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DECISION



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

FILE: B-195208

DATE: March 5, 1980

MATTER OF: Brodart, Inc.

DLG04029

DIGEST:

1. Protest after bid opening of requirement-- clearly stated in solicitation--that in order to qualify for award bidder must have wood-drying kiln at its plant, is untimely since GAO Bid Protest Procedures require protests based upon alleged improprieties apparent on face of IFB be filed prior to bid opening date.
2. Alleged trade or business custom or practice of ignoring "superfluous" solicitation provisions may not supersede or alter clear and mandatory terms of solicitation.
3. When definitive responsibility criterion is listed in IFB, it cannot be ignored or waived by agency.
4. Late modification reducing price of otherwise successful bid may be accepted since reduction is to interest of Government and does not prejudice other bidders.
5. GAO will not review protester's contention that contracting officer should not have determined another firm to be responsible, absent showing of fraud or failure to apply definitive responsibility criteria.

Brodart, Inc. (Brodart) protests the award of a contract for card catalog cases to Mohawk Valley Community Corporation (Mohawk) by the Library of Congress pursuant to invitation for bids (IFB) No. 79-15.

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[Protest Against Contract Award]

This procurement was to satisfy the annual requirement of the Library of Congress for card catalog cases which, according to the IFB, could vary from a "guaranteed" quantity of 2,100 to a maximum of 4,000. The solicitation contained a paragraph entitled "Bidder's Qualifications" which stated that the agency reserved the right to conduct an inspection of the bidder's plant (and those of its subcontractors, if any) in order to determine the bidder's responsibility.

In addition to responsibility criteria of a general nature, such as the bidder's financial resources and ability to make timely delivery, several specific qualifications were set out in the solicitation. Bidders were required to have in their announced product lines an item similar to that specified, to have been manufacturers of those items "for at least five years," and to have sufficient lumber "on hand" for completion of the contract. Finally, to "insure proper control of lumber, the bidder [was required to] have at his plant modern kilns of forced circulation type." (Emphasis added.) The agency determined that Brodart was not qualified for award of this contract because the firm lacked a wood-drying kiln at its plant. Upon being notified of the award to Mohawk, Brodart protested. Brodart does not question that it lacks a kiln, but contends that the requirement for an on-site kiln was unduly restrictive of competition: Brodart points out that most competitors lack such equipment and, in Brodart's view, it is not needed to produce furniture of the quality specified. Brodart further contends the agency improperly permitted Mohawk to lower its bid price, and that the contracting officer improperly determined Mohawk was a responsible prospective contractor. For reasons discussed below, this protest is dismissed in part and denied in part.

Bids were opened on March 22, 1979 and by letter of May 30 Brodart was informed award had been made to Mohawk on May 25. Brodart concedes it received this letter on June 1. Since Brodart's protest was received in this Office on June 19, the agency contends it is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2 (1979). We agree to the extent the protest relates to the kiln requirement. Protests based upon alleged improprieties apparent on the face of an IFB must be filed prior to bid opening date and protests based upon other grounds must be filed not later than 10 working days after the basis is known or should have been known, whichever is earlier. One of the purposes of these time limitations is to enable this Office to decide an issue while it is still practicable to take effective action where the circumstances warrant. For example, in this case, a protest filed well prior to bid opening would have permitted review and, if the protest were meritorious, amendment of the solicitation prior to exposure of the competitors' bids and award of the contract. The solicitation clearly stated that to qualify for award, "the bidder shall have at his plant modern kilns of forced circulation type" to insure proper control of lumber. Any objections Brodart had to this requirement should have been stated prior to bid opening.

Brodart contends that "superfluous" provisions in solicitations for furniture are commonly ignored as long as the prospective contractor proposes to provide a final product strictly complying with the contract requirements. Brodart states it did not protest prior to bid opening because it assumed the agency was concerned with the end product and not with what Brodart considers an unnecessary IFB provision.

