

*Ms. Hillman*



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Native American Trading Corporation

**File:** B-234107

**Date:** May 19, 1989

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### DIGEST

Protest contending that the contracting agency improperly failed to request the protester, whose bid was the lower of the two received, to extend its bid acceptance period prior to the expiration of its bid is sustained where record indicates that the agency in effect allowed awardee to revive its expired bid without affording the protester a similar opportunity.

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### DECISION

Native American Trading Corporation (NATC) protests the rejection of its low bid and the award of a contract to P&M Trucking, Inc., under invitation for bids (IFB) No. R6-10-89-07 issued by the Forest Service, United States Department of Agriculture, as a small business set-aside. The Forest Service did not make award on NATC's bid on the basis that it had expired prior to the Small Business Administration's (SBA) consideration of the agency's certificate of competency (COC) referral.

We sustain the protest.

The IFB sought bids for refrigerated truck transportation of tree seedlings grown at the J. Herbert Stone Nursery to various delivery sites throughout Oregon, Northern California, Idaho and Nevada. The solicitation contained the Limitations on Subcontracting clause, as prescribed by Federal Acquisition Regulation (FAR) § 52.219-14, which requires that in performing a contract for services, at least 50 percent of the cost of contract performance incurred for personnel shall be for employees of the contractor. The IFB also included, in section K, the Minimum Bid Acceptance Period clause, FAR § 52.214-16, which specifically stated that bidders were free to specify a longer acceptance period than the government's minimum

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requirement of 20 calendar days. The clause then continued with the following provision: "The bidder allows the following acceptance period: \_\_\_ calendar days."

Bids were opened on December 7, 1988. NATC, the apparent low bidder, inserted "20" in the space provided in the above provision, thereby limiting its bid to the minimum acceptance period. According to the Forest Service, the documentation accompanying NATC's bid made it unclear whether NATC would be performing the services itself or intended to subcontract to another firm work worth more than 50 percent of the cost of contract performance incurred for personnel. The contracting officer therefore requested and received additional information from NATC regarding this matter.

After reviewing all the information submitted by NATC, the contracting officer determined NATC was nonresponsible based on a finding that a firm other than NATC would be performing the contract and that NATC would not perform at least 50 percent of the cost of the contract with its own employees. By letters dated December 15, the contracting officer referred the nonresponsibility determination to the Seattle regional office of the SBA for consideration under the COC procedures and notified NATC of the nonresponsibility determination and referral to the SBA.

On January 3, while the COC referral was pending, the contracting officer informed the SBA representative and NATC that NATC was ineligible for award because its bid had expired on December 27, 1988, 20 calendar days after the December 7, bid opening. On January 5, the contracting officer made award to the only other bidder, P&M Trucking, and this protest was filed with our Office on January 10. Work on the contract has not been suspended while the protest is pending on the ground that the potential harm to the reforestation program resulting from any delay in the lifting and transportation of the tree seedlings provides an urgent and compelling reason to proceed with performance.

NATC argues that the contracting officer abused his discretion by failing to request an extension of its bid acceptance period so that the SBA could review and independently evaluate NATC's ability to perform the contract. NATC maintains that the contracting officer was obligated under FAR § 14.404-1(d) to seek an extension of its bid acceptance period and his failure to do so constitutes bad faith. NATC further states that since it was effectively deprived of its right to have SBA consider the matter of its

responsibility, our Office should overturn the award to P&M and permit the SBA to review the contracting officer's nonresponsibility determination under the COC procedures.

As the Forest Service points out, given the brevity of the bid acceptance period, it is highly unlikely that a COC referral could have been processed before NATC's bid expired. The parties disagree whether under these circumstances it was the contracting officer or the affected bidder who should have taken the initiative to arrange for an extension so that the low bid would have been available for acceptance if and when the SBA issued a COC.

