

DeGeorge



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Martin Contracting

File: B-241229.2

Date: February 6, 1991

Paralee White, Esq., Cohen & White, for the protester.
Frank W. Miller, Esq., Department of the Air Force, for the agency.
Steven W. DeGeorge, Esq., and John G. Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Post-bid-opening protest by low bidder whose bid was rejected and who verified bid price by alleging that the solicitation did not require asbestos removal in plaster ceilings but only in ceiling tiles is denied since protester's interpretation would not give effect to the solicitation's requirement, when read as a whole, for the removal of asbestos insulation in contaminated ceilings.
2. A contracting officer's statements do not constitute a waiver of a bidder's error or estop the government from rejecting a bid where it is ultimately properly rejected.

DECISION

Martin Contracting protests the rejection of its bid submitted in response to invitation for bids (IFB) No. F49642-90-BA079, issued by the Department of the Air Force, for the repair of firewall breaks and the removal of asbestos at the Malcolm Grow Medical Center, Andrews Air Force Base, Maryland.

We deny the protest.

The IFB was issued on July 27, 1990, calling for bids to provide all plant, labor, equipment, and materials necessary to repair breaks in firewalls and remove asbestos in certain areas of the Medical Center. The particular work to be accomplished was described in the IFB's statement of work (SOW) and related drawings. One of the major items of work described in the IFB was for the removal of existing asbestos pipe/duct insulation in the ceiling areas of the Medical Center. Also, according to the agency, the SOW calls for the

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replacement of any asbestos contaminated ceilings which are removed in order to access the asbestos pipe/duct insulation located above those ceilings.

At bid opening on August 27, eight bids were received, ranging from Martin's low bid of \$186,000 to a high bid of \$794,160. The government estimate was \$622,200. The contracting officer suspected a mistake in Martin's bid because of the apparent disparity between it, the government estimate and other bids. Martin was requested to attend a meeting with the agency so that the bid could be verified. This meeting took place on August 29, and was attended by several representatives of Martin and the agency, including Martin's president and the contracting officer. According to the submissions of both parties, it became apparent at this meeting that Martin, in preparing its bid, had not taken into consideration asbestos removal above plaster ceilings located in the Medical Center. Martin's position was, and continues to be, that the IFB did not require such work, and that it is not obligated to remove plaster ceilings as "asbestos contaminated" but need only remove them under normal construction practices. The Air Force, on the other hand, views the IFB as requiring this work. The contracting officer requested Martin to either verify its bid or claim a mistake supported by work papers.

Martin wrote to the contracting officer on September 5, verifying its bid price of \$186,600, but also disagreeing with the agency's interpretation of the IFB's requirements. Unsatisfied with this response, the contracting officer again requested Martin to either verify its bid without qualification or claim a mistake. On September 14, Martin replied in writing: "We confirm our bid price per plans and specifications as we understand them." This letter was followed by another letter from Martin, dated September 20, stating that its bid was verified and that it did not allege a mistake. On this same date, Martin protested to our Office against the Air Force's alleged refusal to award to it, arguing that its bid did not contain a mistake "since the specifications do not require the work identified by the Air Force."

On September 24, the initial Martin protest was withdrawn. Martin contends that it withdrew its protest in consideration of oral representations by the contracting officer to Martin's attorney to the effect that the government intended to make award to the firm and that any disagreement over the requirements would be resolved pursuant to the Contract Disputes Act. The Air Force disagrees with this characterization of events and reports instead that the contracting officer specifically stated that while award to Martin was intended, it would be made only after receipt of a proper bid verification.

On September 27, the Base Civil Engineer for the procurement supplied the contracting officer with a memorandum in support of the contracting officer's interpretation of the IFB requirement pertaining to asbestos removal. Upon receipt of this information, the contracting officer concluded that the bid should be rejected for failure to conform to applicable specifications. Accordingly, the contracting officer rejected Martin's bid and proceeded with award to the second-low bidder.

Martin asserts two grounds for protest. First, the protester contends that given its affirmative verification on September 20, its bid could not be rejected as nonconforming because there was no clear evidence of nonconformance. Second, Martin argues that because it was induced to withdraw its protest by the alleged representation by the contracting officer that award would be made to Martin, the agency is now estopped from acting to the contrary.

