

DECISION

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

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FILE: B-214467

DATE: June 27, 1984

MATTER OF: Wilmington Shipyard, Inc.

DIGEST:

1. Bid offering performance period of 60 days was properly rejected as nonresponsive, even though the invitation contains seemingly conflicting provisions subject to two interpretations regarding the length of the required period, since 60 days exceeds the required performance period under either interpretation.
2. Erroneous practices of contracting personnel in prior procurements do not estop the contracting agency from rejecting a bid where required to do so by law.

Wilmington Shipyard, Inc. protests the Army's rejection of its bid to drydock, clean, paint and repair an Army vessel under invitation for bids No. DABT57-84-B-0005. The Army determined the protester's bid to be nonresponsive, whereas the protester contends that the bid deficiency, if there is one, is minor; that it relied on previous advice of the prior contracting officer in preparing its bid; and that the current contracting officer previously accepted a bid prepared in this manner by the protester. The protester also requests bid preparation costs.

We deny the protest in part and deny the request for bid preparation costs.

The solicitation contained many basic items and several "indefinite," or alternative, items to be priced individually. One indefinite item required the contractor to provide towing services from the point of pickup to the contractor's plant, and another provided for towing services to return the vessel. The Army reserved discretion under the invitation to determine after bid opening whether to order both or either of the towing services, or to transport the vessel itself, in which case the government's transportation costs were to be evaluated.

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The invitation included two Special Provisions, in succession, and two other provisions relating to the time frame in which the services must be performed:

--The first Special Provision, reflecting the indefinite nature of the towing services, listed a performance period of "50 days plus a maximum allowance of 10 days for towing services, both to and from contractor's plant."

--The second Special Provision stated that "All services are required to be completed within 50 calendar days after commencement date as shown on the Job Order."

--The invitation's cover sheet stated that the period of performance was "within fifty (50) calendar days after commencement date, as shown on the Job Order."

--The Bid Form, on which firms were to enter prices, warned that, "ACTIVATION OF ANY INDEFINITE ITEMS DOES NOT ENTITLE THE CONTRACTOR TO ANY TIME EXTENSION."

The invitation also included an "Offeror's Proposed Performance Schedule," stating that "[a]ll services shall be completed within _____ calendar days after the commencement date on the job order." Bidders were required to complete the Proposed Performance Schedule and submit it with their bids.

The protester inserted "60" in the blank on the Proposed Performance Schedule. While the protester's bid offered the lowest evaluated price, the Army rejected it as nonresponsive because the proposed performance schedule exceeded 50 days. The Army therefore awarded a contract, exclusive of towing services, to another bidder.

The protester alleges that the previous contracting officer in a prior procurement had instructed it to complete the Proposed Performance Schedule in this manner, apparently to reflect time for towing services, and awarded the protester a contract in that procurement. The record shows that the current contracting officer also accepted such a bid from the protester. The protester contends that it therefore was wrong for the agency to reject its bid under the current invitation.

Our Office consistently has stated that a bid that does not conform to the required delivery or performance schedule is nonresponsive. Arvie Mfg. & Supply Co., B-210114, Jan. 4, 1983, 83-1 CPD ¶ 10. To be responsive, a bid must unequivocally offer to meet the invitation's material terms--that is, those terms having more than a trivial effect on price, quality, quantity or delivery--at the offered price. International Waste Industries, B-210500.2, June 13, 1983, 83-1 CPD ¶ 652. A deviation from the required delivery schedule cannot be waived as a minor informality since the deviation involves a material term, Railway Specialties Corporation, B-212535, Oct. 31, 1983, 83-2 CPD ¶ 519, so that a bid containing such a deviation must be rejected. Sullair Corporation, B-214121, April 17, 1984, 84-1 CPD ¶ 436.

We find the solicitation's performance period terms confusing. It is not clear to us whether the Army intended all services other than towing to be performed within 50 days, with the contractor receiving an extra 10 days for towing if those items were ordered (thus giving effect to the first Special Provision, quoted above), or whether the Army intended that literally all services, including towing, must be accomplished within 50 days. Under either interpretation, however, the protester's bid was nonresponsive.

If the provision for an extra 10 days for towing was intended to have effect, it is clear from the other provisions that the bidder still had to offer a 50-day performance period for the basic services, and the 10 days would be added when and if towing was ordered. Thus, even if the Army intended to allow 60 days for performance where towing was included, clearly only 50 days were permitted without towing. Wilmington's bid, however, must be read as reserving a period of at least 60 days to perform the contract whether or not towing is ordered. Wilmington's 60 day offer thus was inconsistent with the required non-towing schedule (which became the basis for award), and therefore was nonresponsive.

The protester states that it entered the figure "60" on the Proposed Performance Schedule in reliance on advice it received from the previous contracting officer, and on the fact that the Army previously had accepted its 60 day performance schedule in response to the same delivery terms. The Army responds that it has no knowledge of what the previous contracting officer may have advised the

protester, but acknowledges that a prior contract was awarded to the protester in response to a bid offering a 60-day performance period.

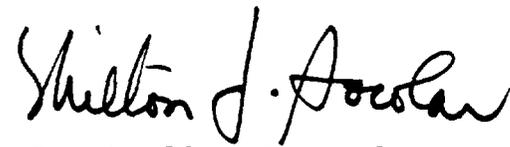
We do not believe that the purported prior advice of the previous contracting officer is relevant to this case, since the earlier solicitations differed significantly from the current solicitation and the one under which the current contracting officer made an award to the protester. The earlier solicitations apparently contained a second Special Provision in which the required performance period included the additional 10 days for towing.

The solicitation under which the current contracting officer made an award to the protester, however, did contain identical provisions to those in the present solicitation, and the record shows that by mutual agreement the contract was modified to reflect a 50-day performance schedule. Nevertheless, notwithstanding the prior actions of this (or the other) contracting officer, we consistently have taken the position that erroneous practices by contracting personnel in prior procurements do not estop or preclude the agency from rejecting a bid where required to do so by law. Emerald Electric, B-212460, Oct. 26, 1983, 83-2 CPD ¶ 505; Northern Telecom, Inc., B-209412, April 12, 1983, 83-1 CPD ¶ 382. We therefore believe the Army properly rejected the protester's nonresponsive bid.

The protest is denied.

In view of our conclusion that Wilmington Shipyard's protest lacks merit, the claim for bid preparation costs is denied. See Garrison Construction Company, B-211359.2, Oct. 31, 1983, 83-2 CPD ¶ 515.

Although we find no merit in the protest, we believe, as stated above, that the invitation's provisions governing the performance period were somewhat confusing, and also that the confusion was compounded by the Army's historically inconsistent use and application of the Special Provisions. We therefore are recommending to the Secretary of the Army, by separate letter, that appropriate action be taken to correct the situation for future procurements.

for 
Comptroller General
of the United States