



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: N.G. Simonowich

File: B-240156.2

Date: March 19, 1991

N.G. Simonowich for the protester.
Bruce W. Baird, Esq., Defense Logistics Agency, for the agency.
Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging responsiveness of awardee's bid for failure to comply with bid deposit requirement is denied where the awardee's bid documents contained no irregularities or facial defects and bid deposit statement unequivocally bound bidder to furnish 20 percent of its bid price as a bid deposit as required by the solicitation. Fact that bidder pledged credit card account with insufficient line of credit is a matter of responsibility since it pertains solely to the adequacy of assets supporting the bid deposit; accordingly, this error did not render bid nonresponsive and agency properly allowed bidder to correct it prior to award.

DECISION

N.G. Simonowich protests the award of item 146 to G.A. Avril Company under invitation for bids (IFB) No. 31-0133, issued by the Defense Logistics Agency (DLA) for the sale of various kinds of scrap metal. Simonowich, the second high bidder, contends that Avril's high bid should have been rejected as nonresponsive and thus that it is entitled to the award.

We deny the protest.

This is the second protest Simonowich has filed with our Office under the subject IFB concerning the requirement that each bidder provide a bid deposit in an amount equal to 20 percent of the total bid price; under the terms of the IFB, the bid deposit could be made by cash, cashier's check, certified check, traveler's check, bank draft, money order, or by charge to a VISA or Master Card credit card account. On the cover page of the bid form, each bidder was required to complete a bid deposit statement.

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On June 22, 1990, Simonowich filed the first protest and challenged the rejection of its bid as nonresponsive. Briefly stated, DLA rejected Simonowich's bid as nonresponsive because, prior to the award, there was an insufficient credit line in the VISA account Simonowich pledged as its bid deposit. We sustained Simonowich's protest in N.G. Simonowich, B-240156, Oct. 16, 1990, 70 Comp. Gen. _____, 90-2 CPD ¶ 298, holding that the deficiency in the credit balance pertained solely to the bidder's responsibility, rather than responsiveness, and could therefore be cured any time prior to award. Based on our finding that DLA improperly rejected Simonowich's bid as nonresponsive due to an insufficiency in the credit line Simonowich pledged as his bid deposit, which was cured by the protester before award, we recommended that Simonowich be awarded the 14 scrap metal items for which he was high bidder.

While Simonowich's protest was pending, Avril, who also had been found nonresponsive after its credit card was declined, advised the contracting officer that it inadvertently had referenced the wrong VISA credit card account on its pledge sheet. Avril also requested that if the credit card problems were waived for the other bidders, that Avril be given the same consideration. Avril's bid deposit statement read as follows:

"The total amount of the Bid(s) is \$ * and attached is the bid deposit, when required by the Invitation, in the form(s) of VISA *\$49,619.31, in the amount of \$10,000.00."

With its bid, Avril also included a credit card information sheet, which the agency required from any bidder who intended to charge either the bid deposit or final contract price on its credit card. Avril's completed sheet contained all the credit card information required by the agency to access Avril's VISA account.

After reviewing our decision on Simonowich's first protest, the agency allowed Avril, the high bidder on item 146, to substitute its business VISA account number for the original VISA account number cited on the bid, and subsequently made award of the item to Avril. After initially lodging an agency-level protest, Simonowich's protest to our Office followed.1/

1/ We consider the second basis of Simonowich's current protest--which objects to award of items 99, 103, and 152 to Simonowich--as academic because the agency has deleted these items from Simonowich's contract; therefore, we will not review this basis.

Simonowich contends that Avril's high bid should have been rejected as nonresponsive because Avril's bid deposit referred to an incorrect VISA account number and the bid deposit did not refer to an approved annual bid bond to otherwise guarantee the bid. The agency disagrees, arguing that the contracting officer's decision to allow Avril to cure its credit card deficiency by substituting the correct VISA card account number on its bid deposit statement is consistent with our decision in N.G. Simonowich, B-240156, supra. Further, the agency contends that it would have been inappropriate to reject Avril as nonresponsive based on the failure of its bid deposit to reference an approved annual bond because the IFB did not require that a bid deposit in the form of VISA or Master Card credit card be supported by an annual bond. We find that the agency properly awarded Avril the contract for item 146.

