



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Allied Paving Company of El Paso, Inc.--
Reconsideration

File: B-250417.2

Date: January 11, 1993

Bert Borsberry for the protester.
Major Bobby G. Henry, Jr., and Ron Tudor, Esq., Department
of the Army, for the agency.
James W. Vickers, Esq. and Jerold D. Cohen, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protest to GAO that invitation should not have required
bonds for contract's option years as well as base period
properly was dismissed as untimely, since it was filed more
than 10 working days after the agency opened bids despite
the company's pre-opening, agency-level protest.

DECISION

Allied Paving Company of El Paso, Inc., asks that we
reconsider our dismissal as untimely of its protest of the
bonding requirements in Department of the Army invitation
for bids (IFB) No. DABT51-92-B-0052. Allied contends that
the requirements are ambiguous at best, and that award under
the IFB therefore was improper.

We affirm the dismissal.

The IFB was issued on August 3, 1992, for paving repairs at
Fort Bliss, Texas, for 1 year with 4 option years.
Amendment 0001 changed the magnitude listing of the project
from between \$1,000,000 and \$5,000,000 to "more than
\$10,000,000. This includes base year and four option
years."

The IFB required that a performance bond equal to 100
percent of the contract price, and a payment bond based on a
percentage of the contract price (40 percent - 50 percent,
depending on the actual contract amount), be submitted
within 15 days after award. Allied protested to the
contracting officer on September 1, the day before bid

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opening, that the IFB, by basing the bonds on the "contract price," required that they cover the option years as well as the base year, which Allied argued precluded small businesses like itself from bidding.

The Army received three bids on the bid opening date, and awarded the contract to F.T. James Construction, Inc., the low bidder, on September 14. Two days later, Allied received a September 10 letter from the contracting officer denying the firm's protest, on the basis that the IFB in fact required bonds covering only the base year.

Allied then protested to our Office that the solicitation was ambiguous regarding the bond requirements, and that James' bid should have been rejected because the firm offered bonds for the base year only. We dismissed the protest on September 23 as untimely since it was not filed with our Office within 10 working days of the date of the initial adverse agency action on the protest to the Army: the occurrence of bid opening as scheduled. Allied Paving Company of El Paso, Inc., B-250417, Sept. 23, 1992, 92-2 CPD 73-2.

Allied asks that we reconsider our dismissal of its protest because it did not learn of the contracting officer's interpretation of the bonding requirements until it received the September 10 contracting officer's decision on its agency-level protest. Allied also complains that James' bid should have been rejected, and argues that the paving requirement should be resolicited.

Allied's protest of the IFB's bonding requirements properly was dismissed as untimely. As pointed out in our September 23 dismissal, where a company has filed a timely protest at the agency level, the time for filing with our Office is measured from any action or inaction by the contracting agency that is prejudicial to the protest. That includes the opening of bids, irrespective of whether the protester expects and/or later receives a formal denial of the protest, since bid opening puts the firm on notice that the agency will not take the requested corrective action.

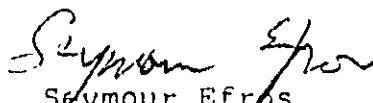
In any event, the Army properly accepted James' bid. We have held that a solicitation requirement regarding submission of a bid bond in an amount related to the "contract price" only obligates a bidder to submit the bond in an amount related to the base contract period. Pacific Coast Utilities Service, Inc., B-209003.2, Jan. 20, 1983, 83-1 CPD 73. This applies equally to payment and performance bonds.

The reason for the above-stated rule is that an option is simply a unilateral right of the government by which, for a

specified time, the government may elect to purchase additional supplies or services called for by the contract, or to extend contract performance. The exercise of an option is contingent on a number of factors, including a continuing need for the services, the availability of funds, and the advantage to the government of exercising the option instead of conducting a competitive procurement. Firms need submit bonds based only on the base contract period because the government generally does not pay contractors, in the form of prices that include premiums for bonds covering option periods, to protect contingent interests. Madison Services, Inc., B-245420, Oct. 17, 1991, 91-2 CPD ¶ 345.

Thus, the contracting officer properly concluded, in denying Allied's agency-level protest, that to comply with the IFB a bidder only had to offer bonds covering the contract's base year. Accordingly, James' bid, which met that requirement, properly was accepted.

Our dismissal of Allied's protest of the bond requirements is affirmed.


Seymour Efron
Senior Associate
General Counsel