



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Atlas Pacific Corporation

File: B-232506

Date: November 8, 1988

DIGEST

1. Protest of solicitation's misdescription of surplus scrap metal is untimely where protester was aware that property was misdescribed and that agency would request waiver of liability for the misdescription prior to bid opening but did not file a protest with the agency until after bid opening.
2. An agency may award misdescribed surplus property to the high bidder where the property is less valuable than what was advertised and the high bidder is willing to waive its rights under the solicitation's Guaranteed Description clause.

DECISION

Atlas Pacific Corporation protests the award of a contract to Pacific Rim Aluminum, Ltd. under Sale No. 41-8439, conducted by the Defense Logistics Agency (DLA), Defense Reutilization and Marketing Region-Ogden, for kirksite scrap metal. Atlas argues that because the solicitation misdescribed the property as kirksite when it was actually 30 percent lead, DLA should have readvertised the sale, rather than awarding to the high bidder who executed a waiver acknowledging the misdescription.

We dismiss the protest.

The solicitation, issued on July 9, 1988, incorporated by reference the instructions, terms and conditions in the DLA "Sale by Reference" pamphlet dated January 1987. This pamphlet cautioned bidders to inspect the property prior to submitting a bid and stated that the property was offered "as is" and "where is" with no warranty as to quantity, quality, weight or description. It also contained a Guaranteed Description clause that provided, with certain

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limitations, that the property delivered would be as described in the solicitation and, if not, the purchaser would be entitled to a refund or downward adjustment in the price. The government also reserved the right to vary the weight of the property delivered by 25 percent.

Item 53 for which Pacific Rim's bid was accepted was listed in the solicitation as scrap kirksite, 600,000 pounds. Kirksite is a zinc alloy that contains about 97 to 98 percent zinc. After the solicitation was issued, DLA discovered that the property was approximately 30 percent lead by weight, rather than 100 percent kirksite, a more valuable metal than lead. DLA determined that rather than withdraw the property from sale, it would require the successful bidder for the property to sign a waiver acknowledging the misdescription and waiving any claim against the government. Atlas inspected the property before bid opening and was informed of the misdescription and the waiver requirement. Pacific Rim did not inspect the property prior to bid opening and was not aware of the misdescription.

DLA received eight bids at the August 9 bid opening. Pacific Rim was the high bidder at \$190,560. Atlas was the third high bidder at \$176,394. Atlas' bid was accompanied by a letter stating that it was bidding on 70 percent kirksite and 30 percent lead, acknowledging that a waiver would be required, and emphasizing that its bid would be significantly higher if it were bidding on kirksite only.

On August 15, DLA informed Pacific Rim that it would only receive the award if the firm agreed to execute a waiver acknowledging the misdescription. Pacific Rim inspected the property on August 16 and advised DLA that it intended to sign the waiver. The following day, DLA discovered that the weight of the property was not 600,000 pounds as advertised, but 850,000 pounds. On August 31, DLA awarded a contract to Pacific Rim, with a waiver specifying that the firm understands that it may remove only 750,000 pounds of the kirksite (a 25 percent variation), and that the property contains 30 percent lead.

Atlas challenges the award to Pacific Rim, arguing that DLA is required to readvertise the sale because the property was misdescribed. Atlas' protest thus is based on an alleged impropriety apparent from the face of the solicitation--misdescription of the property--and was required to be filed before bid opening. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988). Since the protest was not filed until after award was made, it is untimely.

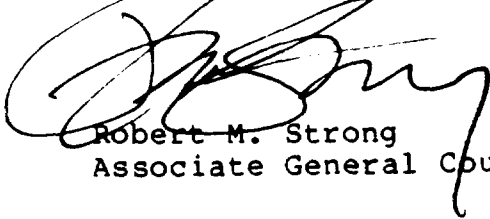
Atlas argues that it had no reason to challenge the misdescription before bid opening because it had been advised by the contracting officer during the site visit to bid on the actual property, and assumed all bidders would do the same. According to Atlas, only after bid opening did it have any reason to question whether all bidders had based their bids on the actual property. We find this argument unpersuasive. There was no reasonable basis for Atlas to assume that all bidders would bid based on the actual property. No amendment to the solicitation was issued correcting the misdescription or requiring site visits by the bidders to ascertain the actual composition of the property. In addition, to the extent that Atlas claims it relied on oral advice from the contracting officer to forgo filing a protest, such reliance was unreasonable. See Westinghouse Electric Corp., B-224492, Aug. 9, 1986, 86-2 CPD ¶ 165.

In any event, Atlas' protest is without merit. As recognized since the decision in MacDell Corp., B-156813, June 30, 1965, the standard Guaranteed Descriptions clause applicable to sales confers no rights on anyone except the bidder to whom award is made. In MacDell, we held that an agency could not properly refuse to award misdescribed surplus property to the high bidder where the property was less valuable than that which was advertised when the high bidder was willing to waive its rights under the Guaranteed Description clause, just as a bidder in line for award may be permitted to offer terms more favorable to the government. Id.

Here, the property was advertised by DLA as kirksite, but actually contained 30 percent lead, a less valuable metal. Atlas argues that due to a rise in the price of zinc, the property increased in value between bid opening and award, making it actually more valuable, rather than less valuable, than when it was advertised, and the high bidder therefore was not entitled to award of the misdescribed property after executing the required waiver. DLA disagrees, arguing that, although the property was misdescribed, because of the 30 percent lead content it was actually less valuable, both at bid opening and the date of award, than that which was advertised. In our view, whether the market price for kirksite increased or decreased during the period between bid opening and award is irrelevant since bidders assume the risk of market fluctuations subsequent to bid opening. The relevant fact is that the property actually for sale was of lower value than the property as advertised at the time it was offered, and that the high bidder was willing to accept

the property as is, releasing DLA from liability for the misdescription. Under these circumstances, the award to Pacific Rim was proper.

The protest is dismissed.

A handwritten signature in black ink, appearing to read 'R. Strong', is written over the typed name and title.

Robert M. Strong
Associate General Counsel