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DECISION



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

FILE: B-190702

DATE: February 3, 1978

MATTER OF: Emerson Construction Company, Inc.--
Reconsideration

DIGEST:

Request for reconsideration is denied where request fails to demonstrate error of fact or law in prior decision or to present new information not previously considered.

Emerson Construction Company, Inc. (Emerson), has requested reconsideration of our decision in B-190702 dated December 15, 1977, wherein we summarily denied Emerson's protest against the award of a contract to another bidder under a solicitation issued by the Upper Missouri Region, Bureau of Reclamation.

Paraphrasing the factual discussion in our prior decision, the solicitation was issued for the repair and modification of certain pilot laterals in the Riverton Unit, Pick-Sloan Missouri Basin Program, with the work divided into two schedules. The solicitation provided that bids would be considered for award on either or both of the schedules and that bidders could make whatever stipulation they desired regarding a combination of schedules. The Bureau of Reclamation had reserved \$1,300,000 for both schedules and the engineer's estimate for both projects was \$1,339,975. Emerson's bids for schedules 1 and 2 were \$688,887.40 and \$688,923.10, respectively, or a total of \$1,577,810.50. Emerson stipulated that it would not accept schedule 1 without schedule 2 and was the only bidder on schedule 1 and the high bidder (out of three) on schedule 2. The agency determined that the unavailability of funds precluded the award of both schedules and that Emerson's bid for schedule 1 could not be considered because of Emerson's stipulation concerning acceptance of award. Award of schedule 2 was made to the low bidder on that schedule with the work on schedule 1 to be readvertised at a later date when additional appropriations are available.

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Emerson contended that as the only bidder on both schedules, it should either be awarded a contract for both schedules or that all bids should be rejected and both schedules readvertised. Emerson also contended that if the limitation on funds prevented it from being considered for award of both schedules, then all of the bids for schedule 2 should have been rejected since they each exceeded the amount of the engineer's estimate for the work on schedule 2.

We denied Emerson's protest, relying in part on past decisions of this Office holding that an agency determination that adequate funds are not available is sufficient reason to reject the bids received, see the decisions cited in our decision in B-190702 dated December 15, 1977, and in B-170898(1), January 11, 1971, where we applied this principle to a determination to award to the low bidder on one of two schedules to the exclusion of another bidder which submitted the only bid on both schedules. We noted also that the solicitation advised that bids would be considered for award on either or both schedules and that the amount of Emerson's bid for both schedules exceeded the amount of available funds. We found no prejudice to any bidder resulting from the agency's determination to consider only the second schedule for award.

Counsel for Emerson now contends that our prior decision is based upon several errors of fact or law as follows: (1) that the language of the solicitation, "Bids will be considered for award on either or both of the following schedules," relates to the rights of the bidders and that the Government did not, by this language, reserve the right to award only one schedule; (2) that the contract for schedule 2 should not have been awarded if funding limitations were to be strictly applied (since the contract amount exceeded the estimate for schedule 2) and that funding limitations were not uniformly applied; (3) that it is a "poor excuse" to say budget constraints prohibit award when the agency's estimates indicate the project would cost more than the available funding; and (4) that Emerson was in fact prejudiced by the agency's actions since its bid for schedule 1 has been exposed and schedule 1 is to be readvertised at a later date.

With regard to the first point, while the solicitation language quoted in our first decision did give bidders the right to "make such stipulation as they desire regarding a combination of schedules," the language also clearly reserved to the Government the right to "award on either or both * * * schedules." Therefore, it was proper to award only one schedule under the terms of the solicitation. Furthermore, since Emerson properly limited award to it under the subject provision to both schedules, award to it of one schedule was not possible.

With regard to the 2nd and 3rd arguments, counsel appears to treat the individual estimates for schedules 1 and 2 as absolute and separate funding limitations for each schedule. We do not share counsel's view. Estimates such as those prepared in connection with this solicitation are neither absolute nor funding limitations, but are approximations or guides used to ascertain funding requirements and to assist the contracting officer in making determinations of price reasonableness. See, e.g., W.G. Construction Corporation, B-188837, August 9, 1977, 77-2 CPD 100. The funding limitation on this procurement, \$1.3 million, applied to the total work contemplated under both schedules; the individual estimates for schedules 1 and 2 were not cost ceilings for those schedules and were properly not applied in any such fashion. Furthermore, as we pointed out in our prior decision, the estimate for the total work and the available funding were sufficiently close that the agency might reasonably have expected some bid or combination of bids to fall within the limits of available funding. Finally, it was not improper to award item 2 as was done even though the bid price exceeded the estimate for that item as the price was considered reasonable and was within the funding limitation. In these circumstances, we see no merit to counsel's second and third allegations of error.

Lastly, while Emerson's bid was exposed, it was an unavoidable consequence of a proper cancellation.

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In view of the foregoing, we are of the opinion that counsel has failed to show any errors of law or fact in our prior decision or to present any new information not previously considered. Accordingly, our prior decision is affirmed.


Deputy Comptroller General
of the United States