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R. Feldman FL II

**DECISION**



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

FILE: B-190035

DATE: March 31, 1978

MATTER OF: Storage Technology Corporation--  
Reconsideration

**DIGEST:**

1. GAO Bid Protest Procedures contemplate that requests for reconsideration of bid protest decisions are to be resolved as promptly as possible. Therefore, where it appears from record and submission of party requesting reconsideration that prior decision is not legally erroneous, GAO will decide reconsideration request without requesting comments from procuring agency. Issuance of decision under such circumstances is not premature or unfair to party requesting reconsideration which states it expected to receive copy of agency response and have opportunity to reply thereto.
2. Where solicitation language does not require submission of information concerning preventive maintenance prior to award, bidder's insertion of bid price in IFB for such maintenance constitutes an offer to provide the required maintenance and acceptance of bid results in binding obligation to perform in accordance with Government's requirements.

By letter of December 16, 1977, Storage Technology Corporation (STC) requests a second reconsideration of our decision, Storage Technology Corporation, B-190035, October 3, 1977, 77-2 CPD 257, affirmed November 21, 1977, 77-2 CPD 388.

The decision dealt with a solicitation which required the contractor to provide preventive maintenance on the equipment it furnished to the Government under the contract. The solicitation stated as follows:

"0003 Maintenance for Items 0001 and 0002 optional periods:	QUANTITY	UNIT	UNIT PRICE	AMOUNT
(1) First year	12	mo		
(2) Second year	12	mo		
(3) Third year	12	mo		
(4) Fourth year	12	mo		
(5) Fifth year	12	mo"		

Item C of the schedule furnished specifications for the two types of maintenance (on-call and preventive) called for under Item 0003. The protest concerned the meaning to be ascribed to the following segment of Item C.

"Preventive Maintenance

The Contractor shall specify in writing the frequency, duration and quality of preventive maintenance. The quality shall be comparable to that provided by the Contractor for identical leased equipment."

The solicitation required each bidder to bid both the equipment items (Items 0001 and 0002) and the maintenance item (Item 0003) and warned that failure to bid any of the items would render the bid nonresponsive. Both STC and Telex Computer Products, Inc. (Telex), the low bidder, bid all three items as required. However, unlike the protester, the low bidder did not specify in its bid the frequency, duration or the quality of preventive maintenance it normally provides. The protester argued that the failure to provide such information rendered the bid nonresponsive, while the agency argued that the information could be supplied by the "Contractor" after the award was made. We agreed with

The agency, noting that the solicitation called for preventive maintenance "comparable to that provided by the contractor for identical leased equipment" and included a liquidated damages clause in the event the equipment was inoperative for a specified period of time. We therefore concluded that information pertaining to frequency, duration and quality of preventive maintenance was not a material condition of the contract and could be provided after the award was made.

Our decision was affirmed on November 21, 1977. STC requests this second reconsideration on the basis that the affirming decision of November 21 was "premature" and did "not accord with administrative due process" because it was rendered before STC responded to the Telex reply to STC's initial request for reconsideration. As stated by STC:

"\* \* \* on October 17, 1977 STC requested \* \* \* [reconsideration]. On October 26, 1977, Telex filed its reply to the \* \* \* request \* \* \*. While [STC] was awaiting the reply of the [procuring agency], in order that it could simultaneously respond to the replies of both the [procuring agency] and Telex, STC received [the decision of November 21] \* \* \*. In other words, despite the fact that the [agency] had not submitted its reply memorandum, and that STC had not responded to the reply of Telex, and had not received the reply of the [agency], your Office rendered its decision of November 21, 1977."

STC misunderstands the procedures followed by this Office when reconsideration of a bid protest decision is requested. A request for reconsideration based on alleged errors of fact in the decision for which reversal or modification is sought will normally trigger a request for a response from the contracting agency so that factual matters can be resolved on the

basis of a complete record containing "both sides of the story." However, when it is alleged that a decision is erroneous as a matter of law, and when our preliminary review of the statements made in support of the allegation do not lead us to that conclusion, we would see little need for an agency response. In other words, we would not normally request an agency response when it appears from the record in the case and from the submission of the party requesting reconsideration that the prior decision is not legally erroneous since that would unnecessarily delay final resolution of the matter and thus would be inconsistent with a basic aim of our Bid Protest Procedures (4 C.F.R. Part 20)--resolving bid protest disputes as expeditiously as possible.