It is well established, however, that a trade or business custom or practice may not supersede or alter the clear and unambiguous terms of a contract. The Murphy Elevator Company, Incorporated, B-180607, April 2, 1974, 74-1 CPD 164. We think the mandatory nature of the kiln requirement was clear and unambiguous; therefore, the existence of the alleged practice is academic. ||

Brodart also contends that in not protesting the requirement until its bid was rejected, it was doing nothing more than following the rationale expressed in Edw. Kocharian & Company, Inc., 58 Comp. Gen. 214 (1979), 79-1 CPD 20. In that case, the protester's bid was found to be nonresponsive because it had not strictly complied with a mandatory site inspection provision prior to bidding. The agency viewed the protest as one against the inclusion of the site inspection provision in the solicitation and contended the protest was untimely because it was not filed prior to bid opening. Because the mandatory prebid site inspection clause had become a standard requirement in all IFBs issued by the agency, we held the issue to be one significant to procurement practices or procedures and the protest was considered on its merit without regard to the timeliness issue. Thus, the Kocharian case provides no support for delaying the protests of objectionable solicitation features until after bid opening.

In Computer Machinery Corporation, B-185592, June 3, 1976, 76-1 CPD 358, which Brodart cites, we found a post-award protest timely where the protester was objecting not to the evaluation criteria as stated in the request for proposals but to the manner in which such criteria had been applied. However, that case provides no support for holding that a protest of a mandatory IFB provision may be delayed until it is applied in accordance with its terms.

Brodart argues in the alternative that even if its protest with regard to the kiln requirement should be considered untimely, it should be considered on the merits under the exception to the timeliness requirements set forth in our Bid Protest Procedures, section 20.2(c). That rule provides for consideration of an untimely protest if it raises a question of significance to procurement practices or procedures. Brodart argues the circumstances surrounding this case raise significant issues because the contracting officer has acted in an irregular manner which has been detrimental to Brodart and which, unless addressed, will impugn the integrity of the competitive procurement system.

Specifically, Brodart suggests that the contracting officer engaged in an "irregular pattern of conduct" designed to "wire" the procurement for Mohawk and that Mohawk was awarded the contract at an unreasonably high price. We have considered the arguments made by Brodart and find that they do not warrant a departure from our timeliness rules.

Brodart has made a number of allegations concerning the contracting officer's personal conduct in which he is portrayed, at best, as a person who is careless with facts and, at worst, as deceitful and untrustworthy. The truth of some of these allegations has not been established and in some instances it has not been clearly shown how the actions complained of prejudiced Brodart. The most concrete evidence that Brodart puts forward to establish its claim that the procurement was "wired" for Mohawk is the contracting officer's insertion of the kiln requirement in the IFB. Again, we believe that if Brodart perceived this requirement as an attempt to direct the contract to Mohawk, it was obligated to protest prior to bid opening.

Brodart also alleges that we should examine the merits of its protest because the contracting officer awarded the contract at an unreasonably high price. (Mohawk was the fourth low of five bidders and its corrected price of \$866,864 was \$222,682 above Brodart's.) The only evidence Brodart furnishes in support of its contention is that it and two other bidders offered lower prices than Mohawk. However, it appears that each of these bids is nonresponsive, as discussed below, and that none of these bidders possesses a wood drying kiln at its plant. We do not believe these facts are a sufficient basis to overcome the determination of price reasonableness inherent in the making of the award to Mohawk.

We have held that significant issue exception to the timeliness requirement must be exercised sparingly if our timeliness standards are not to become meaningless. COMTEN, B-185394, February 24, 1976, 76-1 CPD 130, affirmed B-185394, May 18, 1976, 76-1 CPD 330. Thus, we will not regard an issue as significant unless it is of widespread interest or goes to the heart of the competitive procurement process. Willamette-Western Corporation, et al.,

54 Comp. Gen. 375, 376 (1974), 74-2 CPD 259. The significance of an issue for purposes of this exception does not depend upon the amount of money involved. 52 Comp. Gen. 20, 23 (1973). The primary issue presented here concerns the propriety of a specific standard of responsibility clearly set forth in a solicitation. We cannot conclude that it is of such widespread interest as to warrant consideration here under this exception to our timeliness requirements. Power Conversion, Inc., B-186719, September 20, 1976. In our opinion, this case does not present an opportunity to add anything of significance to the application of the principles set forth previously in many GAO decisions pertaining to undue restrictions of competition.

