

**DECISION**



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

PL-I

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**FILE:** B-212441

**DATE:** March 20, 1984

**MATTER OF:** TEREX Corporation

**DIGEST:**

Where invitation expresses delivery time in terms of "desired" rather than "required" time, bidder may offer any time for delivery as long as it is within reasonable time of "desired" time without rendering its bid nonresponsive; nevertheless, GAO recommends that procuring agency also stipulate "required" delivery time in future.

TEREX Corporation (TEREX) protests the award to Border Machinery Company (Border) under Department of the Interior, Bureau of Indian Affairs, invitation for bids No. NA600-9587 for a front-end loader.

We sustain the protest.

The low TEREX bid was rejected by the contracting agency as nonresponsive due to the alleged failure of TEREX to comply with the invitation delivery requirements. The General Provisions of the invitation provided that:

"The Government desires delivery to destination point on or before thirty (30) calendar days after date of award. . . ."

TEREX did not offer delivery in "thirty (30) calendar days" or less; rather, it stated in its bid that it was "quoting delivery . . . in August, 1983, for orders received by July 15, 1983." Bids were opened on June 7, 1983; the award was made on July 15.

It is the position of TEREX that because of the use of the word "desires" in the "Time of Delivery" provision, it was not required to quote delivery in 30 calendar days or less, but rather it was permitted to quote any delivery period as long as the period was reasonable. This, TEREX believes, it did.

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The position of the agency is that the TEREX bid was properly determined to be nonresponsive to the "Time of Delivery" provision--apparently on the theory that the word "desired," in fact, meant "required." While the agency's original position was that the award was proper, Interior later determined that Border's product was not a "domestic source end product," as certified by Border in its bid, and the award was canceled.

We believe that the TEREX bid was incorrectly determined to be nonresponsive. We base our conclusion on the assumption that the TEREX delivery terms would have been considered to be reasonable in July 1983, when award was made. In In-Trol (International Controls), B-184310, October 9, 1975, 75-2 CPD 223, we held that where the delivery terms in the invitation set forth only a "desired" delivery time, a bidder does not render its bid nonresponsive by offering a delivery time greater than the time "desired" as long as the offered delivery time is within a reasonable time after the "desired" time.

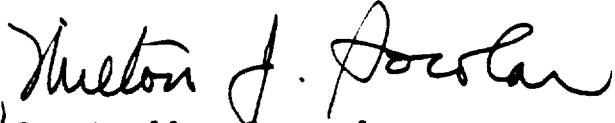
The protest is sustained.

Additionally, Interior may properly award the front-end loader to the protester under the original solicitation rather than resolicit bids, assuming the protester is willing to accept award at the price bid.

Moreover, we are recommending to Interior that future invitations which express delivery times in terms of "desired" times also stipulate final acceptable delivery dates and clearly advise that bids offering later delivery will be considered nonresponsive. See 46 Comp. Gen. 746 (1967), where we said:

"Although we have upheld as legally sufficient invitations specifying only the 'desired' delivery dates, so that the responsiveness of offered delivery terms could only be governed by a reasonableness test, as a matter of policy we feel such open-ended delivery terms are unwise in that they afford an opportunity for the arbitrary inclusion or exclusion of bids. Even granting impartial consideration, these undefined delivery terms can only result in uneven and unpredictable treatment of bidders, because reasonable men will differ on what constitutes a reasonable delivery date under any given set of circumstances.

"Therefore, in the interest of providing as clear a guide to prospective bidders as possible, where early delivery is not of the essence--such as in invitations stating a desired delivery schedule--the invitation should state a final acceptable date and clearly advise that bids offering later delivery will be considered nonresponsive."

*for*   
Comptroller General  
of the United States