

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

60496

FILE: B-185268

DATE: February 10, 1976

MATTER OF: Microfilm Communications Systems, Inc.

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DIGEST:

1. Invitation requirement that equipment to perform contract be in place and operable is matter of responsibility. Wording of requirement calling for that condition to exist "at the time the contractor's bid is submitted" may not turn matter into question of bid responsiveness and cause rejection of bid. Responsibility of bidder is for determination after time for bid opening.
2. Possibility that price structures and schedules of incumbent contractor may be known to and utilized by competitors for underbidding incumbent allegedly resulting in deleterious performance has no bearing on award to other than incumbent since logical, but legally impermissible, extension of arguments would result in all contracts being awarded to incumbents as matter of course and there is no legal prohibition to below-cost bidding.

Microfilm Communications Systems, Inc. (Microfilm), protests any award of a contract to the Microforms Management Corporation (Microforms) under invitation for bids No. N00612-76-B-0004, issued by the Naval Supply Center, Charleston, South Carolina. Award has been withheld pending our decision.

Microfilm, the incumbent contractor, believes that, because its price structures and pricing schedules were matters of common knowledge, other bidders were able to bid below Microfilm prices to obtain the award. These bidders, including Microforms, are allegedly lacking in the experience and knowledge to prepare bids based upon true costs, and their actual performance will probably prove to be deleterious to the interests of the Government. It is also contended that the Microforms bid should not be accepted since at the time of bid opening that firm did not comply with subparagraph (e) of the invitation, "QUALIFICATION OF BIDDERS," which requires as follows:

"The nature of this proposed procurement will tend to render some otherwise qualified firms incapable of satisfactorily performing the full scope of the contemplated contract. In order to preclude prospective offerors from incurring needless expense in preparing bids, the following are considered as minimum qualifications:

* * * * *

"e. Equipment in place in his plant in an operable condition, required to produce all items and in the weekly volumes specified under this contract at the time the contractor's bid is submitted."

While it is unfortunate that the contracting activity called for compliance with the subparagraph (e) requirement "at the time the contractor's bid is submitted," we have consistently held that similar language may not be permitted to have the effect of transforming the purely factual question of responsibility into a legal question of whether the bid conforms, i.e., is responsive, to the invitation. B-168396, February 2 and August 18, 1970; 45 Comp. Gen. 4 (1965). In order to constitute a matter of responsiveness, the information or condition required must be necessary to the evaluation of the bid or an essential element of the promise to perform as required by the invitation. Where, however, the information or condition required relates, as here, to the ability of a bidder to perform any resultant contract, then the matter is properly classified as one concerning the responsibility of the bidder. Whether a bidder is to be considered responsible or not is for determination after the bid opening. Bow Industries, Incorporated, B-181828, December 12, 1974, 74-2 CPD 330.

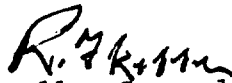
In view of the above, the failure of Microforms to comply with subparagraph (e) has no effect on the responsiveness of the bid. B-162888, January 4, 1968. We note that the contracting officer has determined Microforms to be a responsible bidder for the purposes of performing the contract.

The possibility that the Microfilm price structures and pricing schedules may have been known to and utilized by other bidders has no bearing upon the consideration of any firm for award. Nor does the fact, even if it is true, that a bidder may

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have submitted a below-cost bid constitute a legal basis for precluding a contract award. 50 Comp. Gen. 788 (1971); The Baxter Corporation, B-185017, November 7, 1975, 75-2 CPD 286. The logical, but legally impermissible, extension of these arguments would result in all contracts being awarded to incumbents as a matter of course.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States