

DECISION

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

FILE:

B-210411

DATE:

May 25, 1983

MATTER OF:

Gas Turbine Corporation

DIGEST:

1. Protest that invitation requirements are unreasonable, filed by firm whose bid was rejected because it failed to comply with those requirements, is untimely since the protest involves alleged improprieties apparent prior to bid opening but was not filed before that date as required by GAO Bid Protest Procedures.
2. Where a bidder makes an unqualified offer to comply with the invitation's material terms, the bid is responsive and acceptance legally binds the bidder to comply with those terms. Whether the firm in fact does so involves a matter of contract administration, not bid responsiveness, for which the contracting agency is responsible.

Gas Turbine Corporation (GTC) protests the Coast Guard's rejection of GTC's bid as nonresponsive and award of a contract to a higher priced bidder under invitation for bids No. DTCG-40-83-B-40056 to acquire a used gas generator of a specified model number (a Pratt and Whitney model FT4A2). GTC complains that the invitation's specifications the firm did not meet were unreasonable, and argues that the awardee's bid also should have been rejected as nonresponsive.

We dismiss as untimely the protest as it relates to the reasonableness of the specifications, which the protester admits its bid does not meet. We deny the remainder of the protest, which basically involves the contention that the bid submitted by the awardee, Energy Maintenance Corporation, was nonresponsive because the firm allegedly intends to incorporate used flight discs, unfit for marine use, into its offered generator.

The invitation required the offered generator to meet a number of specifications including that it be

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fully "marinized" (appropriate for marine use); have less than 15,000 hours total operating time; have no hours of operating time since its last overhaul, which must have been performed in a Pratt and Whitney authorized service facility; and contain only certified Pratt and Whitney parts. The invitation also required the bidder to provide certain additional auxiliary equipment, including a "115 Volt AC Ignition Exciter."

The Coast Guard received four bids, of which the lowest was deemed to be nonresponsive. GTC's second lowest bid of \$348,500 also was found nonresponsive because GTC indicated on the bid form that the offered generator did not comply with the requirements that it have no more than 15,000 hours total operating time and have had its most recent overhaul at a Pratt and Whitney authorized service dealer. In addition, GTC offered a 24 volt AC ignition exciter instead of a 115 volt AC ignition exciter as required by the invitation. The third lowest bidder and eventual awardee, Energy Maintenance, offered a price of \$388,000, while the fourth bidder (at \$624,000) was nonresponsive because it took exception to the invitation's delivery requirements.

GTC admits its bid failed to comply with the invitation's requirements regarding the total duration of operation and the most recent overhaul. The firm also does not refute that it offered a 24 volt AC ignition exciter instead of the required 115 volt item. The protester nonetheless contends that the requirements regarding the total hours of operation and the most recent overhaul were unreasonable.

Initially, we point out that since GTC's bid did not comply with the invitation's requirements as described above, the Coast Guard had no alternative but to reject the bid. In order to be responsive, a bid must unequivocally offer to provide the requested items in total conformance with the terms of the invitation. See RAD Oil Company, Inc., B-209047, October 20, 1982, 82-2 CPD 352. Any bid which does not so offer must be rejected as nonresponsive, unless the deviation has no effect or merely a trivial effect on price, quality, quantity or delivery and can be corrected or waived without affecting the relative standing of bidders or otherwise being prejudicial to the other bidders.

Defense Acquisition Regulation (DAR) § 2-405 (1976 ed.); Action Manufacturing Company, B-208205.2, December 13, 1982, 82-2 CPD 526. The deficiencies in GTC's bid clearly do not meet this exception, so that the bid had to be rejected.

The protest that the specifications GTC did not meet were unreasonable is untimely. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983), require that protests based upon solicitation improprieties apparent prior to bid opening must be filed, that is, received by the General Accounting Office, before bid opening. GTC filed its protest regarding the solicitation's requirements only after its bid had been rejected. We therefore will not consider the merits of the issue. See Technical Food Services, Inc., B-210024, December 21, 1982, 82-2 CPD 563.

