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## DECISION

THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548*[Protest of Bid Rejection as Nonresponsive]*

FILE: B-201609

DATE: February 9, 1981

MATTER OF: Northwest Ground Covers and Nursery

## DIGEST:

1. Contention that protester was misled by agency personnel concerning enclosure of cover letter with its bid which led to rejection of bid is without merit since solicitation provided that oral explanations were not binding and erroneous advice given by agency personnel cannot act to estop agency from rejecting nonresponsive bid as it is required to do so by law.
2. Bid containing cover letter which requested that it be allowed to withdraw bid if it was successful bidder on another Government contract opening at same time reasonably may be read as taking exception to solicitation requirements and thus is nonresponsive.

Northwest Ground Covers and Nursery (Northwest) protests the rejection of its bid by the Department of Agriculture under solicitation No. R6-12-81-18 issued by the United States Forest Service, Siuslaw National Forest, for containerized tree seedlings.

Northwest's bid was rejected as nonresponsive because it enclosed with its bid a cover letter which requested that it be allowed to withdraw its bid if it was the successful bidder on another Government contract opening at the same time. Northwest contends that this letter was attached to its bid upon the advice from personnel in the contracting officer's office and also on advice from another Forest Service office.

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The question of the responsiveness of a bid concerns whether a bidder has unequivocally offered to provide the requested items in total conformance with the requirements of the solicitation. A bidder's intention must be determined from the bid itself (an accompanying letter being considered part of the bid) at the time of bid opening. Re Con Paving, Inc., B-198294, April 24, 1980, 80-1 CPD 297. Northwest's bid falls short of an unequivocal offer to provide the requested items.

Federal Procurement Regulations (FPR) § 1-2.404-2(b)(4) (1964 ed. amend. 121), expressly provides that bids shall be rejected in which the bidder:

"Where not authorized by the invitation, conditions or qualifies his bid by stipulating that the bid is to be considered only if, prior to date of award, bidder receives (or does not receive) award under a separate procurement."

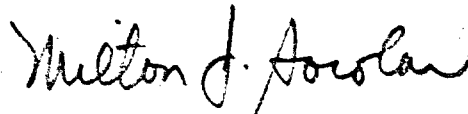
Generally, a bid may only be withdrawn prior to the exact time set for opening of bids. FPR § 1-2.304 (1968 ed. amend. 51). Therefore, conditioning consideration of a bid upon the results of another procurement, the outcome of which may occur subsequent to the bid opening in response to which the qualified bid was submitted, would in effect reserve to the bidder the right to withdraw his bid from consideration after bid opening. Such a practice not only contravenes the requirement for the submission of firm bids and the prohibition against post-bid opening withdrawal, but also results in disparate treatment of bidders in the absence of a solicitation provision permitting all bidders the option of so qualifying their bids.

Even where an IFB permits bidders to condition consideration of their bids upon nonreceipt of an award under another solicitation, a bidder who elects to so qualify his bid cannot be permitted to remove the condition after bid opening because to do so would enable him to determine after the

results of the bidding were known whether or not his bid is to be considered. See Coast Canvas Products II Co., Inc., B-195096, August 29, 1979, 79-2 CPD 165.

This Office has held that where the solicitation states that oral explanations are not binding, reliance of the bidder on an oral explanation is at the bidder's own risk and also that erroneous advice given by the agency personnel cannot act to estop an agency from rejecting a nonresponsive bid as it is required to do so by law. Standard Form 33A, which is a part of the solicitation, clearly states that oral explanations or instructions given before award will not be binding and that any explanation desired regarding the meaning or interpretation of the solicitation must be in writing. Trident Industrial Products, Inc., B-199138, September 23, 1980, 80-2 CPD 222 and Klean-Vu Maintenance, Inc., B-194054, February 22, 1979, 79-1 CPD 126. Consequently, we have held that attachment to a bid of a cover letter making the bid contingent upon the bidder's receipt of a license had the effect of qualifying the bid and rendered it non-responsive notwithstanding the protester's argument that it was advised to furnish the cover letter by an employee of the contracting agency. National Ambulance Company, Inc., 55 Comp. Gen. 597, 599 (1975), 75-2 CPD 413.

Accordingly, the protest is summarily denied.



For the Comptroller General  
of the United States