

DECISION



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

W1443

FILE: B-186594

DATE: September 3, 1976

MATTER OF: Lloyd Kessler

098079

DIGEST:

Solicitation which provides for evaluation of only one of the two items which are in fact awarded is defective.

Lloyd Kessler (Kessler) protests the United States Forest Service (Forest Service) award of a contract for restoration of the West Fork of the Stillwater Trail, Custer National Forest under Invitation for Bids (IFB) R1-11-76-60 to Albert Burton (Burton). The IFB's description of work set forth two requirements. The first requirement, Base Item A, was the restoration of the trail while the second, Alternate No. 1, called for construction of a 24' native timber bridge. The solicitation stated the following basis of award:

"Award will be made to one bidder for the lowest responsible bid received under Total Base Bid Item A."

It also specified that the Alternate No. 1 would not be awarded unless the Base Item A was also awarded. The bids were opened on May 13, 1976. Of the six bids submitted two presented the contracting officer with identical totals for both of the requirements set out in the description of work.

Kessler

Base Item A	20,060
Alternate No. 1	<u>4,000</u>
Total	24,060

Burton

Base Item A	15,060
Alternate No. 1	<u>9,000</u>
Total	24,060

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On May 18, 1976, Kessler inquired as to the status of the procurement and was advised that award had been made the previous day to Burton. The contracting officer was of the opinion that the basis of evaluation set out in the IFB, "the lowest responsible bid received under Total Base Bid Item A," governed and that award to Burton, who was \$5,000 lower than Kessler on Base Bid Item A, was proper.

On May 25, 1976, Kessler protested to this Office the award on the grounds that the solicitation contained an invalid award provision and that the contracting officer had failed to follow the tie bid procedures when he was confronted with identical low bids.

We agree with the protester's contentions. The lowest responsible bidder must be determined based on the work to be let. Any award standard which allows more or less than the work to be contracted for in selecting the lowest bidder does not obtain the benefits of full competition which is one of the chief purposes of the public procurement statutes. If award is to be made on two items, award for both to the bidder who is low on one of the items without regard to his relative standing as to the other may not result in an award to the lowest responsible bidder. See, B-143404, September 15, 1960.

In the instant procurement we are confronted with the following: two equally low bids for the total work to be let; a defective solicitation which stated that award would be on the basis of the base bid alone; and a regulation, FPR 1-2.407-6, which directs that a drawing by lot limited to the tied bidders shall determine the recipient of the award. The contracting officer's determination was in accordance with the defective provision in the invitation, but not in accordance with the applicable provision in the regulation regarding tie bids. We have in the past noted that:

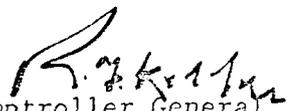
"* * * bidders normally compute their bids on the basis of the terms and conditions stated in the invitation, and will otherwise rely on these provisions and that it is a serious matter to vary or disregard any of the stated terms and conditions of the solicitation after bids have been opened. In 17 Comp. Gen. 554 (1938), it was stated that to permit public officers to permit bidders to vary their proposals after bids are opened would soon reduce to a farce the whole procedure of letting contracts on an

open competitive basis. Changing the ground rules upon which bidders are requested to bid after opening of bids is subject to the same criticism." 50 Comp. Gen. 42, 43-44 (1970).

The Forest Service asserts that the solicitation's basis of award was structured so as to protect the integrity of the competitive bidding system by precluding the possibility of favored bidder selection through the device of alternate selection. We have noted that the preferred means of achieving this objective is thru provisions similar to those contained in Armed Services Procurement Regulation (ASPR) § 2-201(b)(xli) (1974 ed.) which provides a procedure for stating in the invitation a priority order in which alternates will be accepted. See, H. M. Byars Construction Company, 54 Comp. Gen. 320 (1974), 74-2 CPD 233; Sterling Engineering and Construction Company, Inc., 55 Comp. Gen. 443 (1975), 75-2 CPD 293. However, as the above cited decisions indicate the FPR do not contain a similar provision. In any event the procedure followed here is no substitute for the procedure provided in the ASPR when it comes to protecting the integrity of the competitive bidding system.

Had correct procurement procedures been followed the contractor would have been chosen by lot. Which bidder would have won the drawing, of course, is speculative. At this point, however, we do not think remedial action is practical. We have been advised that termination costs of approximately \$15,000 would be incurred by the Government if this contract were terminated. We are therefore not recommending such a course of action, but instead are, by letter of today, writing the Secretary of Agriculture and recommending that steps be taken to avoid a reoccurrence of this situation.

Acting


Comptroller General
of the United States