



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Bender Shipbuilding & Repair Co., Inc.

File: B-225578

Date: April 10, 1987

DIGEST

1. If a firm initially protests to the contracting agency, alleging an apparent impropriety in the solicitation, the agency's opening of bids without taking the requested corrective action is initial adverse agency action, and a subsequent protest to the General Accounting Office more than 10 working days later is untimely.

2. Whether or not a bidder has the necessary physical facilities to perform the contract is a question of a bidder's responsibility, not its bid's responsiveness. Where the contracting officer has made an affirmative determination of responsibility, the General Accounting Office will not review such determination absent a showing that the contracting officer acted fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation have not been met.

DECISION

Bender Shipbuilding & Repair Co., Inc., protests the award of a contract to Gulf-Tampa Drydock Company, under invitation for bids (IFB) No. N62383-87-B-0002 issued by the Department of the Navy, Military Sealift Command, Pacific, for repairs to and drydocking of the USNS Neptune. Bender contends that the Navy improperly included interport differentials as a bid evaluation factor through an amendment to the IFB. Bender argues that the use of interport differentials is prohibited, or in the alternative, that even if interport differentials are not prohibited, the "last-minute imposition" of them in an amendment was an arbitrary and capricious abuse of the Navy's discretion, a breach of the Navy's implied obligation of honest and fair treatment of bidders, and an unreasonable restriction of competition. In its comments on the contracting officer's report, Bender argues further that the

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successful bidder, Gulf-Tampa, was "nonresponsive" because it lacked the necessary physical facilities to perform the contract. Bender seeks award of bid preparation costs and costs of pursuing its protest.

We dismiss the protest.

The IFB, issued on November 4, 1986, provided in Section M-Evaluation Factors for Award that "interport differentials will not be considered in evaluation for award under this solicitation." Amendment 7 to the IFB, issued on November 25, 1986, deleted the clause quoted above and substituted a schedule of interport differentials to be used in evaluating bids. The largest differential, \$104,404.90, applied to Bender's bid. On December 3, the day prior to bid opening, Bender filed a protest with the contracting officer objecting to amendment 7 and requesting that it be rescinded or, in the alternative, that Bender be reimbursed its bid preparation costs since Bender maintained that the procurement had been rendered noncompetitive by the differential. On December 4, bids were opened. Gulf-Tampa was the low evaluated bidder and Bender was second low evaluated bidder.

On December 8, the contracting officer denied Bender's protest. Award was made to Gulf-Tampa on December 11. On December 19, Bender protested the award of the contract to our Office. The head of the contracting activity authorized continued contract performance on December 24, pursuant to 48 C.F.R. § 13.104 (1986), due to urgent and compelling circumstances that significantly affect the interests of the government.

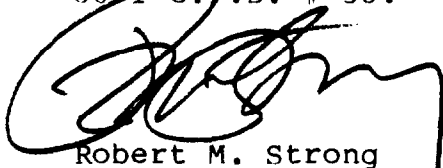
Bender's protest to our Office that the application of interport differentials to this IFB was prohibited and that even if the use of differentials were not prohibited, the "last minute imposition" of them was unreasonable is untimely. Under our Bid Protest Regulations, if a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office, must be filed within 10 working days of formal notification of or actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3) (1986). Under our regulations, "the opening of bids" is identified specifically as an adverse agency action. 4 C.F.R. § 21.0(e). The fact that bid opening occurs without the agency taking any corrective action in response to the protest constitutes initial adverse agency action. Sunrise Associates--Request for Reconsideration, B-219356.2, June 27, 1985, 85-1 C.P.D. ¶ 738.

Here, bid opening occurred on December 4, despite Bender's protest the day before to the Navy. Therefore, Bender should have known that the agency was not going to delete the differentials. This constituted initial adverse agency action and Bender had 10 working days after bid opening to protest to our Office. Accordingly, Bender's protest of the amendment filed here on December 19, 1986, more than 10 working days after bid opening, is untimely and will not be considered on the merits.

Bender's final argument, raised in its comments on the contracting officer's report, is that the successful bidder, Gulf-Tampa, was "nonresponsive" because it lacked the necessary physical facilities to perform the contract. The ability to perform a contract and whether a bidder has the capacity to perform are matters of responsibility, not of its bid's responsiveness. See Great Lakes Dredge & Dock Co., B-221768, May 8, 1986, 86-1 C.P.D. ¶ 444. In addition, we have held that whether a bidder has the necessary equipment to perform a contract is a matter of responsibility. See Kelly & Associates, B-215641, July 20, 1984, 84-2 C.P.D. ¶ 75. Before awarding a contract, the contracting officer must determine that a prospective contractor is responsible. Our Office does not review the contracting officer's affirmative determination of responsibility absent a showing that the contracting officer acted fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation have not been met. Kelly & Associates, B-216641, *supra* at 1, 84-2 C.P.D. ¶ 75 at 1. Neither exception is applicable here.

We dismiss the protest.

Bender seeks its cost of pursuing this protest and its bid preparation costs. However, a claim for such costs which is submitted with a protest that is dismissed without consideration on the merits will not be considered by our Office. C.A. Parshall, Inc., B-220650; B-220555.2, Jan. 14, 1986, 86-1 C.P.D. ¶ 38.



Robert M. Strong
Deputy Associate General Counsel