

DECISION



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

60476

FILE: B-185248

DATE: February 5, 1976

MATTER OF: Avantek, Incorporated

DIGEST:

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99147

1. Contracting officer acted unreasonably and in contravention of ASPR § 2-208 in failing to at least telephonically notify five firms on bidders' list of correct bid opening time when he was made aware of patent error in IFB, which designated bid opening time as either ".30 PM" or "30 PM," even though DD Form 1707 included in solicitation package but not incorporated in IFB indicated correct bid opening time of 1:30 p.m. Contracting officer should not merely presume that reasonable bidders would inquire as to correct bid opening time under such circumstances.
2. Late bidder acted unreasonably in assuming that bid opening under IFB, which designated bid opening time as either ".30 PM" or "30 PM", would occur at 3 p.m. (actual bid opening was at 1:30 p.m.), and had duty to inquire of agency regarding patent discrepancy, even though agency improperly failed to notify bidder of bid opening time discrepancy when agency was made aware of it. Rule under which IFB's terms would be interpreted against Government as IFB drafter has no application where such a patent discrepancy exists.
3. Although protest, insofar as it concerns IFB discrepancy in designating correct bid opening time, is untimely under Bid Protest Procedures, since it was not filed prior to bid opening, balance of protest, i.e., contention that protester's bid should not have been rejected as late, is timely because protester filed within 10 working days after it became aware of basis for protest.
4. Bidder, who submitted bid 30 minutes after 1:30 p.m. bid opening because it unreasonably interpreted IFB bid opening time designation of either ".30 PM" or "30 PM" as 3 p.m., and did not inquire as to correct bid opening time, may not have its late bid considered, despite substantial contribution to bid lateness of defective IFB and Government's improper failure to notify bidders of correct bid opening time, because bidder caused own lateness and integrity of competitive bid system may be jeopardized if late bid is considered since other bids had been publicly opened.

5. Although IFB was patently defective in indicating bid opening time and contracting officer improperly failed to inform bidders of correct bid opening time when he was made aware of IFB discrepancy prior to bid opening, no compelling reason exists to cancel IFB after bid opening and resolicit requirement since late bidder contributed to own lateness by failing to inquire regarding patent deficiency and there is adequate competition, a reasonable price and absence of any indication of prejudice to other bidders.

This decision concerns the bid protest filed in our Office by Avantek, Inc. (Avantek), against the rejection of its bid as late by the Naval Supply Center, Norfolk, Virginia, under invitation for bids (IFB) NO0189-76-B-0012. The IFB was issued on September 30, 1975, for the supply of six transistor microwave amplifiers.

In block nine of Standard Form 33 (SF 33), which was the first page of the IFB, the time indicated for bid opening reads either "* * * until .30 PM 75 October 30" or "* * * until 30 PM 75 October 30." (There is a dispute regarding the "time" designated in the IFB.) The Navy reports that apparently, in reproduction, some particle had blocked out a portion of block nine of the SF 33, and that the intended printing was "* * * until 1:30 PM 75 October 30." The Navy states that this misprint occurred in all of the IFB's issued to potential bidders.

All of the solicitation packages supplied the bidders (including Avantek) for this IFB contained a Department of Defense Form 1707 (DD Form 1707) titled "Information to Offerors." On the front side of this form, certain salient facts concerning this procurement are outlined. The back of the DD Form 1707 is essentially a "no bid form" to be completed by solicited potential bidders who decide not to bid on the procurement. On the bottom of the back of the DD Form 1707, the intended bid opening time of 1:30 p.m., October 30, 1975, is set out.

The Navy reports that the contracting officer became aware of the misprint on the SF 33 at approximately 4 p.m., October 29, 1975. However, because the intended time was indicated on the DD Form 1707 and because no queries had been received from any of the potential bidders solicited, it was determined that there was no need to extend bid opening. Moreover, it was decided not to notify any of the five

firms on the bidders' list of the correct bid opening time. However, the contracting officer advised the bid opening officer to notify him if problems concerning the opening time developed.

Bids were opened at 1:30 p.m., October 30, 1975, and three bids were submitted by the scheduled bid opening time. The low bid was submitted by the Watkins-Johnson Company (W-J). The Navy states that it received an inquiry from only one of the timely bidders on the morning of October 30, 1975, regarding the correct bid opening time. The Navy reports that the bids timely received were opened, read aloud and recorded. After the bids were recorded, all Government representatives vacated the bid opening room, and a copy of the bid abstract was left in the room and made available to the public. The bid opening apparently took no more than 15 minutes. At approximately 2 p.m., a representative of Avantek attempted to submit a bid. The contracting officer determined that Avantek's bid was late. The Navy has withheld award and retained Avantek's bid unopened pending our decision in this matter.

