

Protest of) Date: October 26, 1987
SINGLETON CONTRACTING CORPORATION)
Solicitation No. 363192-87-A-N248) P.S. Protest No. 87-85

DECISION

Singleton Contracting Corporation (Singleton) timely protests award of a contract pursuant to Solicitation No. 363192-87-A-N248 to any bidder other than itself. The contracting officer refused to accept a modification of Singleton's bid written on the outside of its bid envelope which would have made Singleton the apparent low bidder. Without that modification, Singleton was third low.

Invitation for Bids (IFB) No. 363192-87-A-N248 for interior renovations of the National Information Systems Development Center, Raleigh, NC, was issued by the Greensboro, NC, Support Services Office, with bid opening at 3:00 P.M., June 23, 1987. Three bids were received, of which Clancy & Theys Construction Company's bid of \$392,450 was apparent low. Singleton's bid was recorded as \$700,000, the figure that was entered on the bid form, PS Form 7388. At that price, Singleton was third low. On the reverse side of the sealed envelope containing Singleton's bid was the hand-written message:

"Note: Deduct \$310,833 From Our Total Bid"

...

/s/ Wayne Singleton 6/23/87^{1/}

If this deduction is allowed, Singleton's resulting bid becomes low at \$389,167.

The contracting officer states that a Postal Service employee first noticed the bid

^{1/} The complete message read:

Note: Deduct \$310,833 From Our Total Bid
Deduct \$98,000 From Detailed Price B.1
Add \$50,000 From Detailed Price B.2

Mr. Singleton signed the bid. As the sole issue concerns the effect of this writing on the total bid price, we do not address the alternative proposals.

modification after the bids were read aloud in the presence of Postal Service personnel and two interested visitors. The contracting officer draws our attention to Instructions to Bidders, clauses 6 and 7, which contain explicit instructions on how to modify a bid.^{1/}

The contracting officer states that by virtue of these provisions, there is no duty to search for a modification not in an envelope, and that a modification on an envelope cannot be considered if not discovered before the bid is read at bid opening.

The contracting officer asserts that there is a risk that the protester will be unfairly advantaged since, if the note is not noticed at bid opening, the bidder could decide whether to reveal the modification depending upon the advantage to that bidder. As such a decision could be made after the other bids have been revealed, an impermissible "second bite at the apple" is possible. The contracting officer urges the protest be denied.

Singleton, which was not represented at bid opening, argues that its modification, which it describes as hand-written in large and conspicuous letters, should have been accepted by the contracting officer, despite not being discovered at bid opening or read aloud at that time, as it was received before the time set for the opening of bids on June 23, the bid opening date.

The protester alleges that the method of modification which it utilized is recognized by all other Governmental agencies and several other Postal Service Facilities Service Offices. Singleton cites Postal Contracting Manual (PCM) 2-304^{1/} and argues that its method of modifying its bid is better than at least one of the acceptable methods described in that section: in telephonic modifications from the receiving telegraph company the modification is known by at least the person who takes the call in the receiving office, is hand-written, and is not signed by the bidder. It argues that the integrity of the competitive bidding process is better protected by its signed, dated and timely submitted modification.

^{2/} Clause 6 states:

Bids and modifications thereof shall be enclosed in a sealed envelope addressed to the office specified in the solicitation....Telegraphic modifications should not reveal the amount of the original bid.

Clause 7 states:

Bids already submitted may be modified or withdrawn by written or telegraphic notice, prepared as described in 6, above, and received prior to the exact hour and date specified for receipt of bids....

^{3/} PCM 2-304 states in pertinent part:

Bids may be modified ... by written or telegraphic notice submitted so as to be received in the office designated in the invitation for bids not later than the exact time set for opening of bids. A telegraphic modification ... of a bid received in such office by telephone from the receiving telegraph office not later than the time set for opening of bids shall be considered if such message is confirmed by the telegraph company by sending a copy of the telegram which formed the basis for the phone call. Modifications received by telegram including a record of those telephoned by the telegraph company shall be sealed in an envelope by a proper official who shall write thereon the date and time of receipt ... No information contained herein shall be disclosed prior to the time set for bid opening....

Singleton states that the contracting officer's failure to read the modification out loud should not prejudice the protester as the fault lies with the contracting officer. It cites other circumstances in which a modification is accepted though not read aloud; for example, where a modification is timely delivered though mishandled by the Postal Service.

Singleton claims that the presence of the modification on the envelope rather than in the envelope gave it no competitive advantage, and cites instances where modifications not contained within sealed envelopes are accepted; for example, where a telegraph company telephones a modification to the Postal Service, confirming it after bid opening; or where a hand-delivered telegram, received before bid opening, is opened by Postal Service personnel to see whether it contains a modification.

Singleton claims that whether or not a modification written on the bid envelope should be accepted has never been decided by this office, and that the only analogous Comptroller General case is favorable to its position. Singleton directs our attention to Buchanan Construction Company, Comp. Gen. Dec. B-224171.2, February 12, 1987, 87-1 CPD & 154, where the Comptroller General expressed no objection to a bid modification on the bid envelope, even though he upheld the agency's rejection of the bid because the modification was ambiguous. Singleton requests that its modification be accepted and that it be awarded the contract.^{4/}

Whether or not a bid modification written on the bid envelope should be considered is an issue of first impression, having never been squarely decided by this office. However, one recent Postal Service protest decision and several Comptroller General decisions offer useful guidance.

