



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

B-177879

30939
May 18, 1973

The Honorable Robert C. Searns, Jr.
The Secretary of the Air Force

Dear Mr. Secretary:

Reference is made to letter LGM, dated February 28, 1973, with enclosures, from the Deputy Chief, Contract Management Division, Directorate of Procurement Policy, Deputy Chief of Staff, Systems and Logistics, which reported on the protest of R & R Contractors, Inc. (R & R), against awards to any other bidders under invitations for bids (IFB's) F09607-73-B-0022, -0025, and -0040, issued at Moody Air Force Base, Georgia.

IFB -0022 was issued October 16, 1972, for aircraft refueling/defueling and service station operation services; IFB -0025 was issued November 15, 1972, and called for photographic services; and IFB -0040 was issued November 17, 1972, calling for vehicle operations and vehicle maintenance services. In each IFB, paragraph 26 of section "C," "Solicitation Instructions and Conditions," provided:

BIDS-ACCEPTANCE PERIOD (1960 APR.)

BIDS OFFERING LESS THAN 90 DAYS FOR ACCEPTANCE BY THE GOVERNMENT FROM THE DATE SET FOR OPENING OF BIDS WILL BE CONSIDERED NONRESPONSIVE AND WILL BE REJECTED.

This 90-day bid acceptance period requirement was stated in bold type and by its terms did not appear to require further action on the part of the bidder to bind himself. However, each IFB also included standard form (SF) 33 (November 1969 edition), entitled "Solicitation, Offer, and Award," which stated in small print:

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

On November 30, 1972, five bids received in response to IFB -0022 were opened, with the following results:

PUBLISHED DECISION
53 Comp. Cir. _____

[Protest of Bid Rejection as Nonresponsive]
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	<u>Net Price</u>
C.T. Eone, Inc.	\$102,771.88
R & R	109,480.67
James & James Company (J&J)	112,268.80
Technical Service Enterprises, Inc.	113,619.12
W. H. Stevens Corp.	1,037,400.00

All bids, except J&J's, were found to be nonresponsive for failure to comply with the 90-day bid acceptance period specified in the IFB.

The two bids received on IFB -0025 were opened December 20, 1972:

	<u>Net Price</u>
R & R	\$21,712.70
Dwain Fletcher Co.	29,142.00

Both bids were found to be nonresponsive--R & R for failure to comply with the 90-day bid acceptance period, and Dwain Fletcher for failure to sign its bid bond.

Six bids received in response to IFB -0040 were opened January 4, 1973:

	<u>Net Price</u>
Jets Services	\$401,551.50
R & R	426,308.78
Motor Service Co.	438,994.12
J&J	463,090.12
Southeastern Services	473,952.13
Technical Service Enterprises	569,698.22

All bids, except J&J's were found to be nonresponsive for failure to comply with the 90-day bid acceptance period required by the IFB.

In short, of a total of 13 bids submitted in response to these three solicitations, 10 were found to be nonresponsive for failure to comply with the 90-day bid acceptance requirement. On all 10 of these bids, the space provided on SF 33 for indicating a bid acceptance time of other than 60 calendar days was left blank.

Based upon a determination that Moody Air Force Base was unable to extend the current contract for vehicle operations and vehicle maintenance services at the same price and that delay beyond March 1, 1973, in awarding a new contract for these services would have a serious impact on mission performance, the procuring agency accepted the bid of James & James Company under IFB -0040 and awarded contract No. F09607-73-C-00027 to that concern on February 28, 1973. Awards under IFB's

-0022 and -0025 are being withheld pending the decision of our Office on the instant protest.

R & R has protested the rejection of its bids essentially on the bases that paragraph 28, Section "C," providing for a minimum 90-day bid acceptance period, and the acceptance period provision of SF 33 constitute a dual requirement and that the Air Force should have taken action to eliminate this inconsistency before issuing the IFB's. The administrative report of February 28, 1973, recommends denial of the protests in view of our decision reported at 47 Comp. Gen. 769 (1968). In that decision, we considered the question whether a bid could be accepted under almost the exact circumstances presented here; that is, where the invitation required a 90-day bid acceptance period, the SF 33 in the invitation indicated that a 60-day bid acceptance period would result unless a different period was inserted by the bidder, and the low bidder left blank the space on the bid with regard to the bid acceptance period. The low bidder pointed out that it left the bid acceptance period blank since it always accepted whatever number of days was specified in the schedule. Nine out of 11 bidders failed to fill in the bid acceptance blank. Our Office found that the failure to submit any bid acceptance period, thus automatically resulting in a 60-day bid acceptance period, resulted in a nonresponsive bid which could not be considered for award in the circumstances.

For the reasons which follow, we sustain R & R's protest because the IFB bid acceptance period provisions misled bidders and rendered the solicitations fundamentally defective.

