

11668

DECISION



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

FILE: B-195017

DATE October 15, 1979

MATTER OF: Che Il Commercial Company

[Protest of Contract Cancellation]

DIGEST:

1. Failure to formally acknowledge amendment to invitation should be waived as minor informality where it is apparent from bid that bidder was aware of amendment.
2. Where administrative error in sale of surplus property results in award to other than high responsive bidder, award is unauthorized and must be set aside.

Che Il Commercial Company (Che Il) protests the cancellation of a contract awarded to it under Defense Property Disposal Service (DPDS), Defense Logistics Agency, sales invitation for bids (IFB) 62-9020.

The IFB offered for sale some 77 line items of surplus property, some located in Japan and the balance located in Korea. After the sales contracting officer (SCO) rejected as nonresponsive all other bids on item 46 (Food Preparation and Serving Equipment), the item was awarded to Che Il under contract No. 62-9020-007. However, this decision to reject all bids but Che Il's was later determined to be improper. As a result, the award of item 46 to Che Il was canceled and a determination was made to award the item to the high bidder, Tong Pang Enterprise Company (Tong Pang). Che Il contends that this action was not authorized by DPDS pamphlet "SALE BY REFERENCE, January 1978," and believes, therefore, that its award should not have been canceled. However, for the reasons indicated below, we find that DPDS's action was correct.

As originally issued, the IFB provided that bids would be opened on December 12, 1978. Because of a delay in the distribution of the IFB, amendment No 1. was issued extending the bid opening date until

Administrative errors

*DLG 03058
DLG 03059*

007352

January 17, 1979. The amendment also changed the dates for prebid property inspection, for award and for removal of the property. In addition, the amendment notified bidders of a change in the sales site.

When the Japan Sales Office received 10 bids on or before the original bid opening date, it returned them to the bidders along with a copy of the amendment and a letter advising them that the amendment should be signed and returned with the bid. This was in accordance with DPDS policy.

After bid opening, the SCO determined that 9 of the 30 bids received were nonresponsive because of a failure to submit a signed copy of amendment No. 1. As a result of this decision, Che Il's low bid for item 46 was considered to be the only responsive bid for that item. Therefore, the SCO awarded item 46 to Che Il.

When DPDS learned of the SCO's decision, it immediately expressed concern over the propriety of this award and others. After the Japan Sales Office furnished a report on the matter, DPDS concluded that it was wrong for the SCO to reject bids as nonresponsive merely because they were not accompanied by a signed copy of amendment No. 1.

In the case of Tong Pang's bid, DPDS decided that it manifested an intention to be bound by the amendment because the "End-Use Certificate" submitted as part of the bid was dated January 17, 1979, which the amendment established as the new bid opening date. The failure to formally acknowledge the amendment was considered to be an immaterial deviation which should have been waived.

The general rule is that a bidder's failure to acknowledge receipt of an amendment renders the bid nonresponsive. Scott-Griffin, Incorporated, B-193053, February 9, 1979, 79-1 CPD 93. However, the failure to acknowledge receipt of an amendment to an IFB should be waived or cured as a minor informality or irregularity

if "the bid received clearly indicates that the bidder received the amendment." See, for example, Defense Acquisition Regulation (DAR) § 2-405(iv)(A) (1976 ed.). In such circumstances, the bidder is bound to perform all of the changes set forth in the amendment at the price stated in the bid. Artisan Inc., B-186601, August 6, 1976, 76-2 CPD 132; Algernon Blair, Inc., B-182626, February 4, 1975, 75-1 CPD 76. Therefore, we agree with DPDS that Tong Pang's failure to formally acknowledge the amendment should have been waived as a minor informality and that the SCO should not have rejected the bid as nonresponsive.

Notwithstanding the foregoing, Che Il contends that it is improper to cancel the award to it for item 46. Che Il points to the IFB "SALE BY REFERENCE," part 3, paragraph "D," which provides:

"The contract will be awarded to that responsible Bidder whose bid conforming to the Invitation will be most advantageous to the Government, price and other factors considered. A written award mailed (or otherwise furnished) to the successful Bidder within the time for acceptance provided in the Invitation shall be deemed to result in a binding contract without any further action by either party." (Emphasis added.)

Since it received a written notice of award as provided in the above provision, Che Il contends that it has a binding contract and that DPDS has not presented any law or regulation which authorizes the cancellation of the contract.

As noted above, the award to Che Il was made because the SCO erroneously decided that the Tong Pang bid on item 46 was nonresponsive. In an analogous situation, William D. Garrett, B-192592, November 16, 1978, 78-2 CPD 350, we stated:

"The statute governing the disposition of surplus Government property (40 U.S.C. § 484 (1976)) requires advertisements for bids to be made through such methods, and on such terms, as shall permit full and free competition which is consistent with the value and nature of the property, and that award be made to the responsible bidder whose bid, conforming to the IFB, will be most advantageous to the Government, price and other factors considered. As noted above, this requirement for award on the basis of the most advantageous bid was also set forth in Part 3, paragraph D, of the terms and conditions of the sale. We have held that where the highest bid for the purchase of Government surplus sold under competitive bidding procedures is solicited, but through an administrative error, award has been made to the second highest bidder, the interests of the United States, as well as the duty of the contracting officer to award such contracts to the highest bidder, require that such unauthorized award be set aside and award made to the highest bidder. 36 Comp. Gen. 94 (1956), Rogers Trading Company, Inc., B-182380, February 19, 1975, 75-1 CPD 102."

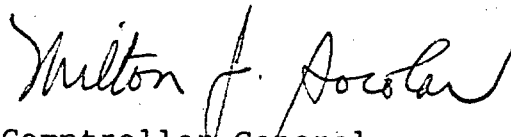
We reach the same conclusion here. Tong Pang offered the highest bid for item 46 while Che Il offered the lowest. Award was made to Che Il solely because of an administrative error. Under the circumstances, the statute (40 U.S.C. § 484) does not authorize an award to anyone other than the highest responsive bidder. Since the IFB provides that title to the property will not pass until it is removed from Government control and the property remains in the Government's possession, DPDS continues to have title to item 46 and is required under law to cancel the contract erroneously awarded to Che Il and make an award to Tong Pang. See Charlie Driesbock Machine Tools, 58 Comp. Gen. 240 (1979), 79-1 CPD 56.

B-195017

5

We agree with DPDS that item 46 should be offered to Tong Pang at its original bid price prior to the item being readvertised.

Protest denied.

A handwritten signature in cursive script, reading "Milton J. Fowler".

For the Comptroller General
of the United States