



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Hygrade Painting, Inc.

File: B-232564

Date: December 19, 1988

DIGEST

1. Protest against procuring agency's decision to cancel and convert solicitation under sealed bidding procedures into a negotiated procurement using the same solicitation is denied where all bids received using sealed bidding were either nonresponsive or unreasonably priced, since this constituted a compelling reason to cancel and convert the solicitation.

2. Protest against procuring agency's decision to reject the protester's bid as nonresponsive for failing to acknowledge two amendments to the solicitation is without merit where the amendments were material and there was sufficient time to consider and acknowledge them.

DECISION

Hygrade Painting, Inc., protests the rejection of its bid as nonresponsive and the subsequent conversion of invitation for bids (IFB) No. GS-05P-88-GBC-0093, for painting at the United States Court House, Cincinnati, Ohio, from sealed bidding into a negotiated procurement. Hygrade contends that the General Services Administration (GSA), the procuring activity, improperly found its bid nonresponsive and did not have a compelling reason to cancel the solicitation.

We deny the protest.

The IFB was issued on April 11, 1988, with bid opening originally scheduled for May 12, 1988. However, the IFB was subsequently amended on three occasions. Amendment No. 01 extended the bid opening date to May 19 and, among other changes, incorporated a modified General Wage Decision.

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Amendment No. 02, issued on May 18 extended the bid opening date to July 26, and required that bidders provide 90 calendar days instead of 60 days for the bid acceptance period. Amendment No. 03 further extended the bid opening date to August 2 and incorporated another modified General Wage Decision.

At bid opening, GSA received nine bids in response to the IFB. The lowest five bids, including the protester's second low bid, were determined to be nonresponsive. The low bidder and the protester failed to acknowledge amendment Nos. 02 and 03, the third low bidder failed to acknowledge amendment No. 03, and the fourth low bidder failed to acknowledge amendment No. 02. The fifth low bidder only offered a 60-day bid acceptance period. The sixth low bidder was responsive; however, GSA determined that the bid was unreasonable as to price because it exceeded the government estimate by 49 percent. Since GSA considered a number of the nonresponsive bidders to be competitive, it canceled the solicitation and converted to a negotiated procurement using the same solicitation, as provided for by Federal Acquisition Regulations (FAR) §§ 14.404-1(e) and 15.103 (FAC 84-5). Bidders were notified of this action by amendment No. 04 to the solicitation issued on August 25.

Hygrade initially protested GSA's decision to cancel the IFB because GSA allegedly did not have a compelling reason for canceling the IFB. In commenting on the procuring agency's report, Hygrade also challenges the agency's determination that its bid was nonresponsive because it failed to acknowledge amendment Nos. 02 and 03. Hygrade contends that we should open a separate protest to resolve whether the agency properly rejected its bid as nonresponsive because it allegedly did not become aware that GSA was rejecting its bid as nonresponsive until it received a copy of the agency's report.

Based on the record before our Office, including Hygrade's comments on the report wherein it presents its arguments regarding the responsiveness of its bid, we do not find it necessary to open a separate protest since we can determine the propriety of GSA's action in rejecting Hygrade's bid as nonresponsive.

Hygrade does not contend that it properly acknowledged these amendments. Instead, it argues that the failure to acknowledge amendment No. 02 should either be waived as immaterial or because GSA issued it only 1 day prior to the previously established bid opening of May 19 and bidders reasonably could not have been expected to timely acknowledge it. Hygrade argues that GSA violated the duty

in FAR § 14.208(b) (FAC 84-32) to provide the amendment in sufficient time prior to bid opening. As to amendment No. 03, Hygrade contends that it timely acknowledged amendment No. 03 by mailgram dated August 2, 1988, although conceding that GSA may argue that the acknowledgment was late.

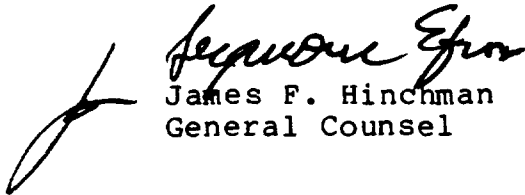
We find that GSA properly determined that Hygrade's bid was nonresponsive. Although GSA did not issue amendment No. 02 until 1 day prior to the scheduled opening date of May 19, the amendment extended bid opening until July 26 and the actual bid opening did not occur until August 2. We find that this was a sufficient period for bidders to have received and considered the amendment and was all that was required by the above cited regulation. See Space Services International Corp., B-207888.4 et al., Dec. 13, 1982, 82-2 CPD ¶ 525.

Furthermore, it would have been improper for GSA to have waived Hygrade's failure to acknowledge the amendment as a minor informality because amendment No. 02 changed the minimum bid acceptance period from 60 days to 90 days. A provision in an IFB which requires that a bid remain available to the government for a prescribed period of time in order to be considered for award is a material requirement and the failure to meet the requirement at bid opening renders the bid nonresponsive. Allstate Guards and Security Services Inc., B-213284, Nov. 16, 1983, 83-2 CPD ¶ 576; CooperVision, Inc., B-231746, June 28, 1988, 88-1 CPD ¶ 616. Also, Hygrade's argument that by acknowledging amendment No. 03, the contracting officer should have known Hygrade received amendment No. 02 is without merit. The acknowledgment of a later amendment does not constitute acknowledgment of a prior amendment. Alcon, Inc., B-228409, Feb. 5, 1988, 88-1 CPD ¶ 114. Since amendment No. 02 was material and Hygrade failed to acknowledge it, we find that GSA properly rejected Hygrade's bid as nonresponsive because the defect could not be waived as a minor informality. See Alcon, Inc., B-228409, supra. We therefore need not discuss whether Hygrade timely acknowledged amendment No. 03.

GSA reports that the Cost Management Section evaluated the price of the sixth low bidder against the government estimate and recommended no award because the price exceeded the government estimate by 49 percent. Hygrade initially argued that prices of the first, second, and third low bidders were not unreasonable but in commenting on the agency report it has not challenged GSA's determination that the sixth low bid was unreasonable. Therefore, we find that there is no basis to question GSA's determination that the sixth low bid was unreasonable as to price. Since the lower

bids were nonresponsive and the protester has not demonstrated that the procuring agency improperly determined that these bids were nonresponsive, we find that GSA reasonably canceled the solicitation and converted it to a negotiated procurement as permitted by the regulations. See Metric Constructors, Inc., et al., B-229947 et al., Mar. 25, 1988, 88-1 CPD ¶ 311. Although Hygrade argues that converting to a negotiated procurement will create an impermissible auction, where cancellation is made in accord with governing legal requirements, the agency does not create an impermissible auction. Id.

The protest is denied.



James F. Hinchman
General Counsel