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DECISION

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

FILE: B-202208.2 DATE: November 4, 1981

MATTER OF: North Coast Electric Company--Reconsideration

DIGEST:

Prior decision, denying protest, is affirmed where the protester does not demonstrate that the decision contains any errors of fact or law.

North Coast Electric Company (North Coast) requests reconsideration of our decision in North Coast Electric Company, B-202208, August 14, 1981, 81-2 CPD 141, in which we denied its protest. The pertinent facts of that case follow.

North Coast submitted a bid in response to invitation for bids (IFB) No. DACW67-81-B-0012. The IFB, which was for a "civil work," was issued by the Seattle District, United States Army Corps of Engineers (Army) to procure two 230-kv transformers for the Libby Powerhouse, Libby, Montana. North Coast submitted the low, responsive bid; but, because the bid certified that the proposed transformers would be of Canadian origin, the Army added the Buy American Act's 6-percent price differential to the bid price. As a result, the General Electric Company was placed in line for the award.

In its protest, North Coast argued that the 6-percent price differential should not have been applied in this situation because, under the terms of the IFB, Canadian end products were exempt. In any event, North Coast maintained that it had been misled by the procuring office during a prebid conversation about the application of the price differential. Finally, in the alternative, North Coast argued that it had made a mistake in its Buy American certification and that its items were actually of domestic origin.

In denying the protest, we held:

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(1) Even though the IFB did not expressly inform bidders that the Buy American Act price differential would be applied to foreign qualifying country end products offered for civil work procurements, under the applicable regulations, which were noted in the IFB, the price differential had been properly applied to North Coast's bid;

(2) It was unnecessary for our Office to determine whether North Coast had been misled by the IFB regarding the application of the Buy American price differential since North Coast admitted that it would have offered the same product regardless of the alleged IFB defect and claimed only that, because of the alleged defect, it was justified in carelessly certifying the origin (Canadian, instead of United States) of its end product;

(3) North Coast acted at its own risk when, upon allegedly receiving conflicting advice from the Army procurement office and the Defense Contract Administration Service (DCAS) regarding the application of the Buy American price differential to Canadian end products, it chose to follow the erroneous interpretation of DCAS and bid on the basis that the price differential did not apply; and

(4) North Coast's claim of mistake in its Buy American Act certification, alleged after bid opening but prior to award, could not be allowed since correction would displace a lower bid and the mistake was not evident from the face of North Coast's bid.

North Coast again argues that the IFB was misleading and that as a result it could not tell whether the procurement was for a civil work or whether the Buy American Act's price differential applied to Canadian end products.

Our prior decision specifically stated that it did not rest upon "the question of whether North Coast was misled by the IFB." We found the controlling factor to be that North Coast did not argue that it would have offered another end product had it known that Canadian end products were subject to the Buy American price differential for this civil work. Instead, North Coast stated that it would have offered the same end product, but under a United States, rather than a Canadian, certification. We held that North Coast was arguing that, because of the wording of the IFB, it was justified in making a careless certification. We rejected this argument, holding that North Coast "had a duty to carefully certify the origin of its end product" regardless of the wording of the IFB.

Nothing North Coast brings out on reconsideration makes us alter this conclusion. Although North Coast argues that it is expensive and time-consuming "to obtain complete country of origin and related monetary data for the component parts in the large transformer involved here," we find this argument unpersuasive. The standard Buy American Act certificate is to be completed accurately without regard to the time and expense involved in obtaining data needed to make an accurate certification and regardless of the bidder's belief as to the necessity for accuracy.

Although North Coast argues that it was misled by the IFB into believing that Canadian end products were exempt from the Buy American price differential, the record clearly indicates that North Coast did not act solely on the wording of the IFB. Rather, after studying the IFB, it was uncertain whether its Canadian end product would be exempt, so it went to the Army for clarification. The Army claimed that North Coast was specifically told that Canadian products would not be exempt. North Coast, however, maintains that the advice it received was far more tentative. As a result, it solicited the advice of DCAS, which told North Coast that Canadian end products would definitely be exempt. North Coast chose to accept this advice and not the Army's.

In our prior decision, we held that North Coast chose to act on the erroneous advice of DCAS at its own risk. On reconsideraton, North Coast cites George H. Whike Construction Co. v. United States, 140 F. Supp. 560 (Ct. Cl. 1956), for the proposition that a "bidder is entitled to rely on interpretations provided by Government officials who lead the bidder to reasonably regard what they say as being authoritative." North Coast cites other cases for the proposition that the Government has the "burden of clarification" regarding a "government-drawn agreement" except in cases, for example, of a "major patent discrepancy." See, for example, WPC Enterprises, Inc. v. United States, 163 Ct. Cl. 1 (1963). Under these rules, North Coast maintains that it had a right to seek clarification from the Army and that the Army had a duty to provide such clarification in clear and definite terms. And, when North Coast received an allegedly indefinite response from the Army, the company argues it was then entitled to rely on the definite response received from DCAS.

While we do not question the validity of the general propositions North Coast cites, we do not believe that they are applicable to the facts of this case. First of all, the cited cases involved complaints of contractors under awarded contracts unlike North Coast's protest. Second, the Whike case involved definite assurances made by a representative of the contracting agency unlike the case here where the allegedly definite, albeit erroneous, advice was furnished by DCAS rather than the contracting agency, the Army. The key question here is whether North Coast could disregard the Army's advice and rely on that of DCAS. DCAS's advice was nothing more than an informal opinion of a third party, not the Federal Government in its contracting capacity. Under North Coast's reasoning, any bidder dissatisfied with the contracting agency's interpretation of the terms of the IFB could shop around until it found another Government agency willing to give a more "definite" interpretation of the solicitation that is more to the bidder's liking. If a bidder believes that a solicitation is ambiguous because the contracting agency is providing an erroneous

or an indefinite interpretation of a solicitation provision, the proper course of action is to file a protest prior to bid opening. North Coast, however, did not protest prior to bid opening.

As to the allegedly "indefinite response" of the Army, the Army procurement agent has flatly stated that North Coast was told that the Buy American price differential would be applied to Canadian end products. North Coast denies this.

It is well established that the protester has the burden of affirmatively proving its case. Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. And where, as here, the only available evidence is the conflicting statements of the protester and the contracting agency, we have held that the protester has failed to meet its burden of proof. Del Rio Flying Service, Inc., B-197448, August 6, 1980, 80-2 CPD 92.

Therefore, we do not believe that North Coast has shown any basis for us to modify our prior decision. In light of this, that decision is affirmed.

for Milton J. Socolar
Comptroller General
of the United States