GTC also contends that Energy Maintenance's bid does not meet the invitation's requirement that the generator be fully "marinized" because Energy Maintenance intends to incorporate used flight discs into its offered generator. GTC also alleges that the disc serial numbers listed in Energy Maintenance's bid are traceable to a flight engine and the protester argues the incorporation of flight discs in industrial/marine engines is inappropriate. Energy Maintenance, while expressly offering to provide the specified model of generator and promising that the generator will be suitable for marine application, also listed in its bid the serial number and the operating hours for each disc to demonstrate compliance with the invitation's requirement for no more than 15,000 total hours operating time.

The protester also suggests that, although Energy Maintenance's bid lists less than 15,000 hours of operation for each disc, the bid should have been found nonresponsive because it is difficult, if not impossible, to confirm that the discs listed in fact would meet the invitation's requirement for no more than 15,000 hours total operation. GTC argues that the Coast Guard at least was obligated to investigate Energy Maintenance's records to verify the information listed in the bid before determining the bid to be responsive.

We find no legal merit to this aspect of the protest. As stated above, the concept of responsiveness

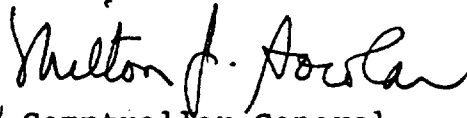
involves whether the bidder submitted an unqualified offer to comply with all the material terms of the invitation. Action Manufacturing Company, supra. Where a bidder has made such an offer, the bidder is legally bound to comply with those terms upon the Government's acceptance of the bid. Tenavision, Inc., B-209261, December 15, 1982, 82-2 CPD 533. Before making an award, the contracting officer must find the bidder responsible, that is, capable of meeting the contract's requirements at the bid price and having a satisfactory record of performance, integrity and business ethics. See DAR §§ 1-902 and 1-903. The contracting officer's signing of the contract constitutes an affirmative responsibility determination, which we will not review absent a showing of possible fraud on the part of procuring officials or that the solicitation contained definitive responsibility criteria which allegedly were not applied. Environmental Laboratory of Fayetteville, Inc.--Reconsideration, B-205593.2, January 13, 1982, 82-1 CPD 32. Whether the contractor subsequently fulfills, or intends to fulfill, its contractual obligations by furnishing items that comply with the specifications is a matter for the contracting agency in the administration of the contract and does not affect the validity of the award. Tenavision, Inc., supra. In other words, the concept of responsiveness involves only the question of whether the bid sufficiently responds to the invitation, and not whether the bidder has the capability or inclination to comply with the offer that the bid represents.

The only evidence that Energy Maintenance qualified its bid consists of GTC's allegation that the listed disc serial numbers identify flight discs that are unfit for marine application and might or might not meet the 15,000 total operating hours requirements. While Energy Maintenance's bid contains an express promise that its offered generator will be suitable for marine use and that the discs will meet the invitation's total operating hours requirement, the protester implies that the serial numbers create an ambiguity whether the bid offers to meet the specifications. GTC, however, has failed to submit any direct evidence to show that the serial numbers in fact identify unacceptable flight discs or that the discs have operated more than 15,000 hours. The protester bears the burden of affirmatively proving its case, and

unsupported self-serving statements are not sufficient to satisfy this burden. Line Fast Corporation, B-205483, April 26, 1982, 82-1 CPD 382. In the absence of such evidence, we have no basis to conclude that Energy Maintenance's bid did not represent an offer to comply with the solicitation requirements regarding operating time and suitability for marine use.

Since Energy Maintenance's bid offered to comply with the invitation's requirements for a fully "marinized" generator with less than 15,000 total operating hours, the bid was responsive in those respects, with the result that Energy Maintenance is legally bound to comply with those terms of the solicitation. It is the Coast Guard's responsibility in the administration of the contract to assure that Energy Maintenance in fact does so.

The protest is dismissed in part and denied in part.

for 
Comptroller General
of the United States