

# DECISION



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

31095

FILE: B-218123

DATE: April 29, 1985

MATTER OF: Power Test, Inc.

## DIGEST:

1. Bid which took exception to material requirements of an invitation for bids properly was rejected as nonresponsive.
2. Protest of specifications is untimely where protester's objections to specifications were first presented in a cover letter submitted with its bid.
3. Even if a solicitation contained a defective specification as alleged by the protester, the deficiency is not a compelling reason to cancel the invitation and readvertise where no prejudice to the bidders has been shown.

Power Test, Inc. (Power Test) protests the rejection of its low bid as nonresponsive and the award to another bidder under invitation for bids (IFB) No. DAAG02-84-B-0138, issued by the Anniston Army Depot, Anniston, Alabama.

The protest is dismissed in part and denied in part.

The Army issued IFB No. DAAG02-84-B-0138 on October 9, 1984, for two dynamometers, absorption type, waterbrake, 1,500 HP. Bid opening was on November 20, 1984, and Power Test submitted the low bid, \$27,492.40 for one dynamometer assembly or \$52,235.56 for both assemblies. Power Test's bid, dated 2 weeks prior to bid opening, was submitted under cover of a letter which stated in part:

"... [W]e believe that the fashion in which these specifications are written doesn't allow for competitive bidding and are restrictive. Therefore, in order to submit our quote; we must take exceptions to your specifications and clarify various points. This clarification will be taken one page at a time and in order. If no comment is made; we will agree as you have the text written. We would also like to state that this letter is part of our bid."

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The remainder of Power Test's five page letter consisted of comments upon specific requirements of the specifications. In some comments, Power Test confirmed that its unit met the specifications or described how it would meet the specifications in a manner which the Army found to be acceptable, but in many others Power Test took exception to the specifications and proposed to furnish something other than that which was required. In addition, Power Test submitted required literature descriptive of its equipment, which was required by the IFB, and a page entitled "Conditions of Sale."

The agency found Power Test's bid to be nonresponsive as a result of the exceptions taken to the specifications and because the "Conditions of Sale" attached to Power Test's bid conflicted with several requirements and conditions of the IFB, including the required bid acceptance period and delivery schedules. On January 21, 1985, the agency made award to Kahn Industries, Inc., which it determined was the low, responsive bidder, at a price of \$89,280 for both dynamometers.

Our review of Power Test's bid shows that it did take exception to several specification requirements. For example, the IFB specification at section C, paragraph 2.5.1 provides in part that the dynamometer must be designed for cantilever mounting. In its bid, Power Test expressly advised that the dynamometer it offered, Model 25X06, is not built to be cantilever mounted but is made to mount to a stationary base. Furthermore, the same paragraph of the specifications states that the approximate maximum length and weight of the dynamometer was to be, respectively, 24 inches and 1,000 pounds. Power Test advised that the overall length and weight of its dynamometer are, respectively, 54-1/2 inches and 3,100 pounds. In addition, the specifications at paragraph 2.5.1.2 require that all material of the dynamometer waterbrake which would come into contact with water must be made of "corrosive resistant material" whereas Power Test advised that in its product the majority of those materials would be cast iron.

To be responsive, a bid as submitted must represent an unequivocal offer to perform the exact thing called for in the solicitation such that acceptance of the bid would bind the contractor to perform in accordance with the solicitation's material terms and conditions. Jensen Corp., B-213677, May 22, 1984, 84-1 C.P.D. ¶ 544. Since Power Test took exception in its bid to several material

specification requirements, its bid properly was rejected as nonresponsive. See Green Mountain Cabins, Inc., B-199669, Feb. 11, 1981, 81-1 C.P.D. ¶ 91 and R. M. Thomas Co., B-196719, Nov. 20, 1979, 79-2 C.P.D. ¶ 370.

Power Test contends its bid should not have been rejected as nonresponsive since the dynamometer it offered can satisfy the agency's needs and that some of the specifications are improperly restrictive. Power Test states that the "whole gist of the protest is whether a high cost cantilever design versus a more sturdy, long lived stationary dynamometer is required."

It is clear that the protester has some fundamental disagreements with the Army as to the type of equipment needed to satisfy the agency's minimum needs. Power Test did not make its objections known prior to bid opening--which would have permitted corrective action to have been taken, if warranted, prior to the exposure of competitors' prices--but took exception to the specifications in its bid in the apparent expectation that any differences would be subject to later negotiations with the agency. As the Army has pointed out, this would not be permissible in a formally advertised procurement in which all competitors are to bid on the basis of the same specifications.

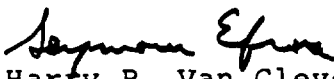
Power Test should have voiced its objections to the specifications prior to bid opening; its failure to do so renders its protest untimely insofar as it constitutes a challenge to the propriety of the specifications. Our Bid Protest Procedures, at 4 C.F.R. part 21 (1984), required protests based on alleged improprieties in the solicitation which were apparent prior to bid opening to be filed prior to bid opening. 4 C.F.R. § 21.2 (b)(1). Even if the letter submitted with Power Test's bid is regarded as a protest of the IFB specifications to the contracting agency, the protest still is untimely; it is well-settled that a protest of an apparent impropriety in a solicitation is untimely where the protest is first submitted with the protester's bid. Bell & Howell Co., B-203235.4, Jan. 5, 1982, 82-1 C.P.D. ¶ 10 and Ven-Tel, Inc., B-203397, July 1, 1981, 81-2 C.P.D. ¶ 3.

Power Test believes that its bid should be accepted since its bid would result in a cost savings to the government. A nonresponsive bid may not be accepted, however, since the integrity of the competitive bidding

system outweighs the advantage of any monetary savings that would result if a material deficiency is waived or ignored. Jensen Corp., B-213677, supra, 84-1 C.P.D. ¶ 544 at 2.

Finally, Power Test argues that all bids should have been rejected as "nonresponsive" and the requirement resolicited, because as a result of the apparently mistaken use of the word "inlet" instead of "outlet," the general introductory paragraph to the specifications described a physical impossibility which no dynamometer manufacturer could meet. This argument was first raised in Power Test's comments upon the agency report. Although phrased as a challenge to the "responsiveness" of the bids received, it really is an allegation that the specifications were defective in this regard. Power Test was aware of this alleged defect in the specifications prior to submitting its bid, for this is the first item discussed in the cover letter attached to the bid. Since Power Test failed to protest this alleged deficiency prior to bid opening, we will not now determine the propriety of the specification. Even if we assume for the purpose of argument that Power Test is correct, we do not believe that provides a basis upon which to reject Kahn's otherwise responsive bid. The mere presence of a technical deficiency in a solicitation does not present, absent a showing of prejudice, a compelling reason to cancel an invitation and readvertise. See Cummings Marine Systems, Inc., B-197506, Aug. 21, 1980, 80-2 C.P.D. ¶ 13. Power Test obviously was not misled by the wording of the introductory paragraph and neither, insofar as we can tell, was any other bidder.

The protest is dismissed in part and denied in part.

for   
Harry R. Van Cleve  
General Counsel