In this case, STC's first request for reconsideration alleged that we legally erred in concluding that the Telex bid was responsive. However, we saw nothing in STC's submission which led us to believe that the prior decision was legally unsound. Consequently, we did not request a response from the agency. Although we did receive a response from Telex, the response was unsolicited and apparently was submitted after STC furnished Telex a copy of the reconsideration request. At no time during the approximately three weeks that elapsed between receipt of the Telex response and issuance of our decision were we informed that STC desired to submit a response to the Telex comments or that it anticipated receiving a copy of a response from the contracting agency. Accordingly, we cannot agree that issuance of our November 21 decision was "premature" or inconsistent with any reasonable standards of fairness.

Aside from the procedural allegation discussed above, STC's main point seems to be that our two prior decisions never addressed the central issue of whether, in the absence from the Telex bid of the written statement on the frequency, duration and quality of preventive maintenance, Telex obligated itself to perform any preventive maintenance. We think it is eminently clear from our prior decision that we view the Telex bid as obligating the firm to perform the maintenance

required by the solicitation. However, we will briefly review the basic principles on which our decisions are predicated.

A bid, to be accepted, must constitute an unequivocal and unambiguous offer to furnish what the Government says it wants on the terms and conditions the Government sets forth. See, e.g., 46 Comp. Gen. 434 (1966); Shnitzer, Government Contract Bidding 237 et seq. (1976). Generally, a signed bid containing a bid price will constitute such an offer. See Nordam Division of R. H. Siegfried, Inc., B-187031, January 4, 1977, 77-1 CPD 3.

Where, however, the Government's solicitation requires a bidder to do more than enter a bid price and sign the bid, a bidder generally must comply with the additional requirement. For example, where a solicitation requires the submission of descriptive data so that the Government can determine exactly what the bidder proposes to furnish, a bid submitted without such data will be rejected as nonresponsive. 40 Comp. Gen. 132 (1960). The reason, of course, is that the data is required to be part of the offer; acceptance of a bid not accompanied by such data would not result in the legal obligation to perform sought by the Government.

On the other hand, the Government may require the submission of data which is not intended to be a part of the "bargain" between the Government and the bidder; rather, in that situation, the data is requested for informational purposes, such as for use in determining bidder responsibility. See e.g., Cubic Western Data, 57 Comp. Gen. 17 (1977), 77-2 CPD 279; 39 Comp. Gen. 655 (1960). Since the data in such a case has no bearing on a bidder's legal obligation to perform upon acceptance of the bid, it is not legally required to be a part of the bidder's offer, and the bidder's failure to submit the data with the bid properly may be waived or cured after bid opening.


We do not read the quoted segment of Item C of the solicitation in this case as establishing a requirement for the submission of information which was to be a part of the resulting contract. The solicitation language

itself did not provide that failure to submit the information with the bid would preclude consideration of the bid, see 36 Comp. Gen. 376 (1956), did not otherwise require submission of the Item C information with the bids, and in fact did not require "bidders" to submit the information at all. Rather, it called for the submission of written data by the "contractor" and thus, as we interpret it, established only a post-award contractual requirement for contract administration purposes so that the agency would know what to expect and how often to expect it during the course of ongoing operations. Accordingly, we think it is clear that the procuring activity did not intend to evaluate the "frequency, duration and quality of preventive maintenance" in determining the awardee but rather, in this formally advertised procurement, it merely sought a low bid offering to furnish equipment (Items 1 and 2) and maintenance on that equipment (Item 3).

We think that the solicitation was sufficiently definite so as to give rise to a binding commitment to furnish necessary maintenance upon acceptance of a bid which did not contain the data mentioned in Item C. The statement in Item C establishes a requirement for a certain level or quality of maintenance. The submission of a bid on Item 0003 represents not only a bidder commitment to provide that level of maintenance, but also a commitment to furnish maintenance of whatever frequency and duration is required to keep the equipment in the operating condition which is satisfactory to the agency. Therefore, in accordance with our interpretation of this solicitation and with the principles discussed above, we think that by inserting prices next to line Item 0003, a bidder unequivocally offered to furnish the maintenance required by the agency. Thus, the fact that one bidder did not include information about preventive maintenance in its bid did not in any way negate that bidder's offer to furnish required maintenance. Accordingly, we cannot agree with the protester that acceptance of the Telex bid did not result in a legal obligation to provide the maintenance required by the invitation.

For the foregoing reasons, the decision of October 3, 1977, is affirmed.

Deputy

  
Comptroller General  
of the United States