For these reasons, we will not consider on the merits Brodart's untimely protest concerning the on-site kiln requirement.

Brodart also contends that the agency's permitting Mohawk to substantially lower its price after bid opening without giving the other bidders a similar opportunity violated competitive bidding requirements. The agency explains the price reduction resulted from Mohawk's discovery of a mistake in one of the component parts of its bid and that its bid price was higher than it should have been. As the correction does not alter the cost standing of the other bidders, the agency contends acceptance of the price reduction was in the best interest of the Government and of no prejudice to the other bidders.

Paragraph 8(e) of the Solicitation Instructions and Conditions (Standard form 33-A (Rev. 7-77) which was a part of this solicitation provides that a late modification of an otherwise successful proposal which makes its terms more favorable to the Government may be considered at any time it is received and may be accepted. As acceptance of Mohawk's price reduction did not change the relative standing of the other bidders and was in the best interest of the Government, we know of no reason why it could not be accepted. 40 Comp. Gen. 466, 468 (1961). This portion of Brodart's protest is denied.

Brodart has also alleged that Mohawk's financial condition should have precluded a finding that the firm was a responsible prospective contractor. However, our Office will not review affirmative determinations of responsibility absent a showing of fraud on the part of procuring officials or that definitive responsibility criteria in the solicitation have not been applied. Carsonville Metal Products Co., B-195991, September 25, 1979, 79-2 CPD 224. There has been no such showing here.

We believe it should be pointed out that apart from the requirement for an on-site kiln, which is the focus of Brodart's complaint, all of the bidders other than Mohawk may have been ineligible for award because their bids were qualified by exceptions to the IFB. The record suggests that either there was a widespread lack of knowledge within this industry of the rules governing Federal formally advertised procurements or--as Brodart suggests--a past practice of the Library of Congress of not enforcing solicitation requirements.

The low bidder, Fraser (\$594,770), inquired of the contracting officer prior to bid opening whether it was the agency's intent to permit the use of particleboard in the card cases. Fraser was of the opinion that the specifications were unclear in this respect and, in Fraser's words, particleboard was "infinitely cheaper" than a solid lumber core. The contracting officer then issued an amendment to the IFB prohibiting the use of particleboard in other than the case tops. Fraser failed to acknowledge receipt of this amendment.

The contracting officer waived Fraser's failure to acknowledge the amendment as a triviality. However, Fraser was later found to be nonresponsible because it lacked an on-site kiln.

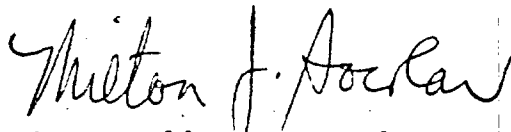
It is clear that at the time Fraser brought this ambiguity in the specifications to the contracting officer's attention, Fraser thought that it would be at a significant competitive disadvantage if it bid on the basis of using lumber core while other bidders were permitted to offer particleboard. The contracting officer thought the point raised by Fraser significant enough to warrant the issuance of an amendment. We cannot reconcile these facts with the later determination that the amendment was "trivial." In our opinion, Fraser's bid was nonresponsive.

As for the protester, Brodart (\$644,182), we note that the IFB specifications required the case hardware and trays to be certain Weber-Knapp items or "equal." Prior to bid opening, Brodart received a written quotation for these items from Weber-Knapp which stated a longer delivery time than permitted by the IFB. There is no indication that Brodart asked the agency to extend the delivery schedule in view of this information. Instead, it qualified its bid by offering a later delivery than that permitted by the solicitation.

The third low bidder, Cole (\$817,250), typed a note upon its bid which stated that the firm was bidding upon its standard items: "the standard construction includes particle board." Although Cole was found nonresponsive for lack of an on-site kiln, we believe there is also a substantial question as to the responsiveness of its bid.

Mohawk was the fourth low bidder; no question has been raised as to the responsiveness of its bid. The responsiveness of the highest bid, that of Buckstaff at \$950,799, has not been at issue but the abstract of bids indicates that firm took exception to the IFB in several respects.

From these facts we think it probable that even if there had not been a requirement for an on-site kiln, all bids other than Mohawk's would have been for rejection as nonresponsive.



For the Comptroller General
of the United States