Avantek has asserted that it reasonably interpreted the bid opening time to be at 3 p.m., October 30, 1975. Avantek has stated that since it intended to bid on this procurement it did not look at the "no bid form" on the back of the DD Form 1707. Avantek delivered its sealed bid to its representative in Maryland with the bid opening time of 3 p.m., clearly marked on the outside of the envelope. Avantek's representative transported the bid by motor vehicle to Norfolk in order to deliver it in time for the presumed 3 p.m. bid opening. The representative states that at no time on October 30, 1975, prior to submitting the unopened bid to Navy personnel, did he communicate with anyone regarding this procurement. He also asserts that he did not open the bid and was unaware of its contents. The Avantek representative has also stated in his affidavit:

"17. I arrived at the Naval Supply Center, Norfolk, Virginia shortly before 2:00 p.m., and was logged in by a security guard at the gate.

"18. I drove to [building where bid opening was scheduled], was requested to and did sign a security register at 2:00 p.m., and took an elevator to the eighth floor.

"19. I initially approached a woman * * * who normally receives responses to Invitation for Bids. She refused to accept Avantek's sealed bid envelope, and directed me to

[another woman], who looked at Avantek's sealed bid envelope, commented that she would have to get someone, and disappeared.

"20. [She] * * * returned in two or three minutes with * * *, the Contracting Officer, and advised me that bid opening had occurred at 1:30 p.m. rather than the 3:00 p.m. indicated on Avantek's sealed bid envelope. She took possession of Avantek's sealed bid envelope, stamped it with a 2:00 p.m. time of receipt, signed it, and requested that I also sign, which I did.

* * * * *

"22. After processing and taking possession of Avantek's sealed bid envelope [she] * * * showed me a synopsis of bids which had already been opened. This was my first indication from any source whatsoever of the amount of the bids which had been opened."

It is Avantek's position that its bid should be accepted as timely, inasmuch as the first page of the IFB (SF 33) indicated that bid opening was at 3 p.m. Avantek asserts that it had no obligation to read the DD Form 1707 because it had every intention of bidding. Consequently, it does not believe it can be said to be on notice of the 1:30 p.m., bid opening time indicated therein. Avantek also asserts that the rule whereby ambiguities are construed against the draftsman should be applied against the Government in interpreting the IFB in this case, and the validity of the 3 p.m., bid time, as interpreted by Avantek, recognized.

Avantek contends that "late" hand-carried bids may be considered, under appropriate circumstances, if the lateness is caused by Government fault and there is corroborating evidence showing that the "late" bidder had no opportunity after the other bids were opened to alter its bid. Avantek cites Le Chase Construction Corporation, B-183609, July 1, 1975, 75-2 CPD 5, and Hyster Company, 55 Comp. Gen. 267 (1975), 75-2 CPD 176, to support its position in this regard. Avantek contends that the evidence and affidavits it has submitted demonstrate Avantek's lack of any opportunity to alter its bid after the other bids were opened. Avantek also points out that the Government was at fault not only for the defective IFB but also for failing to amend the solicitation to correct this defect prior to bid opening when it became aware of this discrepancy. Avantek contends that

this violated Armed Services Procurement Regulation (ASPR) § 2-208 (1975 ed.) which provides for amendment of a solicitation to correct such a defect or ambiguity.

In addition to the Navy's actions in issuing an IFB which did not clearly set forth the exact time of bid opening, we believe the contracting officer acted unreasonably and in contravention of ASPR § 2-208 (1975 ed.) in failing to notify the five firms on the bidders' list, at least by phone, of the correct bid opening time when he became aware of the IFB discrepancy prior to bid opening. The Government should not merely presume, from the absence of queries concerning what it regards as a patent deficiency in the IFB, that all bidders, in the exercise of their reasonable judgment, will ascertain for themselves, either by questioning the appropriate Government officials or by perusing the entire solicitation package, the Government's intended meaning. Indeed, it seems clear that the contracting officer seemingly anticipated that problems could well occur from the failure to notify potential bidders of the correct bid opening time in view of the specific instructions given to the bid opening officer that the contracting officer be notified if problems arose regarding the bid opening time.

