



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: GMI, Inc.
File: B-239064
Date: July 3, 1990

Robert S. Thomas, Esq., for the protester.
Justin P. Patterson, Esq., Office of the Solicitor,
Department of the Interior, for the agency.
C. Douglas McArthur, Esq., and Michael R. Golden, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

A request for progress payments is precatory in nature and does not render a bid nonresponsive in the absence of circumstances which indicate that the request is more than a mere wish or desire.

DECISION

GMI, Inc. protests the rejection of its bid under invitation for bids (IFB) No. 7631, issued by the Department of the Interior for temperature sensor assemblies and extension cables. The agency rejected the protester's bid because it believed that the protester's request for progress payments, which accompanied the protester's bid, rendered the bid nonresponsive.

We sustain the protest.

The agency issued the solicitation on November 20, 1989, as a 100 percent small business set-aside for a firm, fixed-price contract for the assemblies and cables. The solicitation included the clause at Federal Acquisition Regulation (FAR) § 52.232-15 (FAC 84-29), Progress Payments Not Included, which stated that bids conditioned upon inclusion of a progress payments clause would be rejected as nonresponsive.

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The agency received five bids on December 28 and the protester submitted the lowest bid. The agency rejected the protester's bid as nonresponsive because the cover letter to the protester's bid stated, "GMI is requesting progress payments in accordance with [FAR §], 52-232-16, 'Progress Payments,'" and GMI had inserted virtually identical language under the IFB's invoicing instructions.

By letter dated March 13, 1990, the agency notified the protester that it had rejected GMI's bid as nonresponsive because of the protester's request for progress payments. The agency advised GMI that it had awarded a contract to the remaining low responsive, responsible bidder, Tool-Tronics Hydrospace, Inc., at a price of \$88,605. The protester filed this protest with our Office on March 27.^{1/} Contract performance was not suspended because the protest was not filed within 10 calendar days of award. 31 U.S.C. §§ 3553(c) and (d) (1988).

To be considered for an award, a bid must be responsive-- that is, it must offer to comply, without exception, with those terms of the IFB having more than a trivial effect on price, quality, quantity, or delivery. FAR §§ 14.301(a) and 14.405 (FAC 84-53); Valley Forge Flag Co., Inc., B-216108, Sept. 4, 1984, 84-2 CPD ¶ 251. An IFB provision prohibiting the submission of bids that condition an award on the contractor's receipt of progress payments is a material provision affecting price, so that any exception to the provision would render the bid nonresponsive and require its rejection. Lavelle Aircraft Co., B-218309, June 12, 1985, 85-1 CPD ¶ 678; Canadian Commercial Corp., 62 Comp. Gen. 113 (1983), 83-1 CPD ¶ 16, aff'd, Defense Logistics Agency-- Reconsideration, B-207777.2, Mar. 18, 1983, 83-1 CPD ¶ 275.

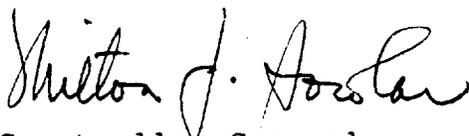
^{1/} The agency contends that the protest is untimely because it was filed with our Office more than 10 days after award. Our Bid Protest Regulations, 4 C.F.R. § 21.0(e) (1990), clearly provide that the 10-day period for filing protests, 4 C.F.R. § 21.2(a)(2), refers to "working days" of the federal government. GMI's protest, filed within 10 working days of award and 6 working days after receiving notice that the agency had rejected its bid, is therefore clearly timely.

However, a notation containing a "request" for progress payments ordinarily must be construed as precatory in nature, and does not render a bid nonresponsive unless circumstances indicate that the request is something more than a wish or desire. Canadian Commercial Corp., 62 Comp. Gen. 113, supra. The agency states that in the cited case the bidder had requested progress payments in accordance with governing regulations, but the protester here twice in its bid package requested progress payments in accordance with FAR § 52.232-16, the specific clause covering progress payments. We have no basis to conclude that the protester's identification of the specific regulation permitting progress payments in its two requests compared to a request for progress payments in accordance with governing regulations converts the request into something more than a wish or desire.

Since nothing in the record indicates that GMI's request for progress payments was anything more than the expression of a wish or desire for such payments, we think it is clear that the agency would not have been obligated to make such payments had it accepted the protester's bid. Thus, as a legal matter, the agency should not have viewed the protester's bid as taking exception to the solicitation and should not have rejected the bid as nonresponsive.

With regard to a remedy, the agency was not required to suspend performance, 31 U.S.C. § 3553(d)(1) (1988), and did not do so. The agency has advised us that these are not off-the-shelf items and that substantial performance costs have been incurred by the awardee. Therefore, it is not practicable to recommend corrective action. However, we find the protester is entitled to its bid preparation costs and its costs of pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d). The protester should submit its claim for costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.

for 
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of the United States