Bid deposits and bid bonds are forms of bid guarantees designed to protect the government's interests in the event of a bidder's default. Marine Power and Equip. Co., Inc., 62 Comp. Gen. 75 (1982), 82-2 CPD ¶ 514. If a bidder fails to honor his bid in any respect, the bid bond secures a surety's liability for all excess procurement costs. Surface Preparation and Coating Enters., Inc., B-235170, July 20, 1989, 89-2 CPD ¶ 69. A bid deposit similarly obligates a bidder not to withdraw before award and to pay the full purchase price; while a bid deposit may be applied towards the purchase price of goods being sold by the government, in the event the bidder defaults on his contractual obligations, the government may retain the deposit as liquidated damages. Marine Power and Equip. Co., Inc., 62 Comp. Gen. 75, supra. Bid deposits offer some advantages over bid bonds--the government has immediate access to the funds without any defenses sureties might raise. On the other hand, bid deposits tie up all bidders' funds for a period of time.

In determining whether a bid is responsive to a bid deposit requirement we look to see whether the bid deposit documents submitted at bid opening are in the form required by the solicitation. See Forbes Mfg., Inc., B-237806, Mar. 12, 1990, 90-1 CPD ¶ 267 (where bidder's personal check rendered his bid nonresponsive since the solicitation provided that the only acceptable form of bid deposit was a guaranteed instrument of payment). Submission of a bid deposit in the exact manner and form called for by the solicitation demonstrates that the bidder has obligated itself to forfeit the bid deposit in the event that it withdraws before award or fails to pay the full purchase price. See Marine Power and Equip. Co., Inc., 62 Comp. Gen. 75, supra (replacement of one valid negotiable

instrument with another did not render a bid nonresponsive where the bidder had executed all documents necessary to create a binding procurement contract at the time of bid opening).

On the cover page of its bid, Avril clearly stated that its VISA account was to be debited to cover the 20 percent bid deposit charge. The accompanying credit card information sheet submitted by Avril was complete and contained no irregularities or facial defects; thus, Avril's VISA pledge represented a firm commitment by Avril to be liable for the bid deposit. Since its bid documents clearly bound Avril to furnish the bid deposit by means of a credit card charge, an instrument explicitly approved for use as a bid deposit by the solicitation, Avril's bid was responsive. See Marine Power and Equip. Co., 62 Comp. Gen. 75, supra; Intermountain Paper Stock, Inc., B-211269, Apr. 22, 1983, 83-1 CPD ¶ 450.

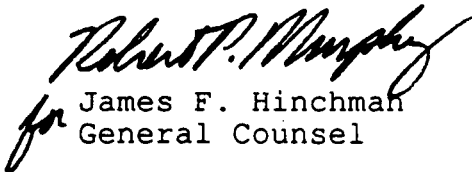
Whereas bid responsiveness concerns whether the bid itself unequivocally offers to perform in conformity with all material terms and conditions of a solicitation, "responsibility" refers to a bidder's ability to perform all the contract requirements, and is determined not at bid opening, but at any time prior to award based on information received by the agency up to that time. Ibex, Ltd., B-230218, Mar. 11, 1988, 88-1 CPD ¶ 257. The existence and thus the adequacy of Avril's VISA credit line cannot be determined from the bid itself, and thus does not affect the responsiveness of the bid. After correctly interpreting our initial decision in N.G. Simonowich as stating this principle, the agency properly allowed Avril to cure the defect concerning its responsibility by substituting a different credit card account prior to award.

Simonowich also argues that Avril's bid was nonresponsive because its bid deposit was not supported by an annual deposit bid bond. Given that there was no requirement in the IFB for a supporting bid bond, Avril's lack of such a bond did not affect the responsiveness of its bid. We recognized in N.G. Simonowich, B-240156, supra, that unlike cash, cashier's checks and other forms of bid deposits acceptable in this procurement, credit cards are not guaranteed instruments and are subject to such events as insufficient funds and stop

payment orders. We noted that Simonowich's annual bid bond-- which gives the government access to an amount equal to the bid deposit in the event of default--provides added protection to the government in the event of a credit card deficiency. Our conclusion that Simonowich's bid was responsive did not, however, rest on the fact that the protester also had presented an annual deposit bid bond.

While a bid bond was not required under the IFB at issue here, we recommended in N.G. Simonowich, B-240156, supra, that the agency consider either requiring that bidders who use credit cards back them up with a bid bond, or immediately processing credit card transactions at bid opening. DLA does not plan to adopt either of these measures, based on its view that they would make surplus sales less attractive to credit card users, lowering both competition and prices. By processing credit card bid deposits after bid evaluation and the agency is prepared to make award (which occurred 8 days after bid opening in N.G. Simonowich), DLA receives less protection than with other forms of bid deposits. Applicable regulations appear to permit the delay that DLA believes is beneficial to the government, see 32 C.F.R. § 172.5(iv) (1990), and we have no reason to question the agency's judgment in this regard.

The protest is denied.


for James F. Hinchman
General Counsel