

DECISION



Mary
Jim
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548 *24357*

FILE: B-209395; B-209395.2 **DATE:** February 28, 1983

MATTER OF: Educational Development Corporation; Kee Service Co.

DIGEST:

1. Where agency agrees that protests have merit and takes appropriate remedial action, further development and consideration of matters by GAO would serve no useful purpose.
2. Protest issue is untimely where not filed within 10 working days after the basis of protest was known or should have been known.
3. Agency did not unjustly harass protester by not opening a late bid sent on time by registered mail until after it could be ascertained that the bid was mailed no later than the fifth calendar day prior to bid opening. Such action was in accordance with Defense Acquisition Regulation § 2-303.2.

Educational Development Corporation (EDC) and Kee Service Co. protest the award of a contract to J.L. Associates by the Department of the Navy under invitation for bids (IFB) No. N00189-82-B-0079 for mess attendant services. We dismiss EDC's protest and dismiss in part and deny in part Kee Service's protest.

The protests are based on the following language appearing in the IFB:

"For the purpose of assisting the Contracting Officer in making an affirmative determination of the bidder's responsibility * * *, bidders are requested to submit manning charts with their bids * * *."

"It is understood and agreed by the parties that any resulting award based * * * upon the bidder's submission of manning charts as

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provided herein above for the purpose of assisting the Contracting Officer in making an affirmative determination of responsibility shall not be construed as limiting in any manner whatsoever the Contractor's obligation to fulfill all the requirements set forth in this contract."

Despite this language, the contracting officer determined that all the bidders whose prices were lower than J.L.'s were nonresponsive because they submitted inadequate manning charts.

J.L. was the ninth low bidder. Kee Service was fifth low and EDC was eighth low.

After the protests were filed, the contracting officer recognized that the manning charts related to responsibility (the bidder's capacity and ability to perform) rather than responsiveness (the obligation to perform in accordance with the material requirements of the IFB) and therefore concluded that she had erroneously rejected the bids as nonresponsive. She then advised those bidders whose prices were lower than J.L.'s that bids would be reevaluated, and asked that they extend their bids. All but the first and second low bidders did so.

The contracting officer advises that the third low bidder is currently under consideration for award. She states that if after the bid reevaluation, the low responsive and responsible bidder is someone other than J.L., the contract awarded to J.L. will be terminated for the convenience of the Government. We agree with this course of action.

It is apparent from the solicitation that the requirement for submission of manning charts was for the purpose of determining bidder responsibility, and did not relate to bid responsiveness. See Peter Gordon Company, Inc., B-196370, July 18, 1980, 80-2 CPD 45. This is so despite the fact that the solicitation called for the information to be submitted with the bid. See Seacoast Trucking and Moving, B-200315, September 30, 1980, 80-2 CPD 235. Requirements bearing on bidder responsibility may be met after bid opening. See Devcon Systems Corporation, 59 Comp. Gen. 614 (1980), 80-2 CPD 46. Accordingly, the contracting officer's decision to reject as nonresponsive those bids which were accompanied by inadequate manning charts was erroneous.

Nevertheless, as previously indicated, the contracting officer has already taken appropriate remedial action here. It is apparent that our further development and consideration of the issue would serve no useful purpose. This basis of protest is therefore dismissed as academic.

Kee Service alleges that it has been "unjustly harassed" because its bid was opened late even though it was sent on time by registered mail. Documentation submitted with the protest indicates, however, that the protester's bid was received late, and was not opened until it could be ascertained that the bid was mailed not later than the fifth calendar day prior to the date specified for bid opening. This action was proper and in accord with Defense Acquisition Regulation § 2-303.2 (1976 ed.). This portion of Kee Service's protest is denied.

Kee Service also protests the cancellation of a prior solicitation for the same services. The protester indicates that it was notified of the cancellation by letter dated April 29, 1982. Its protest was filed here on October 19, 1982. Consequently, this issue is untimely under our Bid Protest Procedures which require that protests such as this be filed within 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(b)(2) (1982). The protest on this issue is dismissed.

The protests are dismissed in part and denied in part.

Milton J. Rowland
for Comptroller General
of the United States