In Arcon Corporation, P.S. Protest No. 87-22, May 6, 1987, we upheld a contracting officer's decision that a conditional deduction typewritten on the envelope containing the bid rendered it nonresponsive. Although not dispositive of the case, we noted that:

[B]y writing its intended bid modification on the outside of the envelope containing its sealed bid, Arcon may have intended to achieve an advantage over other bidders. Bid modification[s] should follow the procedures described in the IFB, that is, they should follow the formalities of the original bid, or, where appropriate, be issued by telegram. IFB Instructions to Bidders & 6, 7. When these procedures are followed a bidder's intention to modify its bid is apparent to the bid opening officer. This is not true when a bid modification appears on the face of the envelope. If Arcon's bid without the envelope deduction had been the low bid, Arcon could have simply allowed the contracting officer to ignore the deduction and been awarded the contract at a higher contract price. If, as occurred, Arcon required the deduction to become low bidder, Arcon could point out the envelope deduction and, if it was accepted, become

^{4/} Singleton alleges that presentation of its position in this protest was hampered by the contracting officer's refusal to supply Singleton a copy of written advice received from counsel. We have reviewed that advice and conclude it did not raise issues not addressed by Singleton and that Singleton was not disadvantaged by the refusal to disclose. We do not find that correspondence "necessary to a clear understanding" of the protest, PCM 2-407.8 f, and, therefore, will not compel its disclosure.

low bidder. This method of modification gives the bidder an impermissible second opportunity to become low bidder. [citation omitted]

The protester cites Buchanan Construction Company, supra, in which the Comptroller General expressed no objection to modifications written on bid envelopes. While the case did not turn on the location of the modification, the Comptroller General noted that it was written on a bid envelope. The modification, though, was not considered as it was determined to be ambiguous.

In Central Mechanical Construction, Inc., Comp. Gen. Dec. B-220594, December 31, 1985, 85-2 CPD & 730, however, the Comptroller General did reject a bid modification written on the outside corner of a bid envelope. The decision stated that contracting officials reported that examinations of bid envelopes are not normally made. The decision refuses to direct acceptance of the modification, as it affords the bidder a possible advantage over other bidders: "The manner of the modification ... afforded [the bidder] an option it either could exercise or refrain from exercising depending on its relative standing among other bidders."^{1/}

The risk of an unfair competitive advantage supports denial of this protest. Had Singleton's original bid been low and the modification not noticed by postal officials, Singleton could have chosen not to bring the modification to the attention of the contracting officials and been awarded the contract at a higher price. Had its needs been suited, as here, the protester could have drawn attention to the modification making it low bidder, thereby obtaining an impermissible second opportunity to become low bidder. See Arcon Corporation, supra; Central Mechanical Construction, Inc., supra.

Clauses 6 and 7, Instructions to Bidders, set forth acceptable ways in which to modify a bid, namely written modifications enclosed within a sealed envelope and telegraphic modifications.

Modifications should follow the procedures set forth in the IFB,^{1/} so that the bidder's

^{5/} In Pluribus Products, Inc., Comp. Gen. Dec. B-224435, November 7, 1986, 86-2 CPD & 536, the Comptroller General considered the effect of an "all or none" notation on the bid documents of the low bidder. The Comptroller General concluded that the placement of the notation in a logical location within the bid documents themselves did not give the bidder a possible advantage over other bidders. The notation was not noticed until well after bid opening and resulted in displacement of the protester, which had been apparent low bidder on certain parts of the solicitation. Central Mechanical Construction, Inc., supra, was distinguished on the ground that it dealt with a notation on the envelope while the "all or none" notation was logically located on the bid documents.

^{6/} While attempted modifications that fail to comply with Clauses 6 and 7, Instructions to Bidders, are ineffective, where such provisions control, we note that writings on bid envelopes can render a bid ambiguous and therefore nonresponsive. See Arcon, supra; Buchanan, supra. This is because a "bidder's intention must be determined from all the bid documents at the time of bid opening and this includes extraneous documents submitted with the bid which must be considered a part of the bid for purposes of determining the bid's responsiveness." John C. Grimberg Company, Inc. - Request for Reconsideration, Comp. Gen. Dec. B-218231.2, April 26, 1985, 85-1 CPD & 478. Such extrinsic documents found capable of rendering a bid nonresponsive have included a telegram (Id.); a cover letter (Alliance Machine Company, Comp. Gen. Dec. B-220034, November 13, 1985, 85-2 CPD & 548); and notations written on a bid envelope (Arcon, supra).

intention to modify its bid is unquestionably apparent to bid opening officials. See Arcon, supra. The issue cannot turn on the fortuitous discovery by contracting personnel of a modification submitted by another method.^{1/}

The protest is denied.

**[Signed: "Norman DMenegat
for"]**

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Compared to original 3/12/93 WJJ

^{1/} Regardless of the protester's argument that its chosen method of modifying its bid is more reliable than the officially denominated methods, those methods are the exclusive means which a contracting officer must accept as valid.