The Air Force counters that rejection of Martin's bid was proper pursuant to Federal Acquisition Regulation (FAR) § 14.406-3(g)(5), which provides for the rejection of an obviously erroneous bid if the price is far out of line or there is other evidence such that the acceptance of the bid would be unfair to the bidder or the other competitors. In this regard, the agency points to the statements by Martin that its bid did not include the removal of plaster ceilings in accordance with asbestos removal procedures. The agency also "question(s) the responsiveness of the bid" because Martin made it clear after opening that it did not intend to perform in accordance with the specifications. The agency responds finally that estoppel is not supportable on the facts in the record.

Martin argues that the IFB did not require removal of the plaster ceilings in accordance with asbestos removal procedures, while the Air Force argues to the contrary. Where, as here, a dispute exists as to the meaning of a solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. Aerojet Ordnance Co., B-235178, July 19, 1989, 89-2 CPD ¶ 62. Applying this standard here, we find that Martin's interpretation is not a reasonable one and that the contracting officer's rejection of the bid was proper.

A major work-item identified by the solicitation was the removal of asbestos pipe and duct insulation located above the ceilings of the Medical Center. The parties do not dispute this. In addition, the IFB is clear that for access to the asbestos insulation, the ceilings are required to be removed. In this regard, however, Martin contends that only ceilings

which are comprised of ceiling tiles, and not plaster ceilings, have to be removed using asbestos removal procedures. In support of this view, Martin points to Addendum 2 to the solicitation which, in specifying the removal of certain asbestos contaminated ceilings, references only "ceiling tiles." While not disputing this specific reference to "ceiling tiles," the Air Force argues that, read as a whole, the IFB placed bidders on notice that plaster ceilings might also be asbestos contaminated, and that, therefore, asbestos removal procedures would be necessary regarding such ceilings as well.

While the solicitation SOW does not specifically identify plaster ceilings as being asbestos contaminated and therefore subject to the special removal procedures, we think that the Air Force's intent that this was in fact the case was nevertheless sufficiently clear. A basic purpose of this procurement is for the removal of asbestos insulation above ceilings. The fact that the insulation happens to be located above both ceiling tiles and plaster ceilings, thus likely causing them to be contaminated, did not, in our view, reasonably necessitate express identification. To distinguish between ceiling types in terms of this requirement, as does Martin's interpretation, results in a limitation inconsistent with the basic purpose of the procurement. Since Martin's interpretation does not give full effect to the Air Force's obvious intent, it is not a reasonable reading of the solicitation.

Additionally, the Air Force points out that the drawings accompanying the IFB include a general note that states in bold-face type that the contractor is to remove asbestos pipe and duct insulation. The drawings show the location of this insulation. Another general note on each of the same drawings states that "unless otherwise noted ceilings are plaster." We agree with the Air Force that these notes should have put Martin on notice that plaster ceilings could be asbestos contaminated and require asbestos removal procedures.

Accordingly, since Martin, by virtue of its unreasonable interpretation, made it very clear that it did not bid on the basis of removing contaminated plaster ceilings with asbestos removal procedures, its bid was properly rejected pursuant to FAR § 14.406-3(g)(5). See Kumar Mechanical, Inc., B-240433, Nov. 13, 1990, 90-2 CPD ¶ 391.

As a final matter, Martin argues that the Air Force is estopped from awarding to anyone else because the contracting officer allegedly promised award to Martin in exchange for withdrawal of the firm's original protest. We are not persuaded by this argument. An agency's actions do not constitute a waiver of a bidder's error or estop the

government from rejecting a bid where it is ultimately properly rejected. See Asbestos Mgmt. Servs., B-236379, Aug. 25, 1989, 89-2 CPD ¶ 180. Here, we find that Martin's bid was properly rejected by the contracting officer for the reasons cited above. Accordingly, regardless of the conversation which may have taken place between Martin's attorney and the contracting officer, no estoppel results.

The protest is denied.


For James F. Hinchman
General Counsel