

Moorhouse 120079

DECISION



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

FILE: B-208393

DATE: December 7, 1982

MATTER OF: Marine Power and Equipment Company, Inc.

DIGEST:

1. In solicitation for a contract of sale requiring a bid deposit of 20 percent of the bid, a deficiency of \$100 on a deposit of \$73,522 is de minimis, and properly may be waived.
2. When both Department of Defense manual covering disposal of property and solicitation for contract of sale specifically permit bid deposit to be in the form of a personal check, contracting officer may accept such a check and need not attempt to determine whether it is backed by sufficient funds.
3. Evidence of agent's authority may be established after bid opening, even when solicitation attempts to make submission of such information a matter of bid responsiveness. Alleged back-dating of statement of agent's authority therefore does not affect validity of award.
4. It is not part of GAO's bid protest function to conduct investigations to determine whether protester's speculative allegations are valid.

Marine Power and Equipment Company, Inc. protests the sale of three surplus vessels--two large, covered lighters and an aircraft transportation lighter--under Invitation for Bids No. 60-2048, issued by the Defense Logistics Agency's Defense Property Disposal Service (DPDS). On an "all or nothing" bid for the three items, Alaska Towing Company was high at \$367,611.11. Marine Power makes a number of arguments regarding the alleged nonresponsiveness of the high bid. We find these arguments without legal merit, and consider Marine Power's other grounds of protest, including

Alaska Towing's alleged violation of criminal statutes, to have no effect on the validity of the award. We therefore deny the protest.

Facts:

The sale in question took place in Pearl City, Hawaii, with bid opening at 9 a.m. on June 22, 1982. The record shows that on June 18, Alaska Towing called from its Seattle, Washington office to ask whether DPDS had received its bid, sent by priority mail; subsequent telephone calls established that up to the morning of bid opening, the bid had not been received. For this reason, the record further indicates, Alaska Towing arranged for an agent to submit its bid. This individual offered his personal check in the amount of \$73,422.22 as a bid deposit. When Alaska Towing's bid package arrived on June 23, the firm requested the contracting officer to open it and substitute the bid deposit contained therein for the agent's check. The contracting office refused, on grounds that late bids must be returned unopened to the bidder; Alaska Towing, however, arranged for an agent (unidentified in the record--possibly the same one who submitted the bid) to pick up the bid package and present the firm's check to the contracting officer. This substitution, the record indicates, was accomplished on either June 23 or June 24.

Marine Power argues that Alaska Towing's bid should have been rejected as nonresponsive because the deposit submitted by the agent was \$100 less than the required 20 percent of the bid. In addition, Marine Power alleges that the agent's check was drawn on insufficient funds, and that DPDS improperly accepted the substitute check. Marine Power also argues that Alaska Towing's bid was nonresponsive because it was not accompanied by a notarized statement of the agent's authority, as required by the solicitation, and that such a statement, provided by Alaska Towing after bid opening, was back-dated, so that its submission to DPDS was a criminal act, warranting cancellation of the award. Finally, Marine Power alleges that Alaska Towing's presumed payment to the agent constituted an improper contingent fee.

Bid Deposit Amount:

Marine Power argues that the \$100 deficiency on the bid deposit is material, and should not have been waived by the sales contracting officer. However, the agency correctly

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points out that the Defense Disposal Manual specifically authorizes contracting officers to waive "inconsequential" deficiencies in bid deposit amounts when rejection of the bid would not be in the best interest of the Government. See DoD 4160.21-M, Ch. XII, par. C.3.a. (July 1979).

While Marine Power argues that this manual is without the force and effect of law, it is issued pursuant to the Federal Property and Administrative Services Act of 1949, as amended, and we have recognized and applied it previously. See, for example, Marine Power & Equipment Co., Inc., B-198693, January 17, 1978, 78-1 CPD 36. Thus, the first issue for our consideration is whether the \$100 deficiency in Alaska Towing's bid deposit was "inconsequential."

Since at least 1975, we have given clear expression to the de minimis doctrine in protests concerning procurements where bid bonds are required. In Arch Associates, Inc., B-183364, August 13, 1975, 75-2 CPD 106, we held that a bid bond of \$55,000, or \$284 less than the required 20 percent of the bid--a deficiency of .514 percent--was de minimis and could be waived as a minor informality. We see no reason not to apply this rationale to bid deposits, since the purpose of either a bid bond or bid deposit is to protect the Government's interests in the event of the bidder's default. See generally 39 Comp. Gen. 796 (1960). A bid bond guarantees that a bidder will execute all documents necessary to create a binding procurement contract; a bid deposit, while applied to the purchase price of the goods being sold by the Government, obligates the bidder not to withdraw before award and to pay the full purchase price. If the bidder fails to fulfill these obligations, the Government may retain the deposit as liquidated damages. See DoD 4160.21-M, Ch. XII, par. M.4.

Alaska Towing's deficiency amounts to .136 percent of the required bid deposit. We see no way in which this deficiency could adversely affect the Government's ability to protect its interests. It is clearly de minimis, or in the language of the DoD Manual, "inconsequential," and we find that it was properly waived by the sales contracting officer. Compare Davisville Construction Co., B-190080, December 12, 1977, 77-2 CPD 456 (refusing to apply the de minimis doctrine to a 50 percent deficiency); Capital Coatings, B-186608, June 28, 1976, 76-1 CPD 416 (refusing to apply de minimis to a 16 percent deficiency).

