

DOCUMENT RESUME

03329 - [A2413556]

[Reconsideration of Decision Regarding the Effective Period of a Bid Guarantee]. B-188100. August 26, 1977. 5 pp.

Decision re: McNamara-Lunz Warehouses, Inc.; by Milton Socolar (for Elmer B. Staats, Comptroller General).

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Department of the Air Force: Randolph AFB, TX.

Authority: Freedom of Information Act (5 U.S.C. 552). 32 C.F.R. 806.57. 55 Comp. Gen. 715. 55 Comp. Gen. 734. 54 Comp. Gen. 271. 54 Comp. Gen. 750. 55 Comp. Gen. 735. 55 Comp. Gen. 739. A.S.P.R. 7-1601.2. A.S.P.R. 2-404.2(h). A.S.P.R. 10-102.5. B-185137 (1976). B-163880 (1968).

The protester requested reconsideration of a decision holding that the bidder must furnish a bid guarantee effective for the entire time of a 60-day bid acceptance period. The decision was affirmed, since the bidder had the duty to seek explanation of the inconsistencies, if any, in the invitation prior to bid opening. The contracting officer may not waive failure to comply with bid guarantee requirements or permit correction of a nonresponsive bid after opening. GAO has no authority under the Freedom of Information Act to determine what other Government agencies must disclose. (Author/SC)

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DECISION

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

FILE: B-188100

DATE: August 26, 1977

MATTER OF: McNamara-Lunz Vans and Warehouses, Inc. --
Reconsideration

DIGEST:

1. Prior decision holding that where IFB specifies 60-day bid acceptance period, bidder must furnish bid guarantee effective for entire time, even though IFB indicates that performance will begin before end of acceptance period, is affirmed. Protester had duty to seek explanation of inconsistencies, if any, in IFB before bid opening.
2. Contracting officer may not waive failure to comply with bid guarantee requirements or permit correction of nonresponsive bid after opening.
3. GAO has no authority under Freedom of Information Act to determine what other Government agencies must disclose; protester seeking documents that procuring agency claims exempt from disclosure must appeal within agency or to court of competent jurisdiction, as provided by Act.

McNamara-Lunz Vans and Warehouses, Inc. (McNamara-Lunz) requests reconsideration of our decision, McNamara-Lunz Warehouses, Inc., B-188100, June 23, 1977, 77-1 CPD 448. In that decision we held that where the invitation for bids (IFB) specified a 60-day bid acceptance period, the bidder was required to furnish a bid guarantee effective for that entire time, even though, according to the protester, the IFB indicated that award would be made before the end of the bid acceptance period.

The IFB in question, No. F41606-77-90016, was issued by Randolph Air Force Base, Texas, on October 29, 1976, with a bid opening date of November 29, 1976. The services being procured--packing, crating, and drayage of household goods--were to be performed on a requirements basis in specified locations.

The IFB contained a standard "Period of Contract" clause which stated in pertinent part:

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"This contract shall begin 1 January and end 31 December 1977, both dates inclusive. * * *"

However, a 60-day bid acceptance period, which would have run through January 28, 1977, was indicated on page 1 of the IFB. Offerors were referred to section C, paragraph 28, which stated that offers allowing less than the specified number of calendar days for acceptance by the Government would be rejected as nonresponsive. With its bid each bidder was required to submit either a bid bond or other security. Any guarantee in the form of an irrevocable letter of credit was required to:

"(i) be issued by a bona fide financial institution,
(ii) be a firm guarantee in an amount equal to 20 percent of the bid price."

Awards were to be made to the low or aggregate low bidder for each of several schedules contained in the IFB.

McNamara-Lunz was the low bidder for certain areas, but it submitted a letter of credit which expired on December 31, 1976.

On December 16, 1976, the contracting officer requested McNamara-Lunz to obtain an extension of this letter of credit until January 31, 1977; McNamara-Lunz immediately did so. On December 23, 1976, however, the contracting officer notified McNamara-Lunz that its bid guarantee had been found defective because it was not for the prescribed acceptance period and its bid was then rejected.

We upheld this determination on the strength of B-163884, April 18, 1968, which the contracting officer had relied upon, and more recent decisions, which stand for the proposition that the bid acceptance period is a material requirement of the solicitation. We held that McNamara-Lunz's failure to submit a bid guarantee which was coextensive with the bid acceptance period made its bid nonresponsive.

In so concluding, we rejected McNamara-Lunz's argument that, in view of the performance dates specified in the IFB, award before January 1, 1977, was required and that a bid guarantee beyond December 31, 1976, was unnecessary. We quoted Armed Services Procurement Regulation (ASPR) § 7-1601.2, which sets forth the Period of Contract clause used in the solicitation and states:

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"(b) When the period of performance is less than a calendar year, the above clause shall be modified to show the appropriate beginning and ending. However, the date for the end of the contract period shall not be later than 31 December of the year in which the contract is awarded."

