advised by the contracting officer to rescind the service charge. Finally, Kari-Vac states that our adjudication of this

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protest should take into consideration the amount of money that Kari-Vac could save the Government.

GSA contends that the issues raised by Kari-Vac's protest are moot since all bids expired prior to the filing of this protest. Because of this, contracting officials intend to readvertise the requirements which are the subject of the protest. Nevertheless, GSA contends that the inclusion of a service charge in a bid renders it nonresponsive, citing 50 Comp. Gen. 733 (1971). GSA argues that the bidder cannot delete the service charge after bid opening since it is a material condition, affecting price, and to allow such deletion would be prejudicial to the other bidders. GSA does not specifically respond to the allegation that Kari-Vac was advised to rescind the service charge. The record only provides a telephone memorandum that Kari-Vac was told, after bid opening, that the service charge could not be allowed and that Kari-Vac was sending a letter deleting such charge.

With respect to GSA's contention that the instant protest is moot, we disagree. Government Contractors, Inc., B-193548, February 26, 1979, 79-1 CPD 133. Clearly, Kari-Vac's protest evidences an intention to accept the award if the protest is sustained; therefore, we will decide the protest on the merits.

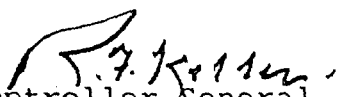
Under Federal Procurement Regulations (FPR) § 1-2.404-2(b) (1964 ed. amend. 121), a bid must be rejected as nonresponsive where the bidder imposes conditions which modify requirements of the IFB or limit its liability to or limit the rights of the Government so as to give the bidder an advantage over other bidders. Objectionable conditions may be deleted under the regulation where they do not go to the substance, as distinguished from the form, of the bid. A condition goes to the substance of the bid when it affects price, quantity, quality, or delivery of the items offered. FPR § 1-2.405 (1964 ed. circ. 1) provides that a bidder shall either be given an opportunity to cure any deficiency resulting from a minor informality or irregularity, or the contracting officer shall waive such deficiency. However, this provision defines a minor informality or irregularity as an immaterial and inconsequential defect

when its significance as to price, quantity, quality, or delivery is trivial or negligible, the correction or waiver of which would not be prejudicial to other bidders. The IFB implemented the above in paragraph 10 of standard form 33-A. While the regulation gives some examples of bid conditions justifying rejections, clearly, the examples are not all inclusive and such matters are considered on a case-by-case basis.

Since Kari-Vac's bid included a condition materially affecting price, the above prohibits its deletion or waiver and requires rejection of the bid. Our decision in 50 Comp. Gen. 733, supra, relied on by GSA, involved an almost identical bid condition ("1-1/2 interest per month on past due invoices") which we viewed as justifying rejecting the bid. Moreover, even though Kari-Vac alleges that it was advised by the contracting officer that the service charge could be deleted (denied by the agency), a contracting officer is without authority to make a nonresponsive bid responsive by waiving or allowing a bidder to delete a condition affecting price. See Juanita H. Burns and George M. Sobley (a joint venture), 55 Comp. Gen. 587 (1975), 75-2 CPD 400.

Kari-Vac has requested that our decision take into account the money that Kari-Vac could save the Government. However, as our decisions indicate, the importance of maintaining the integrity of the competitive bidding system outweighs the possibility that the Government might realize a monetary savings in a particular procurement if a material deficiency is waived. A. D. Roe Company, 54 Comp. Gen. 271 (1974), 74-2 CPD 194; Chemical Technology, Inc., B-192893, December 27, 1978, 78-2 CPD 438.

Accordingly, Kari-Vac's protest is denied.


Deputy Comptroller General
of the United States