Bid Deposit Check:

1. Alleged Insufficient Funds:

Marine Power's allegation that the personal check of Alaska Towing's agent was not backed by sufficient funds is based on a letter of June 28 from the business partner of the agent to DPDS, protesting rejection of another bid. The letter suggests that the contracting officer either knew or should have known that the agent's check would be dishonored. In advancing this as a basis of protest, Marine Power implies that the contracting officer had an affirmative duty to determine that the check was backed by sufficient funds before making award to Alaska Towing.

Although some of our decisions, B-158864, May 16, 1966, and B-154922, September 23, 1964, for example, indicate that in the past, sales contracting officers have attempted to make such determinations by contacting banks on which personal checks were drawn, we question whether such information would be available today without the agent's authorization because of the restrictions on disclosure of financial records in the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3402 (Supp. IV 1980). Moreover, there is nothing in the Defense Disposal Manual that requires the contracting officer to make this type of determination. Rather, deposits on property sold by the Department of Defense may be in any one or a combination of forms, specifically including personal checks. See DoD 4160.21-M, Ch. XII, par. M.4. The general terms and conditions of sale (Standard Form 114C), incorporated by reference in the solicitation for the protested sale, require only that uncertified personal or business checks be first party instruments. If an uncertified check is not paid by the drawee for any reason, 114C states, this form of deposit will no longer be accepted from the bidder who tendered the check. We cannot conclude that the contracting officer should have rejected the agent's personal check, since it was a first party check and the agent had not, to our knowledge, previously presented uncertified checks that had been dishonored.

We note, however, that both Defense Acquisition Regulation § 7-2003.25 (DAC 76-26, December 15, 1980) and Federal Procurement Regulations § 1-10.102-2 (1964 ed. amend. 184, October 1977) require bid guarantee checks to be in certified or cashier's form, and we are suggesting that, at least for sealed bid sales, DPDS consider adopting a similar policy. Personal checks may not adequately protect the Government's interests, since they are subject to such events as insufficient funds and stop payment orders, and do not represent the

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firm commitment required to form binding legal contracts. See Edward D. Griffith, B-188978, August 29, 1977, 77-2 CPD 155.

2. Substitution of Checks:

Marine Power argues that the substitution of Alaska Towing's check for that of the agent on the day following bid opening constituted an improper acceptance of a late bid deposit. In the absence of clear evidence that the agent's check would have been dishonored, and in view of our determination that it was an adequate bid deposit, both as to amount and form, we believe the substitution was simply the replacement of one valid negotiable instrument acceptable as a bid deposit by another. Therefore, we do not agree that the acceptance of Alaska Towing's check was improper.

Evidence of Agent's Authority:

Marine Power further argues that Alaska Towing's bid was non-responsive because it was not accompanied by a notarized statement from the agent detailing the arrangement between the principal and the agent, together with a copy of the agency agreement. Although such a statement was required by the solicitation, the record shows that the only evidence of the agent's authority at the time of bid opening on June 22 was the individual's signature as "agent for Alaska Towing." However, in a telephone call to the sales contracting officer on June 23, the president of Alaska Towing referred to both his "agent" and his "agent's check." DPDS received a notarized statement of agency from Alaska Towing, dated June 18, on July 1, 1982.

Despite specific solicitation provisions that attempt to make evidence of an agent's authority a matter of bid responsiveness, we have repeatedly held that such evidence may be submitted after bid opening. See Cambridge Marine Industries, Inc., 61 Comp. Gen. 187 (1981), 81-2 CPD 157, citing 49 Comp. Gen. 527 (1970). Thus, Marine Power's protest on this basis is without legal merit.

Alleged Criminal Activities:

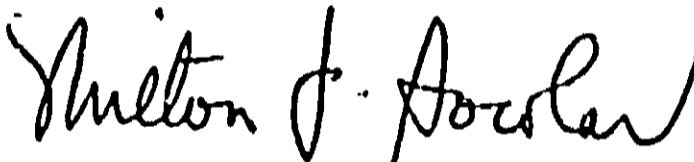
Marine Power also alleges that the statement of agency was back-dated, and that its submission to the Government by Alaska Towing violates the False Statements Act, 18 U.S.C. § 1001 (1976). Regardless of the date it was executed, this notarized statement of agency could have been submitted any

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time before award, and in our opinion the June 18 date therefore is irrelevant with regard to the validity of the award. If Marine Power believes its evidence of a false statement is sufficient to warrant submission of the matter to the Attorney General, we see no reason why it may not take such action.

As for Alaska Towing's alleged breach of the covenant against contingent fees, Marine Power has no direct knowledge of the arrangements between Alaska Towing and its agent, and merely presumes that the agent was paid for his services. Payment for services rendered, however, would not necessarily constitute a contingent fee. Marine Power's statement is speculative, and it is not part of our bid protest function to conduct investigations in order to establish the validity of such allegations. See Alan Scott Industries, B-201743 et al., March 3, 1981, 81-1 CPD 159, aff'd on reconsideration, April 1, 1981, 81-1 CPD 251.

The protest is denied.

for 
Comptroller General
of the United States