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DECISION



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

FILE: B-204482

DATE: February 23, 1982

MATTER OF: Free-Flow Packaging Corporation

DIGEST:

1. Bid was properly rejected as nonresponsive when an accompanying letter limited bidder's liability upon default by stating that bidder would not be held in violation of contract if the material failed to meet the specification requirements.
2. Protest of alleged improprieties in solicitation is untimely when filed with the bid since under § 21.2(b)(1) of our Bid Protest Procedures any protest against apparent improprieties in an invitation must be filed prior to bid opening.

Free-Flow Packaging Corporation (Free-Flow) protests the determination of the General Services Administration (GSA) that Free-Flow's bid, submitted in response to invitation for bids (IFB) No. 2FC-YRR-A-A0092, was nonresponsive.

We deny, in part, and dismiss, in part, the protest.

Free-Flow's bid was determined to be nonresponsive on the basis of a letter accompanying the bid, which stated:

"* * * Therefore, we submit this bid under the condition that if we are the low bidder, our material would be submitted to Mr. Schindeldecker for flammability testing and if our material failed, we will not be held in contract violation."

In its protest to this Office, Free-Flow contends that the letter accompanying its bid was not intended to be a qualification of the bid. Rather, Free-Flow states that the clause in question--

"* * * merely states that the apparatus required for one of the tests required in Federal specification PPP-C-1683 for the bid material is no longer available in the United States and has not been for years, and, therefore, a prospective bidder cannot determine whether his material complies."

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 specification requirements of the invitation. Re Con Paving, Inc., B-198294, April 24, 1980, 80-1 CPD 297. A bidder's intention must be determined from the bid documents at the time of the bid opening. Abbott Laboratories, B-183799, September 23, 1975, 75-2 CPD 171. We have held consistently that extraneous documents submitted with a bid, including a cover letter, must be considered a part of the bid for purposes of determining the bid's responsiveness. Carco Electronics, B-186747, March 9, 1977, 77-1 CPD 172; National Oil & Supply Company, Inc., B-198321, June 20, 1980, 80-1 CPD 437.

Free-Flow's bid does not constitute an unequivocal offer to provide the requested material in total conformance with the specification requirements of the IFB. The cover letter accompanying the bid imposed the condition that "our material would be submitted * * * for flammability testing and if our material failed, we will not be held in contract violation." The effect of this condition was to limit the Government's right to terminate the contract for default if the material did not meet the specified flammability requirements and to place the burden and costs of reprocurement on the Government in the event that the product did not meet specifications.

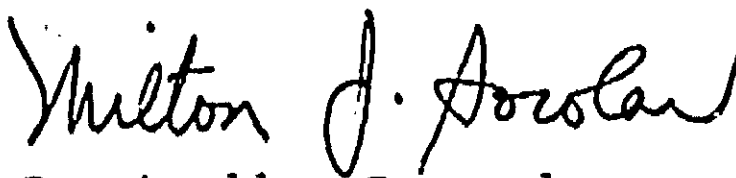
All bidders must compete for advertised contracts on a common basis. No individual bidder can reserve rights or immunities from responsibility for breach that are not extended to all bidders by the conditions and specifications advertised in the IFB. Specifically, we have held that any deviation from the default provisions of an IFB renders a bid nonresponsive. Dubie-Clark Company, B-186918, August 26, 1976, 76-2 CPD 194; Montague-Betts Company, Inc., B-182530, November 19, 1974, 74-2 CPD 270. Free-Flow's use of language limiting its liability for default under the proposed contract thus renders its bid nonresponsive.

Free-Flow also argues that the procurement should be suspended because the specification requirements of the IFB were unduly restrictive as the fuse required for flammability testing was not generally available in the United States.

To the extent that Free-Flow's statement of exception in its bid may have been intended as a protest against the restrictiveness of the specifications, it is untimely and not for consideration on the merits. Section 21.2(b)(1) of our Bid Protest Procedures requires that protests based on alleged improprieties in the solicitation, which are apparent prior to bid opening, be filed prior to bid opening. GSA opened bids in the case on June 23, 1981. Free-Flow's bid was rejected on August 10, 1981, and Free-Flow filed its protest with this Office on August 20, 1981. Therefore, Free-Flow's protest against the restrictiveness of the solicitation was raised, at the earliest, at the time of its bid submission, if the exceptions in its cover letter are construed as a protest to the contracting agency.

We have held that a protest of an apparent impropriety in a solicitation is untimely where the protest is first submitted with the protester's bid. Ven-Tel, Inc., B-203397, July 1, 1981, 81-2 CPD 3; Emerson Electric Co., B-194346, September 9, 1975, 75-2 CPD 141. A bidder who participates, without objection, in a procurement through the point of bid opening is deemed to have acquiesced in the terms and conditions set out in the solicitation. Patterson Construction Co., B-180290, February 28, 1974, 74-1 CPD 113.

The protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States