



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Nebraska Aluminum Castings, Inc.--Claim
Reconsideration
B-222476.8

File:

Date: December 2, 1987

DIGEST

Request for reconsideration is denied where neither error of fact in decision nor failure to specifically reference regulations allegedly violated by the Army provide a basis for reversal of decision.

DECISION

Nebraska Aluminum Castings, Inc. (NAC), requests reconsideration of our decision of September 15, 1987, denying its claim of \$118,525 for bid preparation, protest and other costs under 31 U.S.C. § 3702 (1982), resulting from the Department of the Army's rejection of its bid as materially unbalanced under invitation for bids (IFB) No. DAAK01-85-B060. Nebraska Aluminum Castings, Inc.--Claim, B-222476.6, et al., Sept. 15, 1987, 87-2, C.P.D. ¶ _____. Previously, pursuant to our bid protest function under the Competition in Contracting Act of 1984 (CICA) (31 U.S.C. § 3551(1) (Supp. III 1985)), we issued three decisions and two letters sustaining the Army's action and denying NAC's claim for bid preparation and protest costs. Nebraska Aluminum Castings, Inc., B-222476, June 24, 1986, 86-1 C.P.D. ¶ 582, aff'd on reconsideration, B-222476.2, Sept. 23, 1986, 86-2 C.P.D. ¶ 335, B-222476.3, Nov. 4, 1986, 86-2 C.P.D. ¶ 515, letter to NAC, B-222476.4, Nov. 25, 1986, letter to Senator J. James Exon, B-222476.5, Dec. 23, 1986. We affirm our denial of the claim.

NAC's request for reconsideration is based primarily upon the argument that our decision contained an error of fact and it failed to address NAC's contention that the Army's rejection of NAC's bid as nonresponsive was contrary to the Federal Acquisition Regulation (FAR), citing 48 C.F.R. §§ 14.201 and 14.407 (1986).

In order to address the issues it is necessary to provide a brief background of the facts underlying the previous protest and denial of the claim. The low bidder under the procurement was rejected as nonresponsive, making NAC the

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low bidder. NAC was also found nonresponsible due to its lack of experience in producing the item being procured. This determination was referred to the Small Business Administration (SBA) which found NAC responsible and so advised the Army. The Army was in the process of appealing the SBA's granting of a certificate of competency to NAC when NAC's bid was determined nonresponsive in that it was materially unbalanced with respect to the firm's first-article pricing.

NAC protested to our Office and we concluded that the Army had properly rejected NAC's bid as materially unbalanced because the firm's first-article prices were grossly inflated (\$22,510 for each of 10 first-article units versus \$19.17 per production unit). We found the Army's action proper because it was based upon our holdings in Edgewater Machine & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 C.P.D. ¶ 630; Riverport Industries, Inc., 64 Comp. Gen. 441 (1985), 85-1 C.P.D. ¶ 364, aff'd on reconsideration, B-218656.2, July 31, 1985, 85-2 C.P.D. ¶ 108.

One of the contentions raised by NAC in its claim, and previously, was that it had been misled by pre-bid agency advice that front-end loading of the first-article price was not improper since only the bottom-line price would be evaluated. In responding to that argument in two previous decisions, we concluded that NAC had no basis to rely upon such advice as the solicitation included a FAR clause to the effect that such advice was not binding. In once again responding to this argument in connection with the subject claim, we also noted "that early in the procurement NAC wrote a letter to the contracting officer requesting advice on unbalancing and the contracting officer responded in writing that NAC should seek advice from its legal counsel." In its present request for reconsideration, NAC contends that such statement was in error because this exchange of letters was in reference to a solicitation issued subsequent to the subject procurement. Upon re-examining the voluminous record in this case, we find that this statement was in fact in error. We do not find, however, that this error of fact alters our prior position that NAC's reliance on such advice as it reports receiving was at its risk in view of the solicitation admonition that oral advice was not binding. See FAR, 48 C.F.R. § 52.214-6.

The second contention that we will deal with is NAC's contention that in denying its claim we failed to consider NAC's argument that rejection of its bid was contrary to FAR

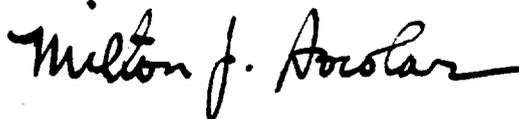
48 C.F.R. §§ 14.201 and 14.407. Read together, these sections essentially provide that solicitations for sealed bids should contain all information, including evaluation factors and their relative weights, necessary for bidders to respond and, in the absence of any such evaluation factors, award should be based on price and price related factors only.

NAC is correct that these regulations were not referenced in the decision denying its claim. However, the gravamen of the issue for which these regulations were cited was addressed in our latest decision and in the earlier ones. As we noted in the last decision, NAC alleged that the Army acted in bad faith in rejecting its bid without a clear warning that a bid in the form of NAC's would be rejected as nonresponsive. We replied that the absence of the clause in the IFB did not justify ignoring the responsiveness of the unbalanced bid, and in the second reconsideration of the protest we addressed the issue this way:

"The acceptance of a bid with first article prices greatly exceeding the actual value of the units would be detrimental to the competitive system because such a bidding scheme allows the bidder to enjoy an advantage not enjoyed by its competitors for the award--the use of interest-free money for contract start-up purposes--and because the financial risk to the government, in the event of contract termination after the first articles have been accepted and paid for, is significantly increased. Therefore, even though the solicitation at issue here may have contained no express notice cautioning bidders that first article pricing should reflect only reasonable production and testing costs, the rejection of NAC's bid without such notice is required in order to maintain the integrity of the competitive system. Moreover, NAC's continued assertion that this lack of notice was prejudicial is not compelling where the bid was egregiously unbalanced on its face."

Nebraska Aluminum Castings, Inc., B-222475.3, Nov. 4 1986, supra. Therefore, we do not view the failure to refer to the cited regulations as providing a basis for reversal.

The request for reconsideration is denied.



Acting

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