



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: The Owl Corporation

File: B-224174

Date: December 23, 1986

DIGEST

1. Solicitation pricing provision used by the contracting agency in the sale of surplus personal property that incorporated commercially published price quotes as a reference price from which bidders were required to state their bids as a percentage of the published market prices is not ambiguous or misleading where it is susceptible of only one reasonable interpretation.

2. Bidder protested the terms of solicitation amendment, alleging that submitting a bid under the amended solicitation "could result in financial ruin." Bidder's subsequent failure to acknowledge the amendment may not be waived even if bid contains a date which reflects the extended bid opening date, since intent on the part of the bidder to abide by the terms of the amendment cannot be inferred.

DECISION

The Owl Corporation (Owl) protests the terms of invitation for bids (IFB) No. 3FBPS-86-47TC, issued by the General Services Administration (GSA), Philadelphia, Pennsylvania, for the sale of various grades of bulk wastepaper generated by certain government buildings during the period of October 1, 1986, through September 30, 1987. Owl also protests the subsequent rejection by the contracting officer of its high bids for several grades of bulk wastepaper as nonresponsive because Owl failed to formally acknowledge an amendment to the solicitation.

We deny the protest.

BACKGROUND

The solicitation, issued on August 15, 1986, established a bid opening date of September 8, 1986. The solicitation contained 13 bid items for various grades and types of bulk wastepaper. The solicitation essentially stated that award

037687

131867

would be made by individual item number on the basis of the highest price received for that item number. Specifically, the solicitation required bidders to state their bids for the items as a percentage of the market prices as published monthly in commercial trade publications, which were identified by the solicitation as the "Mill Trade Journal" or the "Official Board Market." Further, the solicitation described each line item (grade as offered) and also identified the corresponding grade category as it appeared in the commercial trade publications that constituted the price base and from which bidders calculated their "percentage bid prices." However, the solicitation's description of an item (grade as offered) and the corresponding category designated by the solicitation as the price base in the commercial publication (grade in publication) were not always identical. The solicitation included the following three line items:

| <u>Item No.</u> | <u>Article for Sale</u> (Grade as described in solicitation) | <u>Designated Corresponding</u> <u>Grade in Publication</u> (Mill Trade Journal) |
|-----------------|--|--|
| 5 | White Ledger | White Ledger |
| 6 | Mixed Paper | White Ledger |
| 11 | White Ledger (Computer Paper) | White Ledger |

On August 27, 1986, the contracting officer was informed that the Mill Trade Journal changed its prior practice and now quoted two prices for the grade of white ledger: white ledger (manifold) and white ledger (post consumer). After investigating the matter, the contracting officer decided to use white ledger (manifold) instead of white ledger (post consumer) as the price base for items 5, 6, and 11. His decision was based on several factors. First, the editor of the Mill Trade Journal indicated to the contracting officer that white ledger (manifold) was a continuation of and corresponded to the prior white ledger category. Second, the contracting officer found that an industry publication (National Association of Recycling Industries, Inc., Circular PS-86) defined white ledger (manifold) as including "forms used once for machine data processing." Since items 5 and 11 of the solicitation consisted of "once-used computer paper," the contracting officer determined to use the white ledger (manifold) category as the price base for these items.

With respect to item 6 (mixed paper), the contracting officer states that various property custodians in the Baltimore service area indicated to him that approximately one-half of the mixed paper offered for sale consisted of once-used computer paper; he therefore concluded that white ledger (manifold) would also be the appropriate price base for this item. He therefore issued an amendment (No. 1) designating white ledger (manifold) as the price base on which bid percentages were required to be based for items 5, 6, and 11. The amendment also extended the bid opening date to September 15, 1986. The contracting officer states, without further explanation, that because "virtually no potential bidders received" this amendment, he reissued the amendment (No. 2) on September 5 with bid opening again extended to September 22, 1986.

On September 18, Owl filed a protest with our Office contesting the price bases designated by amendment 2. Owl furnished a copy of the protest to the contracting officer who therefore apparently knew prior to bid opening that Owl had received and was aware of amendment 2. On September 22, the bid opening date, GSA found that Owl had failed to formally acknowledge amendment 2. However, Owl's certified check which constituted its bid deposit bore a date of September 18, 1986, 2 working days before the bid opening date. The contracting officer subsequently rejected Owl's bid as nonresponsive for items 6 and 11. Owl did not bid item 5. Owl submitted the high bid for item 6 and the second-high bid on item 11; however, the high-bid on item 11 was also rejected as nonresponsive for failing to acknowledge the amendment and that firm has not protested this determination. Therefore, Owl would otherwise be in line for award for items 6 and 11 but for the determination by the contracting officer that Owl's bid was nonresponsive. Owl has timely protested the rejection of its bid.

