

01228

DECISION



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

FILE: B-186749

DATE: October 19, 1976

MATTER OF: Munck Systems, Inc.

DIGEST:

Where bidder submits bid bonds which expire prior to 120-day bid acceptance period agency's rejection of bid as nonresponsive pursuant to mandatory language of ASPR § 2-404.2(h) is proper. Rationale of 38 Comp. Gen. 532 is applicable to instant case since Government's interest would not be secured after expiration of bid bonds thus making it possible for bidder to decide after opening of bids whether to have its bid rejected, to prejudice of other bidders and contrary to competitive bidding principles.

By letter dated June 17, 1976, Munck Systems, Inc. (Munck) protested the proposed award of a contract for the furnishing and installation of two 35-ton bridge cranes at Dover Air Force Base, Delaware, and Travis Air Force Base, California, to any other bidder under invitation for bids (IFB) F07603-76-00016, issued by the Air Force on April 5, 1976. The IFB, which had a 120-day acceptance period, provided for a single award or, in the alternative, separate awards for each air base and for the furnishing of a bid bond in the amount of 20 percent of the bid price. At bid opening on May 27, 1976, 10 bids were received, with Munck the apparent low bidder on a single-award basis.

In response to the IFB's bid bond requirement, Munck submitted two irrevocable letters of credit with its bid, both in the amount of \$75,000. Letter number 0304, dated May 26, 1976, for Travis Air Force Base, expired June 1, 1976. Letter number 0305, dated May 26, 1976, for Dover Air Force Base, expired June 30, 1976. By letter dated June 4, 1976, the issuing bank amended the expiration date of letter of credit number 0304 to June 30, 1976.

By telephone conversations on June 15 and 17, 1976, Munck was advised by the Air Force that its bid had been rejected as non-responsive based on the fact that the letters of credit submitted by Munck expired prior to the 120-day acceptance period provided for in the IFB. Subsequently, on June 21, 1976, the issuing bank amended both letters of credit, reducing their amounts to \$33,000 and extending their expiration dates to September 27, 1976.

B-186749

Counsel for Munck contends: (1) the 30-day expiration period of Munck's letters of credit fully protected the Government's interest; (2) by "accepting" the June 4, 1976, amendment to letter of credit number 0304, the Air Force waived the right to object to the fact that Munck's letters of credit expired prior to the 120-day acceptance period; (3) any mistake in Munck's letters of credit was purely clerical and, therefore, should have been waived by the Air Force; and (4) because of the \$36,022 difference between Munck's bid and the next lowest bids, award to Munck would result in substantial benefit to the Government.

In 38 Comp. Gen. 532 (1959), we first stated our view that where it has been determined that an IFB requires a bid bond, that requirement is a material part of the invitation, noncompliance with which renders a bid nonresponsive. The determination of a bid's responsiveness must be made from the face of the bid, without resort to extraneous documents. Hewlett-Packard Company, B-184595, January 12, 1976, 76-1 CPD 18. Thus, it is axiomatic that a nonresponsive bid cannot be cured after bid opening.

The bid bond provision of the instant IFB in pertinent part stated:

"* * * Each bidder shall submit with his bid, a Bid Bond with good and sufficient surety or sureties acceptable to the Government, or other security as provided below, in the amount of twenty percent (20%) of the bid price.

"* * * Where a bid guarantee is required by the invitation for bids, 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. A bid guarantee shall be in the form of a firm commitment, * * *. If the successful bidder, upon acceptance of his bid by the Government within the period specified therein for acceptance (sixty days if no period is specified) fails to execute such further contractual documents, if any, and give such bond(s) as may be required by the terms of the bid as accepted within the time specified (ten days if no period is specified) after receipt of the form by him, his contract may be terminated for default. * * *"

Although the above-quoted provision does not clearly state that bid bonds' expiration dates must be coextensive with the bid acceptance period, in view of the purpose of the bid bond requirement (i.e., to protect the Government's interest in the event that a successful bidder

B-186749

fails to execute a contract) we believe that this should be inferred from the above language. Specifically, the phrase "good and sufficient surety" implies security of the Government's interest for the full duration of the IFB's acceptance period, and not just for a portion thereof.

In this regard, Armed Services Procurement Regulation (ASPR) § 2-404.2(h) (1975 ed.) provides for the mandatory rejection of nonresponsive bids due to defective bid bonds as follows: "When a bid guarantee is required and a bidder fails to furnish it in accordance with the requirements of the invitation for bids, the bid shall be rejected except as otherwise provided in 10-102.5." (Emphasis added.) The exceptions listed in ASPR § 10-102.5 (1975 ed.) are not applicable to the facts of this case.

Counsel for Munck does not dispute the fact that at the time of bid opening Munck's bid guarantees expired prior to the IFB's 120-day acceptance period. Thus Munck's bid, which deviated from a material specification in the IFB, was per se nonresponsive and, therefore, properly rejected. Since ASPR § 2-404.2(h), supra, does not provide exceptions due to clerical mistakes or for price advantage to the Government, counsel's arguments in this regard are unpersuasive.

Counsel has attempted to distinguish 38 Comp. Gen. 532, supra, and other decisions cited by the Air Force on the basis there is no indication in the instant case that Munck could have opted in or out of the procurement without suffering termination for default. It is our opinion, however, that the "two bites at the apple" rationale of 38 Comp. Gen. 532, supra, is applicable to the instant case. The fact that the Government's interest would not be secured after the expiration of the letters of credit (assuming no award by the Government prior to the expiration date of the letters of credit), would make it possible for Munck to decide after bid opening whether or not to have its bid rejected by virtue of extending or not extending its bid bond. This, in effect, would give Munck "two bites at the apple," which is not only unfair to the other bidders but contrary to the purposes of the statutes governing Federal procurement and the best interests of the Government. 38 Comp. Gen. 532. supra. Thus, with regard to Munck's first, third, and fourth contentions, above, it is our opinion that the bid was properly rejected as nonresponsive.

B-186749

With regard to Munck's second contention, counsel is apparently asserting that mere physical receipt of Munck's June 4, 1976, amendment waived any right that the Air Force had to object to the fact that Munck's letters of credit expired prior to the IFB's 120-day acceptance period.

The Air Force, on the other hand, maintains that upon receipt and "acceptance" of the June 4 amendment it acted in accordance with the requirements of ASPR § 2-404.2 (1975 ed.) which provides inter alia that papers relating to a procurement be preserved with originals of all rejected bids.

In view of the fact that Munck's bid was nonresponsive at bid opening (although Munck was not advised of this until 19 days after bid opening) and, as noted above, nonresponsive bids cannot be made responsive by the submission of extraneous documents subsequent to bid opening, we fail to see how the Air Force waived the right to object to Munck's bid by "accepting" Munck's June 4, 1976, amendment. In our opinion, the Air Force acted properly, pursuant to ASPR § 2-404.2, supra, in "accepting" Munck's amendment.

For the above-stated reasons, Munck's protest is denied.

Acting

R. F. K. 1/12
Comptroller General
of the United States