



Comptroller General
of the United States

Washington, D.C. 20548

B-222476.15

October 21, 1988

The Honorable J. James Exon
United States Senate

Dear Senator Exon:

This is in response to your letter of July 21, 1988, written jointly with Senator David K. Karnes and Congresswoman Virginia Smith, concerning the Army's rejection of the bid submitted by Nebraska Aluminum Castings, Inc. (NAC) under invitation for bids (IFB) No. DAAK01-85-B-B060. The Army rejected NAC's bid as materially unbalanced because the firm's price for each of 10 first article compasses (\$22,510) was more than 1,000 times greater than its price for each production unit (\$19.17). In a number of decisions and letters, we have said that we have no basis for legal objection to the Army's action. Your letter forwarded to us a copy of the decision of the United States Claims Court in Northern Virginia Van Co. v. United States, 3 Cl. Ct. 237 (1983), which NAC contends justifies a reconsideration of our position with respect to NAC's claim.

In Northern Virginia Van Co., the IFB contemplated the award of a requirements contract for moving services and required bidders to submit hourly rates based on an estimated number of hours for various labor categories. Because the low bidder, Northern Virginia, submitted a pricing structure containing nominal prices for some categories and enhanced prices for others, the contracting officer determined that the bid was unbalanced. The contracting officer then reevaluated bids based on estimates different than those contained in the IFB, even though the estimates in the IFB were believed to be the best available. Under this reevaluation, Northern Virginia's bid was no longer low, and the firm brought suit to block the proposed award to another bidder. The court said that it was improper for the agency to evaluate bids using estimates different than those contained in the solicitation, and that because the solicitation did not provide that a materially unbalanced bid would be subject to rejection, there was no authority to

reject Northern Virginia's bid. The court sustained, however, the agency's decision to cancel the IFB and resolicit its requirement.

NAC contends that based on Northern Virginia Van Co. this Office must object to the Army's rejection of NAC's bid to supply compasses because there too the IFB did not provide for rejection of an unbalanced bid. We do not agree.

Northern Virginia Van Co. correctly states the general rule that bids must be evaluated in a manner consistent with the terms of the solicitation, and we agree with the court that ordinarily rejection of a materially unbalanced bid must be based on a solicitation provision expressly providing that such a bid is nonresponsive. In particular, this is our view in cases involving option years or estimated quantities, where the government seeks to eliminate bidding patterns that can distort the evaluation. It is also our view, however, that when a bid contains grossly front-loaded prices for first articles--a situation much different than that faced by the court--the bid should be rejected as nonresponsive, even in the absence of an express warning against unbalanced first article pricing. Extreme unbalancing--such as charging over \$22,000 for an item identical to one priced at less than \$20 if sold from the production run--results in the government paying far more for the item than it is worth. We do not think bidders must be warned that the government might regard such a bid as unacceptable.

In any event, the Army's solicitation in NAC's case did provide, in explicit terms, that progress payments made prior to first article approval would not exceed the first article price. This provision was designed to limit the government's financial exposure under the contract until such time as the contractor had shown that it was capable of satisfactory contract performance. Given this purpose, the provision could not be read as indicating that the government would make progress payments up to the first article price regardless of amount, and without regard to whether that price bore any reasonable relationship to the properly allocated costs of producing and testing the first articles. NAC's unbalanced first article pricing structure, however, was predicated on just such a reading. In effect, the bid sought contract financing on terms other than those authorized by the IFB. The fact that the solicitation did not contain an express warning regarding unbalanced pricing did not render inapplicable the basic principle of government procurement that a bid submitted on terms inconsistent with a material solicitation provision is nonresponsive.

In short, the decision in Northern Virginia Van Co. does not warrant changing our position on NAC's complaint. We continue to find no legal basis for objecting to the Army's rejection of NAC's bid.

Sincerely yours,

Acting

Milton J. Fowler

Comptroller General
of the United States