In addition, the Navy readily admits that although the DD Form 1707 indicating the correct bid opening time was in the solicitation package, it was not considered part of the IFB. Although ASPR § 2-201 (1975 ed.) indicates that the DD Form 1707 may be made part of the IFB as the "cover sheet," it is clear (contrary to W-J's contentions) that the Navy regarded the SF 33 as the "cover sheet" of the IFB, and that the DD Form 1707 was not part of the IFB. Even if the DD Form 1707 was considered part of the IFB, we believe the contracting officer still should have notified the bidders of the correct bid opening time, so as to ensure that no bidder would be prejudiced by the error in the IFB.

Notwithstanding the foregoing, we believe that Avantek also acted unreasonably in assuming that the correct bid opening time was 3 p.m., whether the IFB indicated ".30 PM" or "30 PM." We agree with the Navy that both ".30 PM" and "30 PM" have no meaning in the context used in the IFB. Where such a patent discrepancy exists in an IFB, we believe it is the duty of the bidder to ask for an explanation prior to submitting its bid, and a reasonable bidder may not blindly make its own assumptions regarding a clearly defective requirement. See Beacon Construction Company of Massachusetts

v. United States, 314 F.2d 501 (Ct. Cl. 1963); Space Corporation v. United States, 470 F.2d 536 (Ct. Cl. 1972); Merando, Inc. v. United States, 475 F.2d 601 (Ct. Cl. 1973). See also B-135933, June 26, 1958, where we found that patent inconsistencies in an IFB regarding the correct bid opening time should be brought to the agency's attention prior to bid opening. Under such circumstances, where the bidder knew or should have known of the patent IFB deficiency, the rule under which the IFB's terms would be interpreted against the Government as the IFB's drafter can have no application. See Jefferson Construction Company v. United States, 151 Ct. Cl. 75 (1960); Space Corporation v. United States, supra, at 539; Merando, Inc. v. United States, supra. Moreover, although the DD Form 1707 was admittedly not part of the IFB, it was in the solicitation package supplied to Avantek. Therefore, we believe Avantek acted unreasonably in failing to inquire as to the correct bid opening time and in assuming that 3 p.m. was the intended time.

In view of the foregoing, Avantek's protest insofar as it is against the IFB's deficient indication of the bid opening time must be regarded as a protest of an impropriety in the solicitation apparent prior to bid opening. Since Avantek did not file its protest prior to bid opening, the protest of the IFB deficiency is untimely under section 20.2(b)(1) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975). See Associated Refuse and Compaction Services; B-180484, April 17, 1974, 74-1 CPD 201; E. Sprague, Batavia, Inc., B-183082, April 2, 1975, 75-1 CPD 194. However, Avantek did not find out until it attempted to deliver its bid that the contracting officer had acted in contravention of ASPR § 2-208 (1975 ed.) in failing to notify the bidders of the proper bid opening time when he realized the IFB deficiency existed. Therefore, since Avantek's protest was received in this Office on November 3, 1975, within 10 working days of when it became aware of this procurement deficiency and since Avantek's protest is essentially against the rejection of its bid as late, the balance of Avantek's protest is timely filed under our Bid Protest Procedures, and will be considered on the merits.

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A bid submitted after the scheduled bid opening time is late and generally may not be considered for award. ASPR §§ 2-301(a), 2-302, and 2-303.1 (1975 ed.); 34 Comp. Gen. 150 (1954); 47 id. 784 (1968). However, a hand-carried bid which is received late may be accepted where the bid lateness was due to improper Government action and consideration of the bid would not compromise the integrity of the competitive bid system. See Le Chase, supra; Hyster, supra, and cases cited therein.

On the other hand, a late bid should not be considered if the late bidder significantly contributed to the bid lateness by not acting reasonably and diligently in fulfilling its own responsibility of delivering its hand-carried bid to the proper place by the proper time, even where the lateness is substantially caused by erroneous Government actions or advice. 47 Comp. Gen., supra; B-169845, June 23, 1970; James L. Ferry and Sons, Inc., B-181612, November 7, 1974, 74-2 CPD 245; Associate Control, Research and Analysis, Inc., B-184071, September 25, 1975, 75-2 CPD 186. Notwithstanding the Government's improper actions in this case, we believe Avantek acted unreasonably in interpreting "30 PM" or ".30 PM" (as the case may be) to be 3 p.m., and in failing to inquire regarding this patently obvious IFB deficiency.

