

# CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

## A LAWYER'S VIEW OF RESPONSIVENESS

### RESPONSIVENESS DETERMINATIONS

By Roxie Jamison Jones

A bid should be rejected by the CO as nonresponsive when material Invitation for Bid (IFB) requirements are limited, reduced, or modified. This article reviews the common causes of nonresponsiveness.

**Conditions.** When reviewing the contents of a bid, focus on whether the bid as submitted is an offer to perform without exception, the exact thing called for in the invitation. Unacceptable conditions affect quality, quantity, and delivery terms. FAR § 14.404-2(e) (1985). For instance, a letter of credit submitted as a bid guarantee that conditioned the guarantee on assignment of the contract to a commercial banker in the event of default impacts upon the solicitation default clause and is therefore nonresponsive. *Mycon Construction, Co.*, B-231412, July 27, 1988. If statements that are inconsistent with invitation requirements are found in material certifications and representations, the bid is also nonresponsive. For instance, a total small business set aside certification that *not* all end items will be manufactured or produced by a domestic small business concern causes a bid for a set aside contract to be nonresponsive. In certain instances a bidder's stated condition may have no real effect on the IFB's requirement. This is the case where the bid price for supplies during a second contract option term is conditioned on the exercise of the first option to extend the contract. Since the condition is a contract requirement, that is, the exercise of the second option would never occur without the exercise of the first option, a bid is responsive even with the stated condition.

**Material Omissions.** Because the bid as submitted becomes the contract document, the omission of material information has the effect of limiting the contractor's obligation to perform the government's exact requirements. Thus, when a bidder does not propose prices for the items required by the IFB, the bid is usually nonresponsive. But if the IFB permits more than one award or award for combinations of items, an omitted price that has no relevance to contract award does not affect the bid's responsiveness. Similarly, if required certifications and representations are omitted but the omission does not affect the bidder's material obligation to perform, the bid is responsive and the errors may then be corrected after bid opening. GAO has found that a bid remains responsive even without standard certifications and representations. *All Star Maintenance, Inc.*, B-231618, August 25, 1988. As in all cases, an omitted price may be corrected when the rules on mistake in bid can be applied. But note that the omission of a

price entry for a material requirement which is not divisible from the remainder of the solicitation may not be waived as a minor informality.

**Unacknowledged Amendment.** If a bidder does not acknowledge receipt of a material amendment, government acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. An amendment is material when it has more than a negligible effect on price, quality, quantity, delivery terms, or changes the legal relationship between the government and the parties. Thus, GAO found that a bidder's failure to acknowledge an amendment adding the Anti-Kickback Procedures clause to an IFB made the bid nonresponsive because the Anti-Kickback detection and reporting procedures affected the party's legal relationship. *Mak's Cuisine*, B-227017, June 11, 1987.

**Unproduced Documentation.** Often IFBs require documentation to be submitted at the time set for bid opening. The failure to submit the required documentation renders a bid nonresponsive if the documents are material to the invitation requirements. GAO has consistently held that a bid bond is a material part of a bid and failure to submit a bid bond required by the IFB renders a bid nonresponsive. So is producing descriptive literature when the literature is required to show compliance with the IFB specifications. Likewise, when a vendor bids an "or equal," system under a brand name or equal invitation, the bid is nonresponsive if the descriptive literature fails to establish that the system would meet all the listed requirements. But remember, matters of responsibility cannot be converted to responsiveness by the terms of the invitation. Thus, information regarding a bidder's responsibility which is omitted from the bid at bid opening may not be the basis for a nonresponsiveness determination even if the invitation states that failure to include the information at bid opening will result in a nonresponsiveness determination.

**Timing.** Because with sealed bidding, bids may be modified or withdrawn no later than the exact time set for bid opening, responsiveness is said to be determined at bid opening. A nonresponsive bid may not be corrected after bid opening to make it responsive.

**From the Editor-** Roxie Jones is an attorney in the Division who is assigned primary responsibility or the Census Bureau. Roxie is located in Suitland.

👉 Comments, criticisms, and suggestions for future topics are welcome. - Call Jerry Walz at FTS 377-1122