We have recognized that it is within an agency's discretion to request bid acceptance period extensions where the need to determine a bidder's responsibility has administratively delayed the award of a contract, Kos Kam, Inc., B-221806, May 14, 1986, 86-1 CPD ¶ 460; Midwest Security Agency, Inc., B-222424, Apr. 7, 1986, 86-1 CPD ¶ 345, and this certainly would have been an appropriate course of action for the contracting officer to have taken here. On the other hand, we have recognized a corresponding obligation on the part of bidders to check with the contracting officer before their bids expire if they have a continuing interest in receiving the award. Arsco International, B-202607, July 17, 1981, 81-2 CPD ¶ 46. Here, although NATC was notified 8 days before its bid was to expire that the contracting officer had referred the matter of its responsibility to the SBA, there is no indication in the record that NATC then attempted to extend its bid acceptance period or that it engaged in any other conduct from which a continuing interest in the award could or should have been inferred prior to the expiration of its bid acceptance period.<sup>1/</sup> We need not decide, however, the propriety of the contracting officer's actions in this regard because, for the reasons specified below, we find that the award to P&M was improper.

As we indicated above, NATC expressly limited its bid acceptance period to 20 calendar days; therefore, on December 27, 1988, its bid expired prior to the SBA's review of the COC referral. As for the awardee, the agency states in its report to our Office that "P&M did not limit

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<sup>1/</sup> Although it could be argued that a bidder's participation in the COC procedures is sufficient conduct that indicates a continuing interest in the award such that the bid acceptance period could be considered extended, here NATC's bid expired before it made any communication with SBA concerning the COC.

its bid acceptance period" and that award properly was made to that bidder on January 5, 1989. However, the record does not support the agency's position with regard to P&M.

The agency has furnished us a copy of P&M's bid. That copy indicates that P&M did not insert a figure in the space provided in section K for bidders to indicate a bid acceptance period. Thus, P&M's bid also offered an acceptance period of 20 calendar days which also expired on December 27, 1988. The record does not indicate that P&M voluntarily extended its bid acceptance period prior to its expiration, or that the Forest Service requested P&M to revive its bid and extend its bid acceptance period after its bid expired.<sup>2/</sup> The agency simply proceeded with award, apparently on the mistaken belief that P&M's bid was still available for acceptance. In effect, P&M was permitted to revive its bid and receive the award.

We recognize that bids that have expired generally may be revived if doing so would not compromise the integrity of the competitive bidding system. TLC Systems, B-231969, Sept. 13, 1988, 88-2 CPD ¶ 238. Where, as here, both of the two bids received have expired at the end of the initial 20-day acceptance period, both bidders should have been asked or permitted to revive their bids and extend their bid acceptance periods to permit the resolution of the question of NATC's responsibility. It is clear that NATC, the low bidder, was not allowed an opportunity to revive its bid as P&M in effect was. Thus, we find that the protester was prejudiced by the agency's unequal treatment of the bidders in its failure to request NATC to revive its bid and extend its bid acceptance period while the SBA considered the COC referral. Accordingly, the award to P&M was improper and we sustain the protest on this basis.

In view of the fact that a substantial portion of the contract has been completed pursuant to a determination of urgency, we cannot recommend corrective action. Accordingly, NATC is awarded its bid preparation costs and the cost of filing and pursuing its protest. 4 C.F.R. §§ 21.6(b) and (d). NATC should submit its claim for such costs directly to the Forest Service. 4 C.F.R. § 21.6(e).

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<sup>2/</sup> We assume that P&M was not asked by the agency before its bid expired to extend its bid, since if the agency had done so it would have had to make the same request of NATC. See FAR § 14.404-1(d) (FAC 84-5); Systematics General Corp., B-224991, Feb. 20, 1987, 87-1 CPD ¶ 190; W.A. Strom Contracting, Inc.; Seubert Excavators, Inc., B-216115; B-216115.2, Dec. 26, 1984, 84-2 CPD ¶ 705.

Because of the conclusion we have reached we need not discuss NATC's allegation, first made in its comments on the agency report, that P&M did not possess the appropriate state license for the intrastate transportation of tree seedlings within Oregon.

*Milton L. Fowler*  
for Comptroller General  
of the United States