In contrast, the "late" bidders in Le Chase, supra, and Hyster, supra, cited by the protester, acted reasonably and diligently in attempting to deliver their hand-delivered bids. In Le Chase, supra, the "late" bidder, unaware that the two bid opening rooms had been incorrectly designated in the IFB, unsuccessfully sought clarification as to the bid opening place upon arrival at the bid opening building. Thereafter, the bidder proceeded to one of the IFB's designated rooms, which was locked and unoccupied. The bidder finally arrived in the room to which the bid opening had been transferred, one minute after the scheduled bid opening but prior to the actual opening of any bid. In Hyster, supra, the "late" bidder actually tendered, albeit unsuccessfully, its bid to a proper agency official in the bid opening room, prior to the opening of any bids and prior to the bid opening time indicated on the bid opening room clock.

Moreover, it is our belief that acceptance of Avantek's late bid would tend to compromise the integrity of the competitive bid system. The bids were publicly opened, read, recorded and left unattended for public inspection in the bid opening room for a period of approximately 15 minutes. In addition, information regarding the results of the opening was apparently freely made available shortly after bid opening to any who inquired by telephone. In view of the foregoing, the integrity of the competitive bid system could be jeopardized by the consideration of the Avantek bid tendered after the other bids were exposed. See 38 Comp. Gen. 234 (1958), B-143288, June 30, 1960; 47 Comp. Gen., supra. Cf. Commercial Envelope Manufacturing Co., Inc., B-183010, July 17, 1975, 75-2 CPD 44.

The situation is readily distinguishable from the circumstances in the cases referenced by Avantek. In Le Chase, supra, no bids had been opened when the "late" bidder's bid was accepted by the Government. In Hyster, supra, the Government representative improperly refused the timely tender of the "late" bidder's bid, and only accepted the "late" bid after bid opening had commenced. However, the other bids were not read aloud upon opening; the "late" bidder, although still in possession of its bid, was not in the bid opening room during most of the bid opening; the "late" bidder made no attempt to gain access to the other bids which, although available for inspection in the bid opening room, were constantly monitored prior to the acceptance of the "late" bid; and the agency advised our Office that there was no indication that the "late" bidder gained any knowledge of the other bids after opening and prior to the "late" bid's acceptance.

In view of the foregoing, we concur with the Navy's determination that Avantek's bid must be rejected as late.

In addition, we do not believe the circumstances of this case provide a sufficient basis to compel cancellation and resolicitation. The United States Court of Claims stated in Massman Construction Company v. United States, 102 Ct. Cl. 699, 719 (1945), cert. denied. 325 U.S. 866 (1945):

"* * *To have a set of bids discarded after they are opened and each bidder has learned his competitor's price is a serious matter, and it should not be permitted except for cogent reasons.* * *"

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To the same effect, see ASPR § 2-404.1 (1975 ed.), which requires "a compelling reason" for cancellation and resolicitation after bid opening. Although defective specifications may, under appropriate circumstances, be sufficient reason to cancel and resolicit, we have held that the fact that inadequate or deficient provisions are in the IFB does not, per se, require cancellation of an IFB once bids have been opened and the prices exposed. 52 Comp. Gen. 285 (1972); Edward B. Friel, Inc., B-183579, November 20, 1975, 55 Comp. Gen. _____, 75-2 CPD 333.

The present situation is analogous to the cases where a bidder is erroneously not solicited or not timely solicited by a procuring activity, or where a bidder fails to receive an amendment extending the bid opening due to Government fault. We have held in such cases that if the method of solicitation, in fact, provided adequate competition and reasonable prices, the failure to solicit or supply an amendment to a particular bidder does not, absent a showing of a deliberate intent to exclude that bidder, afford a sufficient basis to cancel a solicitation and readvertise. B-167928, December 8, 1969; 49 Comp. Gen. 707 (1970); B-176261, August 14, 1972; B-178967(1), November 5, 1973. We believe this rule is applicable here.

In view of the foregoing, and since there is adequate competition, a bid price offered by a timely bidder (W-J) which is clearly regarded as reasonable by the Navy, and an absence of any indication of prejudice to any other prospective bidder, no compelling reason exists to cancel and resolicit, and award may be made under the present IFB.

Accordingly, Avantek's protest is denied. However, we are bringing the serious procurement deficiencies set out above to the attention of the Secretary of the Navy.


Deputy Comptroller General
of the United States