



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Lava Tap Cleaning Services, Inc.
File: B-234728
Date: May 18, 1989

DIGEST

1. Failure to furnish a bid guarantee with the bid requires the rejection of the bid as nonresponsive and cannot be cured after bid opening.
2. Protest of inclusion in solicitation of a bid guarantee requirement, not filed prior to bid opening, is untimely under General Accounting Office Bid Protest Regulations, and therefore will not be considered on the merits.

DECISION

Lava Tap Cleaning Services, Inc., protests the rejection of its bid as nonresponsive to invitation for bids (IFB) No. GS-07P-89-HTC-0042/7ADB issued by the General Services Administration (GSA) for custodial services at the Federal Building/United States Court House, Roswell, New Mexico. The contracting officer determined that Lava Tap's bid was nonresponsive because the protester failed to furnish a bid guarantee as required by the IFB. For the reasons set forth below, we deny the protest.

The GSA issued the IFB on January 25, 1989, with the bid opening set for February 24. The IFB required a bid guarantee in the amount of 20 percent of the bid price or \$3 million, whichever is less. Upon evaluating the five bids submitted, Lava Tap was the apparent low bidder. However, Lava Tap failed to furnish a bid guarantee by the time of bid opening. Consequently, the contracting officer rejected Lava Tap's bid as nonresponsive and awarded the

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contract to Pride Maintenance, Inc., the next low bidder. On March 1, the GSA received a telefax message from First City National Bank of Houston, transmitting a facsimile of an irrevocable letter of credit for Lava Tap naming the GSA as beneficiary in the amount of \$10,000. The original letter of credit did not arrive at GSA until March 2. Having previously determined protester's bid to be nonresponsive, GSA returned the original letter of credit to Lava Tap on March 3.

Lava Tap contends that by rejecting its bid as nonresponsive, the GSA violated the Competition in Contracting Act of 1984 (31 U.S.C. § 3553(c) and (d) (Supp. IV 1986)), which requires that a sealed bid be awarded to the lowest acceptable bidder. Lava Tap also argues that the solicitation was ambiguous and confusing as to a bidder's obligation to furnish a bid guarantee prior to bid opening. In this regard, the protester, specifically refers to the IFB statement that: "Failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid." (Emphasis added.)

Failure to furnish a bid guarantee in accordance with the solicitation's terms requires the rejection of the bid as nonresponsive. McLemore Pump, Inc., B-230031, Jan. 27, 1988, 88-1 CPD ¶ 83. The statement in the IFB's bid guarantee requirement that failure to comply "may be cause for rejection of the bid" is just as compelling and material as if more positive language were employed. Id. We have held that the word "may" is used in the clause because there are limited regulatory exceptions, not apparent here, to the requirement that a bid accompanied by an inadequate bid guarantee be rejected. The clause does not give the contracting officer discretion to waive the bid guarantee requirement. See James C. Bateman Petroleum Services, Inc., B-228252, Oct. 5, 1987, 87-2 CPD ¶ 337. Consequently, the GSA had no discretion to waive the late receipt of Lava Tap's letter of credit and under the circumstances was required to reject protester's bid as nonresponsive at bid opening. Furthermore, Lava Tap's submission of a bid guarantee after bid opening cannot cure the failure to submit a guarantee with its bid, since a nonresponsive bid cannot be made responsive after bid opening. Servidyne, Inc., B-231944, Aug. 8, 1988, 88-2 CPD ¶ 121.

For the first time, in its comments upon the GSA's report, Lava Tap also challenged the propriety of including a bid guarantee requirement in this particular solicitation. As this allegation was not raised prior to bid opening, it is untimely and will not be considered. 4 C.F.R. § 21.2(a)(1) (1988).

The protest is denied.



James F. Hinchman
General Counsel