



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: IMCO General Construction, Inc.

File: B-224108

Date: December 19, 1986

DIGEST

1. An offer which includes a bid acceptance period shorter than that required by the solicitation is properly rejected as nonresponsive. The fact that an apparent conflict existed between the bid acceptance period expressed in the solicitation and the contract performance schedule does not affect the application of this rule.
2. Protester's post-bid opening argument that the solicitation contained an apparent conflict between the bid acceptance period and the contract performance schedule, is untimely, since an alleged impropriety in the solicitation must be raised prior to bid opening where the impropriety is apparent on the face of the solicitation.

DECISION

IMCO General Construction, Inc. (IMCO), protests the rejection of its low bid for expansion of the Wells Dam Fish Hatchery under invitation for bids (IFB) No. 6-SI-10-03450, issued by the Department of the Interior. The bid was rejected as nonresponsive because IMCO provided a 15 day bid acceptance period rather than the minimum 60 day period required by the IFB. IMCO contends that Interior improperly found its bid nonresponsive. We dismiss the protest in part and deny it in part.

On July 29, bids were opened and five bids were received. The three low bids were as follows:

037642

<u>BIDDER</u>	<u>AMOUNT</u>
IMCO	\$483,038.00
Coyote Corp.	578,697.50
Hale and Long	629,095.00

After asking IMCO to confirm its bid price because the bid was below the government estimate and significantly lower than the next low bid, the Bid Opening Board determined that the protester was the apparent low bidder and recommended to the contracting officer that award be made to it. However, upon further review of the bids in the contracting office, it was determined that IMCO was nonresponsive because its bid reflected a 15 day bid acceptance period rather than a 60 day bid acceptance period as required by the solicitation. The protester's bid was therefore rejected.

By letter dated August 5, to the agency, IMCO stated that it limited the acceptance period of its bid to 15 days because there was a discrepancy in the solicitation. IMCO stated that the solicitation provided for a construction schedule which required, among other things, that a portion of the work be completed by October 1. Therefore, IMCO reasoned that if award were made as much as 60 days after bid opening, at the latest September 27, it would be impossible to comply with the construction schedule.

By further letter dated August 8 to the contracting officer, IMCO's attorney stated that IMCO protested the rejection of its bid, and on August 15, the contracting officer responded to that letter denying the protest. On August 22, the contract was awarded to Coyote Corporation, the next lowest bidder. On August 26, IMCO filed its protest with our Office. On September 16, the agency determined to proceed with performance of the contract notwithstanding IMCO's protest.

IMCO argues that its bid should not have been rejected despite the fact that the bid acceptance period offered by it was shorter than the acceptance period required. The protester distinguishes his situation from previous decisions of this Office where we found bids which deviated from a solicitation's bid acceptance period requirement to be non-responsive. IMCO states that the solicitation required bids to be held open for 60 days after bid opening (July 29) and provided for the contractor to commence performance 15 days from notice to proceed and yet required a portion of the contract to be completed by October 1. The protester therefore asserts that an impossible situation could well have arisen whereby the contractor would not commence performance until after the October 1 deadline.

The agency on the other hand argues that IMCO is in effect alleging an impropriety in the solicitation which is untimely under our Regulations, 4 C.F.R. § 21.2(a)(1) (1986), because IMCO requests as a possible remedy that the solicitation be canceled because of the solicitation defect. The agency also argues that even if the protest is timely, the bid was properly rejected as nonresponsive because the bid acceptance period is a material term of the solicitation and IMCO took specific exception to it.

We consistently have held that an IFB requirement that a bid remain available for acceptance by the government for a prescribed period of time to be considered for award is a material requirement. Trans World Maintenance, Inc., B-216469, Dec. 6, 1984, 84-2 C.P.D. ¶ 634. A failure to comply with such a requirement renders a bid nonresponsive and ineligible for consideration for award regardless of whether award is made within the shorter acceptance period offered in the rejected bid. Trans World Maintenance, Inc., B-216469, supra.

To hold otherwise would unfairly permit the bidder after the expiration of the time it set for bid acceptance, to accept the contract or, if intervening circumstances such as unanticipated cost increases made acceptance unattractive, to refuse the contract. On the other hand, bidders complying with the required acceptance period are bound by the prices bid for the time stated for acceptance by the IFB. Bridge-water Construction Corp., B-214817, Feb. 14, 1984, 84-1 C.P.D. ¶ 201.

Essentially, IMCO argues that under the contract completion schedule Interior intended to, and could have, awarded this contract within the shorter period bid by IMCO and thus its 15 day acceptance period was reasonable. However, we have rejected essentially this same argument in prior decisions. In this connection, we have stated that the fact that an award is made within a period shorter than the bid acceptance period required of bidders or, as in this case, it could have been made during the shorter period, is not relevant to the question of the bid's responsiveness. The purpose of requiring a particular bid acceptance period is to insure the government adequate time after bid opening for bid evaluation and other pre-award processing. See Trans World Maintenance, Inc., B-216469, supra. Responsiveness, however, is a matter of a bid's acceptability as submitted and opened. It cannot depend on the subsequent fortuity that the government will be in a position to proceed with award earlier than anticipated by the invitation as issued.

The firm's bid price reflects the bidder's limitation of its risk through the offer of a shorter acceptance period than

its competitors offered in their proper responses to the IFB. See Hild Floor Machine Co., Inc., B-196419, Feb. 19, 1980, 80-1 C.P.D. ¶ 140. Thus, even if we assume, as IMCO did, that Interior anticipated award within the 15 day period, this does not alter the materiality of the acceptance period requirement.

Here, in fact, award was made 24 days after bid opening. While we recognize that had the agency needed the full 60 days to award this contract, this might have created difficulties in meeting the contract completion schedule. However, IMCO did not have the right to modify unilaterally the 60-day bid acceptance period. If IMCO found that there was a problem with the bid acceptance period, it should have communicated the problem to Interior in a timely manner to permit Interior to take corrective action.

To the extent IMCO is protesting the apparent conflict between the bid acceptance period and the performance schedule, its protest is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986). Our Bid Protest Regulations require that protests based upon alleged solicitation improprieties which are apparent prior to bid opening must be filed with either the contracting agency or our Office prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1986). IMCO's protest regarding this apparent conflict should have been raised prior to bid opening since its actions demonstrate the impropriety was apparent on the face of the solicitation. See Crown Laundry and Dry Cleaners, B-220283, Jan. 14, 1986, 86-1 C.P.D. ¶ 35; GM Industries, Inc., B-216297, May 23, 1985, 85-1 C.P.D. ¶ 588.

The protest is denied in part and dismissed in part.

for *Sepperson* *for*
Harry R. Van Cleve
General Counsel