DECISION

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

FILE: B-220327.2; B-220327.3 **DATE:** April 23, 1986

MATTER OF: The Department of the Navy; Yanke Container, Inc.--Request for Reconsideration

DIGEST:

1. The General Accounting Office affirms prior decision where the request for reconsideration does not establish that the decision was based on errors of fact or law.

2. The General Accounting Office (GAO) withdraws its recommendation to terminate an existing contract, based on belief that performance had been suspended, when the agency points out in its request for reconsideration that because it was notified of the protest more than 10 days after award, it was not required to suspend performance. Because termination and award to the protester is therefore neither practicable nor in the best interest of the government, GAO now finds the protester entitled to the costs of filing and pursuing the protest and of bid preparation.

The Department of the Navy and Yanke Container, Inc. request reconsideration of our decision in Wirco, Inc., B-220327, Jan. 29, 1986, 65 Comp. Gen. ____, 86-1 CPD ¶ 103, and of the corrective action recommended in that decision. We initially sustained Wirco's protest against the rejection of its low bid for failure to acknowledge an amendment to invitation for bids (IFB) No. N00024-85-B-6270, covering a first article and various production quantities of torpedo shipping containers. We found that changes made by the amendment were not material. Yanke essentially disagrees with that finding and argues that the bid was nonresponsive. Additionally, both Yanke and the Navy argue that due to the extent of performance, it is not practicable to terminate the contract awarded to Yanke and make award to Wirco.

We affirm our decision. However, we withdraw our recommendation for corrective action, as discussed below.

Yanke first contends that our initial decision is legally incorrect in that we found that the unacknowledged amendment did not materially affect delivery requirements.[1/] We therefore held that the protester's failure to acknowledge the amendment properly could be treated as a minor informality because Wirco had submitted a price for and was legally obligated to provide the correct total number of containers. As we stated, although the Navy theoretically could have required delivery either sooner or later and in various other combinations, it did not do so. We believed that the effect on price, if any, of the change in the delivery schedule was negligible.

Yanke has provided no evidence to the contrary in its request for reconsideration. We remain unconvinced that the addition of 2 containers to each of 5 previously scheduled deliveries would have more than a negligible effect on price, and we continue to find that the change was a matter of form over substance, akin to a typographical error.

Second, Yanke argues that the amendment materially affected price and quantity because, by deleting line item No. 0007, it reduced the required total quantity of containers by 250. Line item No. 0007 was an option item that was not evaluated; therefore, its deletion had no effect on the outcome of the bidding.

Yanke next argues that Wirco's bid was inadequate because it did not include an alternate offer based on a waiver of first article testing. Yanke could have raised this argument in its comments to the agency report, but did not do so. It is therefore an untimely basis for reconsideration. We cannot permit parties to present their claims in a piecemeal fashion and thereby disrupt procurements for unnecessarily long periods of time. See Presto Lock, Inc.--Request for Reconsideration, B-218766.2, Nov. 21, 1985, 85-2 CPD ¶ 581. However, we note that alternate bids on offer B were not required unless an offeror believed that it qualified for waiver of the first article requirements.

1/ The original bid schedule called for 35 containers; the delivery schedule attached to the IFB, however, provided for only 5 deliveries of 5 containers each, for a total of 25. The amendment added 2 containers to each of the previously scheduled deliveries, for a total of 35.

Yanke's remaining argument--that Wirco did not return the entire bid package--was previously raised by the agency. Although not discussed in our initial decision, the argument provides no basis to change that decision. Failure to return part of a bid package does not automatically render a bid nonresponsive. Rather, the bid is responsive if it is submitted in such a form that acceptance would create a valid and binding contract and require the bidder to perform in accordance with all the material terms and conditions of the invitation. Werres Corp., B-211870, Aug. 23, 1983, 83-2 CPD ¶ 243. This is the case where the omitted pages are incorporated by reference in that part of the bid package returned to the contracting officer. Here, since the face sheet of Wirco's standard form 33 indicated that it was page 1 of 78 pages and included attachments (which in turn included the delivery information), the omitted pages are considered incorporated.

Our Office will not reverse or modify a decision unless the request for reconsideration specifies information not previously considered or demonstrates that errors of fact or law exist in the original decision that warrant reversal. 4 C.F.R. § 21.12(a) (1985); Evans, Inc.--Request for Reconsideration, B-218963.2, June 26, 1985, 85-1 CPD ¶ 730. Here, none of Yanke's arguments establishes that our prior decision was incorrect, but only that Yanke disagrees with our findings. We therefore affirm our initial decision.