We stated that in our opinion the above-cited ASFR clause:

"requires only that the date for the end of the contract period shall not be later than '31 December of the year in which the contract is awarded.' There is no mandatory requirement that the contract period must begin on January 1."

In its request for reconsideration, McNamara-Lunz contends that our Office incorrectly read that clause to require only that the date for the end of the contract period be no later than specified. While the quoted language indicates that a contract period of less than a year could be provided for, McNamara-Lunz asserts, in such a case the regulation states that the Period of Performance clause shall be modified to show appropriate beginning and ending dates. Because the IFB in question was not amended to show a different beginning date, McNamara-Lunz argues that the solicitation could reasonably be interpreted to require award before January 1, 1977, and performance beginning on that date. However, as indicated above, we considered this position in our initial decision and see no reason to change our conclusion in the matter. In our opinion, it was not reasonable to read the solicitation as requiring that award be made by January 1, 33 days after bids were opened, when the solicitation elsewhere provided for a 60 day acceptance period.

Absent amendment, McNamara-Lunz further argues, the solicitation contained conflicting provisions, in that the 60-day bid acceptance period extended well beyond the mandatory date for performance. These provisions should be interpreted in the manner which operates more strongly against the party from whom they proceed, e.g., the Air Force, McNamara-Lunz concludes.

We note that award actually was made to the next low bidder before January 1, 1977. Nevertheless, we do not believe that McNamara-Lunz was justified in assuming that a bid guarantee effective for less than the full 60-day bid acceptance period would be responsive. We have held that the rule of interpreting contracts against the draftsman does not apply when an IFB

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contains a patent discrepancy, Avantek Incorporated, 55 Comp. Gen. 735, 739 (1976), 76-1 CPD 75; McNamara-Lunz in its initial protest argued that the IFB contained a "patent incongruity." We believe that it should have sought clarification of this "patent incongruity" before submitting its bid.

As stated in Avantek, it is the bidder's duty to bring inconsistencies to the attention of the contracting officer and ask for an explanation before submitting its bid. A reasonable bidder may not blindly make its own assumptions regarding alleged defective solicitation requirements.

Additionally, McNamara-Lunz argues that because the contracting officer specifically requested the firm to extend the expiration date of its letter of credit until January 31, 1977, prompt compliance with that request cured any technical defects in its bid guarantee. Although the contracting officer's statement of facts indicates that he initially regarded the expiration date of the letter of credit as a minor irregularity, this was not the case. ASPR § 2-402.2(a) states:

"* * * When a bid guarantee is required and a bidder fails to furnish it in accordance with the requirements of the invitation for bids, the bid shall be rejected except as otherwise provided in 10-102.5."

Our decision in B-163984, supra, states that a 30-day time limitation in a letter of credit is in derogation of a condition of an invitation that bidders will not withdraw for a period of 80 days from the date bids are opened, and none of the exceptions stated in ASPR § 10-102.5 is applicable here. The contracting officer therefore could not properly waive failure to comply with bid guarantee requirements, A.D. Roe Company, Inc., 54 Comp. Gen. 271, 272 (1974), 74-2 CPD 194, and cases cited therein, or permit McNamara-Lunz to correct its nonresponsive bid after opening. Miles Metal Corporation, 54 Comp. Gen. 750 (1975), 75-1 CPD 145.

Finally, McNamara-Lunz protests the lack of opportunity to comment upon information, particularly a legal opinion by the Judge Advocate, Randolph Air Force Base, submitted "ex parte" for our review. McNamara-Lunz had requested documents included in the Air Force report from the Air Force but

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was refused certain ones on the ground that they were inter-agency memorandums, exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(5) (1970). While we agree that one or more parties may feel disadvantaged when material is submitted to our Office in this manner, see generally Management Services Inc., 55 Comp. Gen. 715, 734 (1976), 78-1 CPD 74, as a practical matter, most of the information in question was summarized in the remainder of Air Force report which was available to McNamara-Lunz. Our Office has no authority under the Freedom of Information Act to determine what other Government agencies must disclose, Augmentation Incorporated, B-185137, March 16, 1976, 76-1 CPD 179, and McNamara-Lunz's remedy was to appeal to the Secretary of the Air Force or to a court of competent jurisdiction. See 5 U.S.C. 552(a)(4) (Supp. V 1975); 32 C.F.R. 806.57 (1976).

Accordingly, our decision of June 23, 1977, is affirmed.

Milton J. Acosta
for Comptroller General
of the United States