Neither the bid acceptance provisions of SF 33 nor those of paragraph 28 advised bidders of the affirmative action required to submit a responsive bid insofar as bid acceptance time is concerned. The bid acceptance provisions of SF 33 standing alone, are self-executing and require no action by a bidder who is satisfied with the 60 calendar day period. Likewise, paragraph 28 does not specifically require the bidder to take any action on his own initiative; it informs him that he must offer 90 days for acceptance in order to be responsive.

Significantly, the solicitations were not cross-referenced to alert bidders that SF 33 and paragraph 28 had to be considered together and affirmative action taken with respect thereto. Our Office has previously recommended that where an invitation contains language specifying a bid acceptance period and another separate provision located elsewhere in the invitation sets forth a minimum bid acceptance period, the two provisions should be cross-referenced in such manner as to specifically direct bidders' attention to the fact that insertion of a shorter period will cause the bid to be rejected. See letter B-154793, September 21, 1964, copy herewith. See, also, our decisions

B-164851, October 17, 1968, and B-160252, November 18, 1966, copies enclosed. While we have recognized that such action would be desirable since it would assist bidders in submitting responsive bids, in 47 Comp. Gen., supra., at 772 we stated:

* * * We have recognized in previous decisions that the terms of minimum bid acceptance provisions may vary, and it is the bidder's responsibility to consider such terms in the preparation of its bid and respond accordingly. See D-160224, January 25, 1967, B-161628, July 20, 1967.

Admittedly, any questions of responsiveness arising out of the instant invitation could have been avoided if the procuring activity had struck out the parenthetical "60 calendar days" in the "Offer" portion of standard form 33 and inserted in lieu thereof the "90" day minimum acceptance period specified in paragraph 34, or other appropriate action. Further, when a minimum acceptance period is specified, we acknowledge that it is unlikely that a bidder will intentionally offer less than full compliance therewith. * * * While the procuring activity's inaction has perpetuated a situation which places a premium on attentiveness, such circumstance is not in our opinion a proper basis for finding an "inconsistency" to alter thereby the operative effect of a failure to insert "90" calendar days in the bid acceptance space.

That decision, which considered an IFB that contained identical bid acceptance provision as involved here, recognized that the IFB was a pitfall for the unwary bidder in that "it places a premium on attentiveness."

Though we acknowledge that bidders are expected to scrutinize carefully the entire solicitation package and to request assistance timely if interpretation problems arise, we believe that the Government has the initial responsibility of stating what is required in reasonably clear fashion. Communication of the minimum bid acceptance period under the instant solicitations and the one considered in 47 Comp. Gen. 769, supra., was clearly inadequate, as exemplified by the overwhelming number of bidders who obviously either failed to appreciate the 90-day requirement or failed to take proper steps to establish responsiveness to that requirement.

We have observed that a sense of fairness and impartiality should imbue the Federal procurement effort. These solicitations reasonably must be viewed as having contained a trap to ensnare the average bidder into a state of nonresponsiveness as to the bid acceptance period imposed. We must assume that only a grossly misleading invitation would have

caused almost all bidders--who expended considerable time and money to compete for the Government's business--to fail to hold their bids open as required.

In view of the misleading nature of these solicitations, we recommend that IFB Nos. -0022 and 0025 be canceled and the procurement resolicited in bid acceptance terms which clearly state the Government's desire in that regard. As for contract No. F09607-73-C-0027, in view of the fact that the procuring activity, in its use and interpretation of the bid acceptance period provisions, was acting in accordance with the previous decisions of our Office, and also the fact that award was made several months ago, we do not feel that cancellation of the contract would be in the best interests of the Government.

The February 28, 1973, report, advises that the Air Training Command (ATC) has instructed its procurement activities to cross-reference the "Offer" portion of SF 33 with any separate provision specifying a minimum bid acceptance period. The ATC directive, dated January 15, 1973, states:

* * * When it is considered necessary to specify a minimum bid acceptance period, the following entries shall be made in the solicitation in addition to complying with ASPR 2-201(A) Sec C (XVIII): A. In offer portion of Standard Form 33 enter an asterisk adjacent to space provided for bidder to enter bid acceptance period and include following note: "See paragraph (identify number) of Section C." B. immediately following "Bids - Acceptance Period (1960 Apr)" provision in Section C include a statement reading: "To be responsive a bidder must insert in the offer portion of Standard Form 33 a bid acceptance period of (specify number) calendar days or more. It is cautioned that if the bidder makes no entry a bid acceptance period of 60 calendar days will automatically be applied and should 60 days be less than the specified minimum the bid will be rendered nonresponsive." The number of days entered by the Contracting Officer in first sentence of above statement shall coincide with minimum bid acceptance period specified in accordance with ASPR 2-201(A) Sec C (XVIII).

We believe that the implementation should go far to correct the situation discussed above.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in Section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510. Your attention is directed to

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Section 236 of the act which requires that you submit written statements of the action to be taken with respect to the recommendations. The statements are to be sent to the House and Senate Committees on Government Operations not later than 60 days after the date of this letter and to the Committees on Appropriations in connection with the first request for appropriations made by your agency more than 60 days after the date of this letter.

We would appreciate being advised on whatever action is taken on our recommendations.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States