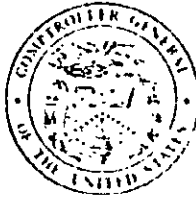


5-271

M Boyle
Proc I

DECISION



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

FILE: 3-189356

DATE: February 3, 1978

MATTER OF: Campbell Industries--reconsideration

DIGEST:

1. Timeliness of protest based on contention that agency intended and permitted place of performance specification to be interpreted in manner different from its unambiguous meaning is governed by section 20.2(b)(2) of GAO Bid Protest Procedures. Where protest was filed 15 days after bid opening and there is no showing as to when protester first learned of basis of protest, GAO has no basis to conclude that protest was not timely filed.
2. IFB, which provided that place of performance is limited to contractor's facility or facility leased to certain parties, did not inform all bidders that agency's facility was also available, and resulted in substantial adverse impact on uninformed bidder's bid prices. Therefore, agency's failure to advise all bidders of availability of its facility was improper. Since contract is completely performed and agency has properly amended its place of performance specification for future procurements, no further corrective action is required.

Campbell Industries (Campbell) requests reconsideration of our decision in the matter of Campbell Industries, B-189356, July 14, 1977, 77-2 CPD 30, declining to consider Campbell's protest against the award of a contract to Triple "A" South (TAS), the low bidder under invitation for bids (IFB) No. N62791-77-B-0098 issued by the United States Navy for the regular overhaul and drydocking of the U.S.S. Florikan.

As stated in the July 14, 1977, decision, amendment No. 3 to the IFB provided that the required work was to be performed at the "CONTRACTOR FACILITY/NAVAL STATION GRAVING DOCK." [The Naval Station Graving Dock is a dock located at the San Diego Naval Station and leased to the San Diego Port Authority, which has "user agreements with Campbell and TAS subject to scheduling by the Navy.] The contract period began July 15, 1977, and

and ended November 1, 1977. Campbell contended that TAS did not have a facility capable of berthing and providing services for the period September 9, 1977, to November 1, 1977.

Our decision concluded that while we presume that Campbell's reservations concerning TAS's ability to perform were considered by the Navy, our Office has discontinued the practice of reviewing protests against affirmative determinations of responsibility, except in limited situations not applicable here. Accordingly, Campbell's contention was not considered.

Campbell now contends in its letter dated August 11, 1977, that the thrust of its protest was that the Navy intended to and did permit contract performance at either a Naval facility not listed in the IFP or places of performance listed in the IFB but that neither the IFB nor the Navy so informed all bidders. Campbell contends that if it knew that the work could have been performed at the Naval facility or the Graving Dock, its bid price could have been substantially reduced. The record shows that the low bidder and the second low bidder priced their respective bids based on their understanding that the Naval facility as well as the Graving Dock was available as a performance site.

In response, in its report received here on November 7, 1977, the Navy conceded that the amendment No. 3 wording allowing the work to be performed at the contractor's facility/Naval Station Graving Dock would have been clearer had it stated "Contractor's facilities/Graving Dock/Naval Station," and the Navy has so clarified its solicitations for the future. Nevertheless, the Navy states that Campbell's assertion that the amendment No. 3 wording on the Graving Dock meant the contractor could not tie up the ship at the Naval Station is misleading. A survey of the last fiscal year of Navy ship repair work in the Port of San Diego, including work accomplished by Campbell, shows that for all of the work on ships at least the size of the U.S.S. Florikan, which constituted 90 percent of all Navy business in the port, contractors had access to the Naval Station facilities. As a result of the past practice, the Navy submits that the intent of amendment No. 3 should have been clear to any experienced bidder in the San Diego area, of which Campbell is one. In fact, the Navy states that two bidders sent letters stating that they understood amendment No. 3 to allow contractors to use both the Graving Dock and pier space at the Naval Station.

The Navy also argues that of the greatest significance in responding to Campbell's argument is Campbell's failure to voice concern in a timely manner which, if submitted, should estop Campbell from now raising the issue. In support, the Navy refers to our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1977), which provides in pertinent part, the following:

"(b)(1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening shall be filed prior to bid opening * * *."

Since Campbell's initial protest letter to our Office of June 13, 1977, as well as its letter of August 11, 1977, questions the language contained in amendment No. 3 to the IFB, said amendment being dated May 19, 1977, it is the Navy's position that Campbell's protest should have been submitted prior to June 1, 1977, the bid opening date. However, since it was not, Campbell's protest is untimely in the Navy's view. Additionally, for Campbell to refuse to make the Navy aware of its problem with amendment No. 3 at any time prior to award--when the Navy could have taken steps to clarify any confusion that may have existed--and then raise the issue at a later date, smacks of bad faith. Hence, if submitted Campbell should not be heard to complain about the language of amendment No. 3. In sum, the Navy's position is that award was justifiably made to TAS and Campbell's untimely protest should be denied.

Timeliness of Protest

Since the IFB, as amended, clearly stated that the place of performance was the contractor's facility or the Naval Station Graving Dock--a provision that we view as unambiguous--and since Campbell did not object to performance at either site, contrary to the Navy's contention, Campbell's protest would not be governed under the provisions of 4 C.F.R. § 20.2(b)(1), which requires protests based upon alleged apparent improprieties to be filed prior to bid opening.

The thrust of Campbell's protest--as we now understand it--is that the place of performance specification was interpreted in a manner different from its unambiguous meaning by the Navy and at least two other competitors, and that these competitors knew of the Navy interpretation prior to bid opening but Campbell did not, thereby affording those so informed a competitive advantage. The timeliness of Campbell's protest would be governed by 4 C.F.R. § 20.2(b)(2), which requires protests based upon other than apparent solicitation improprieties to be filed here within 10 working days of notice of the basis of protest. Campbell's protest was initially filed here on June 16, 1977; however, the record does not establish when Campbell first learned of the Navy's intended interpretation of the place of performance specification. Accordingly, we have no basis to conclude that Campbell's protest was not timely filed.

Alleged Incorrect Place of Performance Specification

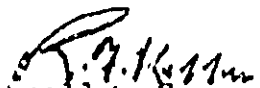
The IFB, as amended, provided that the required work was to be performed at the contractor's facility or the Naval Station Graving Dock. The Navy contends that this provision informed experienced bidders that Naval facility pier space was also available as a place of performance. In support, the Navy says that last year for all repair work on ships at least the size of the U.S.S. Florikan contractors had access to Naval facility pier space. As a result of that past practice, the Navy argues that Campbell and all other experienced bidders in the San Diego area should have known of the availability of the Naval facilities as a place of performance.

In reply, Campbell argues that in all cases referred to by the Navy where a contractor was permitted access to Naval facilities as a place of performance, the IFB expressly so provided, whereas, here, this IFB did not.

First, as stated above, we believe the place of performance specification is unambiguous and required performance at the Graving Dock or the contractor's facility; the Navy's intent to permit performance at

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Naval facilities was not conveyed to prospective bidders by the language in the IFB. Secondly, we believe that the impact of not informing all bidders of the Naval facilities availability on the price of bids was substantial, though unascertainable; therefore, the Navy's use of that specification was improper. Thirdly, as Campbell is fully aware, the contract is completely performed and the Navy has taken steps to clarify future solicitations to expressly state when Naval facilities may be used by a contractor. Accordingly, while Campbell's protest is sustained, no remedial recommendation regarding the instant procurement is possible and no further corrective action by the Navy for future procurements is required.


Deputy Comptroller General
of the United States