The Navy's and Yanke's request for modification of our recommendation is based on the extent of performance of Yanke's contract. The Navy acknowledges that it "inadvertently" failed to notify either our Office or Wirco that it had not suspended contract performance, but states that under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. § 3553(d)(1) (West Supp. 1985), there was no requirement to suspend performance.[2/]

2/ Under CICA, as implemented by the Federal Acquisition Regulation, § 33.104(c)(5) (FAC 84-9, June 20, 1985), an agency generally must suspend performance when, within 10 calendar days of award, it receives notice from our Office that a protest has been filed here. In this case, the Navy awarded the contract to Yanke on September 10, 1985; we received and notified the Navy of the protest on September 23. Thus, the CICA stay provision was not applicable to this contract. We, however, considered Wirco's protest to be timely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), because we received it within 10 working days of award. This finding of timeliness, for purposes of consideration of a protest on the merits, does not affect the shorter time limit for purposes of invoking the CICA stay provision.

The Navy reports that Yanke has been performing and incurring costs for approximately 5 months and that nearly 75 percent of the contract is complete in terms of receipt of materials, plant production readiness, and fabrication of components; only assembly and delivery remain. The Navy notes that approximately one-half of the total contract price of $1,032,208 represents material cost. Further, the Navy reports that $187,850 in progress payments have been made and that vouchers for an additional $200,000 have been submitted. According to the agency, in view of the extent of Yanke's performance, termination costs could exceed 75 percent of the contract price. Additionally, the agency states that it lacks sufficient funds both to pay termination costs to Yanke and award a new contract to Wirco. Accordingly, the Navy requests that we modify our recommendation to permit Yanke to complete the contract for the base requirements. The Navy agrees not to exercise the options in Yanke's contract.

In determining what is the appropriate corrective action on an improperly awarded contract when the agency is not required to suspend performance, we consider all the circumstances surrounding the procurement, i.e., among other things, the seriousness of the procurement deficiency, the degree of prejudice to other interested parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation on the contracting agency's mission. 4 C.F.R. § 21.6(b).

Upon reconsideration, we do not believe that termination of the contract is in the best interest of the government. We have no basis to question the Navy's determination of the probable costs of termination.[3/] In similar circumstances, we have found that the advanced stage of the procurement and high termination costs support a finding that termination is not feasible. See NI Industries, Inc.--Reconsideration, B-218019.2, Aug. 8, 1985, 85-2 CPD ¶ 145. Therefore, we withdraw our previous recommendation and instead recommend that Yanke complete performance for the base requirement only.

3/ Wirco suggests that Yanke is in default of the contract for failure to deliver within 90 days after award, and, therefore, the government is not liable for termination costs. According to the Navy, however, the 90-day requirement was for delivery of a first article (which has been waived for Yanke). Production quantities are not scheduled for delivery until August 1986, the Navy states.

We find, however, that the protester is entitled to costs. Our regulations provide that the reasonable costs of filing and pursuing a protest, including attorneys' fees, may be recovered where the agency has unreasonably excluded the protester from the procurement, except where this Office recommends that the contract be awarded to the protester and the protester receives the award. 4 C.F.R. § 21.6(e). Additionally, the recovery of costs for bid preparation is allowed where (1) the protester was in line for award but was unreasonably excluded from the competition and (2) where the remedy recommended is not one delineated in 4 C.F.R. § 21.6 (which does not include refraining from exercising options under the contract). Id.; Consolidated Construction, Inc., B-219107.2, Nov. 7, 1985, 85-2 CPD ¶ 529.

In comments on the request for reconsideration, Wirco indicates that it believes it is also entitled to lost profits if Yanke is allowed to perform the contract. However, our Office has recognized the general rule that anticipated profits may not be recovered even in the presence of wrongful government action. See Introl Corp., 64 Comp. Gen. 672 (1985), 85-2 CPD ¶ 35.

Our previous finding, which we affirm, is that the agency's rejection of Wirco's bid as nonresponsive unreasonably excluded Wirco from receiving the award. Therefore, Wirco is entitled to recover its costs of filing and pursuing the protest and of bid preparation. Wirco should submit an accounting to the Navy, and the protester and procuring agency should attempt to reach agreement on the amount due. If they cannot do so in a reasonable time, our Office will determine the amount. 4 C.F.R. § 21.6(f).

Our prior decision is affirmed and our recommendation withdrawn.

for Milton J. Socolar
Comptroller General
of the United States