

DECISION

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

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FILE: B-212040.3

DATE: October 12, 1983

MATTER OF: Elrich Construction Co., Inc.

DIGEST:

1. GAO will not disturb contract award even though contracting officer failed to comply with procurement regulation requiring agency to retain late bid until after award, since it appears the contracting officer returned the bid to the protester prior to award at its request.
2. Where there is an irreconcilable conflict between a protester and an agency in a factual matter, the protester has failed to meet its burden of proof and the agency's position will be accepted.
3. Claim for bid preparation costs is denied where it cannot be determined that the protester had a substantial chance of receiving the award.

Elrich Construction Co., Inc. protests the alleged failure of the bid opening officer to accept and consider for award Elrich's bid submitted in response to invitation for bids (IFB) No. 263-83-B(91)-0053 issued by the Public Health Service, National Institutes of Health (NIH).

The solicitation indicated that bid opening was scheduled for 2:00 p.m., June 7, 1983. The agency received 13 bids prior to the bid opening time, while 3 bids, including the protester's bid, were recorded as having been received at 2:01 p.m. by the agency's time-stamp clock. The agency reports that it retained two of the late bids but, in accordance with the protester's request, returned that firm's bid unopened. Later, after checking the time-stamp clock and finding that it was 2 or 3 minutes fast, the agency considered the two "late" bids it had retained. Neither of these bids was low.

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Elrich argues that its bid was improperly returned to it in the face of its representative's objection. It contends that its representative specifically requested the contracting officer to retain its bid and notes that the contracting officer's failure to do so prevented Elrich's bid from being considered along with the other two "late" bids after the agency found that the time-stamp clock was faulty. The protester maintains that the only way that this impropriety can be rectified is by terminating the contract awarded under this solicitation and readvertising the procurement.

We are presented with a factual dispute concerning the circumstances surrounding the return of Elrich's bid. The protester states that its representative objected to the return of its bid, while the agency reports that the protester specifically requested that its bid be returned. Where, as here, there is an irreconcilable conflict between a protester and an agency on a factual matter, the protester has not met its burden of proof and we will accept the agency's position. Alan Scott Industries -- reconsideration, B-201743, et al., April 1, 1981, 81-1 CPD 251.

Nevertheless, the protester seems to argue that since the contracting officer is required by section 1-2.303-7 of the Federal Procurement Regulations (FPR) to retain an apparently late bid until after award, he would have acted improperly in returning the bid even if the bidder had made such a request.

FPR § 1-2.303-7 provides that:

"A late bid which is not for consideration shall be held unopened until after award and then returned to the bidder (unless other disposition is requested or agreed to by the bidder)."

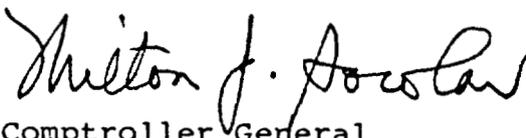
We do not believe that this regulation permitted the contracting officer to return the protester's "late" bid to it before award even at the bidder's request. The parenthetical clause does not refer to what may happen to the bid prior to award. Rather, we believe it refers only to

what will be done with the bid after award is made. This interpretation is consistent with what we believe is the purpose of this provision which is to provide the government with the possibility of taking advantage of a low bid price should the agency subsequently determine that the bid was incorrectly found to be late or that the bid falls within one of the exceptions to the rule prohibiting consideration of late bids.

We therefore agree that the contracting officer acted improperly in returning the bid. Since, however, the bid was returned to the bidder, that bid may no longer be considered for award because of the possibility that the bid has been altered after bid opening. Jerry Warner and Associates, 57 Comp. Gen. 708 (1978), 78-2 CPD 146. Moreover, we do not agree with the protester that these circumstances warrant termination of the awarded contract. Concluding, as we must, that the agency's version of the facts--that Elrich requested return of the bid--is correct, we are not inclined to upset an award because a bidder now complains of the fact that the contracting officer acceded to the bidder's request. We note also that the the agency received 15 bids and that it therefore received adequate competition under the solicitation even without the protester's bid.

Elrich requests that we award it bid preparation costs. Since, as indicated above, the protester's bid was returned to it, there is no way of determining whether the bid has been altered. Consequently, we cannot fairly determine whether Elrich's bid would have been low and therefore whether Elrich had a substantial chance of receiving the award of the contract. Therefore, Elrich cannot be entitled to bid preparation costs. Propper Manufacturing Co., Inc., B-208035, March 22, 1983, 83-1 CPD 279.

The protest and claim are denied.

for 
Comptroller General
of the United States