CONTENTIONS BY OWL

Owl contends that the solicitation, as amended, is defective and that sale should be resolicited because GSA's use as the price base for the subject bid items of the white ledger (manifold) grade category, instead of the white ledger (post consumer) grade category, is misleading and arbitrary. Owl argues that white ledger (manifold) only properly refers to new, unused, and more valuable paper than GSA is here offering for sale. Further, Owl alleges that GSA failed to sample the mixed paper it is selling and failed to consider relevant information Owl allegedly offered to GSA to show that GSA's choice of the white ledger (manifold) price grade

is based on inadequate estimates of the composition of the wastepaper offered for sale. Specifically, Owl states that while GSA maintains that a substantial amount of the mixed paper is computer paper, a proper sampling would show that only a "miniscule amount" is really computer paper. Moreover, Owl contends that mixed paper is inadequately defined in the solicitation so that bidders inexperienced in GSA wastepaper contracts may be misled into submitting bids reflecting the erroneous assumption that mixed paper is of white ledger (manifold) quality. Owl believes that the Mill Trade Journal's white ledger (post consumer) is the proper price base that should have been used by GSA.

Concerning the responsiveness of its bid, Owl argues that another bidder also did not formally acknowledge the amendment but simply attached a document to its bid indicating that it had learned of the amendment from Owl. Owl also argues that it impliedly acknowledged the amendment both by the protest that it filed with our Office and with the contracting officer before bid opening and by the date appearing on its certified check (2 days before bid opening).

ANALYSIS

Since we find nothing wrong with the solicitation, we do not think that a resolicitation is required. A solicitation requirement is ambiguous, in a legal sense, only where it is susceptible of two or more reasonable interpretations. Polarad Electronics, Inc., B-204025, Nov. 12, 1981, 81-2 CPD ¶ 401. Despite Owl's assertions, the solicitation more than adequately defined mixed paper and white ledger paper and was therefore not misleading or ambiguous. For example, the solicitation defined mixed paper as including "computer printouts without carbon, manila folders, forms, manuals, magazines, colored ledger, carbon interleaf and mixed paper." Mixed paper was further defined as a mixture of "various qualities of paper and miscellaneous material collected from wastepaper receptacles in government buildings within the area covered by this contract." Moreover, the solicitation defined white ledger paper as consisting of "all-white sheets and shavings, . . . writing papers, and other hard papers which have similar fiber content."

We therefore think that no reasonable bidder could have assumed that mixed paper was of white ledger quality simply because the price base used by GSA was white ledger (manifold). In this regard, the solicitation made unmistakably clear that the white ledger (manifold) category was simply a price base and not a representation of quality for the corresponding bid items. The solicitation referenced

the price base categories in the commercial trade publications as a price base only and set forth the steps for determining the percentage bid prices based on the market prices of those commercial trade publications. Thus, there is only one reasonable interpretation as to the purpose of the Mill Trade Journal white ledger (manifold) category in the solicitation: it would be used as a price base and not as a statement of quality of the paper being offered for sale. Moreover, the fact that the protester, the incumbent, is the high bidder and otherwise in line for award (except for the acknowledgment of the amendment) for items 6 and 11, strongly militates against the claim that other bidders were potentially misled into submitting unreasonably high bids because of mischaracterization by GSA of the quality of the items offered for sale. Accordingly, we deny this protest ground.

We also think that Owl's bid was nonresponsive because Owl failed to acknowledge the amendment. Ordinarily, where an amendment extends the bid opening date, and the bid contains a date which reflects the extended bid opening date, a bidder's failure to formally acknowledge the amendment may be waived. See Protimex Corp., B-204821, Mar. 16, 1982, 82-1 CPD ¶ 247; Inscom Electronics Corp., 53 Comp. Gen. 569 (1974), 74-1 CPD ¶ 56. However, the rationale of these cases is that where the bidder who fails to formally acknowledge an amendment includes a date in its bid which impliedly reflects knowledge of the amendment, it is reasonable to infer the bidder's receipt of the amendment and its willingness to abide by the terms of the amendment. We can make no such inference here. As stated above, a few days prior to bid opening and prior to submitting a bid, Owl filed a protest with our Office and furnished a copy of the protest to the contracting officer. In that protest, Owl maintained that the specifications were "fatally ambiguous," left the bidders "totally unable to bid intelligently on the sale," and would necessitate "claims for contract adjustment." Owl also stated that submitting a bid under amendment 2 "could result in financial ruin" for Owl. Therefore, under the circumstances, we cannot reasonably infer an intent on the part of Owl to abide by the terms of the amendment in the absence of a formal acknowledgement. Owl's failure to acknowledge the amendment must be viewed in light of its pre-bid opening statements about the amendment. So viewed, Owl's failure to acknowledge the amendment can reasonably be interpreted as an intentional refusal by Owl to bid on the basis of amendment

2, that is, a repudiation of that amendment. Accordingly, we think that Owl's failure to acknowledge the amendment may not be waived. Therefore, the bid is nonresponsive.

The protest is denied.

fa *Seymour E. Van Cleve*
Harry R. Van Cleve
General Counsel