



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Apex Micrographics, Inc.

**File:** B-235811

**Date:** August 31, 1989

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### **DIGEST**

1. Where there is uncertainty as to when the protester was aware of the basis for its protest, the General Accounting Office will resolve doubt over whether the protest was timely in the protester's favor and consider the protest on the merits.
2. A bid which was not accompanied by a bid sample required by the solicitation was properly rejected as nonresponsive.
3. The failure to acknowledge an invitation for bids amendment establishing wage rates pursuant to the Service Contract Act cannot be cured after bid opening by a bidder whose employees are not already covered by a collective bargaining agreement binding the firm to pay wages not less than those prescribed by the Secretary of Labor.

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### **DECISION**

Apex Micrographics, Inc., protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. IRS-C-89-015, issued by the Internal Revenue Service for microfiche documents for three Internal Revenue Service offices.

We deny the protest.

The solicitation, issued on January 9, 1989, was set aside for small business and labor surplus area concerns. The time for bid opening, originally scheduled for February 8, was extended until February 23 by Amendment No. 1, issued on February 3. That amendment also added a Service Contract Act wage determination and clarified the statement of work. Amendment No. 2, issued on February 7, consisted of minor changes to the solicitation and left the extended bid opening date unchanged.

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Fourteen bids were received in response to the solicitation. The first two low bids were determined to be nonresponsive to the labor surplus area requirement. The protester was the third low bidder but its bid was determined to be nonresponsive for failure to acknowledge Amendment No. 1 and for failure to include a required bid sample. On April 17, the contract was awarded to the fourth low bidder. All unsuccessful bidders were notified by mail in a letter dated April 18.

On May 9, Apex filed a protest with the contracting agency contending that the agency had awarded the contract to an offeror other than the lowest responsive and responsible offeror. The contracting officer dismissed Apex's protest on June 12 as untimely as it allegedly was filed more than 10 working days after the agency considered Apex to have known or should have known of its basis for protest; because any objection it may have had to the bid sample requirement had not been timely raised prior to bid opening; and because the protester's brief letter did not contain all the information required by agency regulations. As a matter of "additional information," however, the contracting officer also explained that Apex's failure to acknowledge Amendment No. 1 and to submit a bid sample was the basis for the nonresponsiveness determination.

Apex filed a protest in our Office on June 9 alleging that its bid had been improperly rejected as nonresponsive. The agency argues that this protest is untimely for two reasons, the first of which is that both Apex's agency-level protest and the one it filed with our Office on June 9 allegedly were filed more than 10 working days after Apex knew or should have known of its basis for protest. See 4 C.F.R. § 21.2(a)(2) (1988). Second, the agency argues that Apex never timely filed with us any timely appeal of the contracting officer's dismissal of its agency-level protest --i.e., "initial adverse agency action"--because the protester's filing with us already had occurred even before the contracting officer's dismissal had been issued. Since for the reasons stated below we resolve the first issue in the protester's favor we need not discuss the second.

The agency argues that Apex should have known of its basis for protest either through a telephone conversation or upon receipt of a written notice of award, both of which occurred sufficiently in advance of the protests as to render them untimely. We consider the protest to be timely, however, because it is not clear from the record when Apex first became aware of the basis for protest. The date and exact content of the telephone conversation have not been

established and the protester disputes that it received the written notice of award as quickly as the agency presumed it would.<sup>1/</sup> It is our practice to resolve doubts over when a protester first becomes aware of basis for protest in the protester's favor for timeliness purposes. Med-Nat'l, Inc., B-232694, Jan. 12, 1989, 89-1 CPD ¶ 32. Therefore, we will address this protest on the merits.

The protester first alleges that its failure to submit a bid sample did not render its bid nonresponsive since it was a minor "mistake" that could be corrected after opening.

A bid is responsive if it offers to perform without exception the exact service or item called for in the solicitation so that upon acceptance the contractor will be bound to perform in accordance with all of the invitation's terms and conditions. Loral Packaging, Inc., B-221341, Apr. 8, 1986, 86-1 CPD ¶ 347. Where the solicitation specifically states that a sample must be submitted by the time of bid opening, the failure to do so generally is a material deviation from the solicitation's requirements which renders the bid nonresponsive. Id.

Here, the solicitation required each bidder to microfilm the first five pages of the bid package and to submit the film as a bid sample. The film was to meet certain criteria and would be representative of the quality of the work to be delivered under the contract. In addition, the solicitation included the clause "Bid Samples (APR 1984)" found at section 52.214-20 of the Federal Acquisition Regulation (FAR). This clause specifically provides that the failure to furnish samples on time will require rejection of the bid. Apex concedes it failed to comply with this requirement. Although Apex has indicated its continued willingness to submit a bid sample, it may not be considered for award by submitting a bid sample after bid opening. A bidder may not be permitted to make its nonresponsive bid responsive by submitting a bid sample after bid opening since that would be tantamount to permitting it to submit a new bid. Loral Packaging, Inc., supra.

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<sup>1/</sup> In the absence of evidence to the contrary, we assume that mail is received within 1 calendar week from the date that it was sent. Vehicle Modification Co., B-233725, Dec. 12, 1988, 88-2 CPD ¶ 586. In this instance the protester presumably received notice on April 25 and his May 9 protest therefore, was timely filed on the 10th working day after receiving the notice.

The protester's second argument concerns its failure to acknowledge Amendment No. 1 to the solicitation. Apex contends that this, too, was a minor informality and that it should be permitted to correct this mistake after bid opening. The failure to acknowledge an IFB amendment establishing minimum wage rates for a contract cannot be cured after bid opening, unless a bidder's employees are covered by a collective bargaining agreement binding the firm to pay wages not less than those prescribed by the Secretary of Labor. Fourth Corner Forestry, Inc., B-226438, Apr. 27, 1987, 87-1 CPD ¶ 439. The reason is that the prescribed wage rates are mandated by statute, so that if an agency were to give the bidder the opportunity to acknowledge the wage rate amendment after bid opening, the bidder could decide to render itself ineligible for award by choosing not to cure the defect. Because giving the bidder such control over the bid's acceptability would compromise the integrity of the competitive procurement system, the bid must be rejected as nonresponsive unless the bidder already is obligated to pay wages not less than those prescribed. Id.

Since Apex is not a union firm it is not bound by a collective bargaining agreement, and in fact offers no excuse for its failure to acknowledge Amendment No. 1 which contained the wage rate determination. Apex's failure to acknowledge the amendment therefore, cannot be waived as a minor informality.

Finally, we note that Apex has suggested that the omissions from its bid were mistakes which it should be permitted to correct under the mistake FAR § 14.406-3, which provides the procedures for correcting other than clerical mistakes in bids. As both the FAR section and our decisions recognize, however, that authority to permit correction of mistakes in bids is limited to bids that are responsive to the solicitation and may not be used to make a nonresponsive bid responsive. See, e.g., The Ramirez Co. and Fenon Constr. Corp., B-233204, Jan. 27, 1989, 89-1 CPD ¶ 91.

The protest is denied.

  
James F. Hinchman  
General Counsel