

DECISION

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

FILE: B-218548
MATTER OF: SMATCO, Inc.

DATE: June 19, 1985

DIGEST:

1. A protest will be dismissed as untimely if filed later than 10 days after the basis for the protest was known or should have been known.
2. A bid bond requirement is a material part of the solicitation and cannot be waived by the contracting officer nor cured after bid opening.
3. There is adequate competition on a solicitation where the agency sends the solicitation to 77 prospective offerors, the government receives a reasonable price for the procurement and there is no deliberate attempt to exclude a particular firm.
4. A nonresponsive bid cannot be accepted even if it offers a monetary savings to the government since the maintenance of the integrity of the competitive bidding system is more in the government's best interest than the pecuniary advantage to be gained in a particular case.

SMATCO, Inc. (SMATCO), protests the denial of its request to extend the bid opening date by the Department of the Navy (Navy), and the rejection of its bid for failure to provide a bid bond.

The Navy's response is that the contracting officer's refusal to extend the bid opening was reasonable and the rejection of SMATCO's bid was proper.

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The protest is dismissed in part and denied in part.

On January 28, 1985, the Navy issued invitation for bids (IFB) No. N00024-85-B-2037, for the construction of naval vessels. Bid opening was March 12, 1985. Realizing it would be unable to submit a bid bond with its bid, SMATCO telephoned the contracting officer on March 8, 1985, and requested an extension of the bid opening. The contracting officer denied this request, and the bid opening occurred as scheduled. Even though it submitted the lowest price, SMATCO's proposal was rejected as nonresponsive, and the contract was awarded to the next lowest bidder.

SMATCO's contention that its request for an extension of the bid opening was arbitrarily rejected is dismissed as untimely. Our regulations require that a protest must be filed with GAO within 10 days after the protest grounds are known or should have been known. See 4 C.F.R. § 21.2(a)(2). The basis of this protest was known on March 8, when the contracting officer denied the request for an extension. Since SMATCO did not file a protest with our Office until April 11, the protest on this issue must be dismissed as untimely.

SMATCO also argues that its bid was improperly rejected as nonresponsive and that a bid bond requirement can be waived by the contracting officer or the Comptroller General. In the alternative, SMATCO argues that a bidder can cure its defective bid by submitting a bid bond after opening.

SMATCO's bid was properly rejected. It is well settled that a bid is nonresponsive when the required bond is not submitted. Fitts Construction Co., B-211514, 62 Comp. Gen. 615, 83-2 C.P.D. ¶ 190. See also Federal Acquisition Regulations (FAR), 48 C.F.R. § 28.104-4 (1984). In addition, a solicitation provision requiring a bid guarantee is a material requirement of the solicitation, and as such cannot be waived. Design Engineers, B-214658, Apr. 10, 1984, 84-1 C.P.D. ¶ 408.

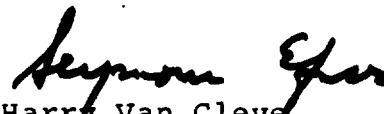
SMATCO's proposition that a bidder can cure the defect in its bid after the bid opening is also rejected. When required, a bid bond is a material part of the bid and must be furnished with it. Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 C.P.D. ¶ 400. Moreover, the responsiveness of a bid must be established at the time of the bid opening, and is not affected by a later offer to cure any defects. Perkin-Elmer, B-214040, Aug. 8, 1984, 84-2 C.P.D. ¶ 158.

SMATCO further argues that the rejection of its bid unduly restricts competition because it resulted in an award based upon only two responsive bids. SMATCO contends that two bids does not represent adequate competition, and the Navy was forced to accept a bid higher than its own.

This protest basis is denied. Adequacy of competition cannot be determined by counting the number of bids solicited or received. We have held that adequate competition may result when only a small number of responsive bids or even one bid is received, so long as the agency makes the required effort to achieve competition. Ashland Chemical Co., B-216954, May 16, 1985, 85-1 C.P.D. ¶ _____. Other determinative factors are that the government receives a reasonable price and that there is no deliberate attempt to exclude a particular firm. Reliable Elevator Corp., B-191061, Apr. 27, 1978, 78-1 C.P.D. ¶ 330. Here, the record indicates the Navy sent solicitation packages to 77 prospective offerors. Further, there is no evidence that the price paid by the awardee is unreasonable. Merely because a protester's bid was lower than the awardee's, does not mean the price received is unreasonable. Survivair, division of U.S.D. Corp., B-215214, Dec. 3, 1984, 84-2 C.P.D. ¶ 600. In addition, there has been no showing the Navy deliberately excluded SMATCO from the solicitation process. We conclude that adequate competition existed despite the small number of responsive bids received.

Moreover, our Office has held that a nonresponsive bid cannot be accepted, even if it offers a product at a lower price. Maintenance of the integrity of the competitive bidding system is more in the government's best interest than the pecuniary advantage to be gained in a particular case. Survivair, division of U.S.D. Corp., B-215214, supra.

The protest is dismissed in part and denied in part.

for 
Harry Van Cleave
General Counsel