

DECISION



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

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97356

FILE: B-182175

DATE: July 21, 1975

MATTER OF: George C. Martin, Inc.

DIGEST:

1. Where IFB permits multiple awards, "all or none" bid lower in aggregate than any combination of individual bids available may be accepted by Government even though partial award could have been made at lower unit cost.
2. In absence of evidence affirmatively showing that low responsive bidder added "all or none" qualification to bid after opening, award is not questioned even though an appearance of impropriety was created when bid opening officer and preparer of bid abstracts, respectively, failed to read aloud or note qualification in violation of Armed Services Procurement Regulation on bid opening procedures. GAO reviewed answers by Government employees to written interrogatories propounded by protester and received expert handwriting analysis from United States Secret Service.
3. Contention that "all or none" qualification on bidding schedule was change in bid requiring initialing by bidder is without merit because (1) qualification was not change; (2) assuming qualification was change, bidding schedule was initialed; and (3) lack of initialing of change could have been waived as minor informality.
4. Failure of procuring activity personnel to read aloud and properly record on abstracts "all or none" qualification is deviation of form from procurement regulations, not of substance, and does not affect validity of award. However, in view of failure of procuring activity personnel to follow ASPR bid opening procedures, GAO recommends that Secretary of Army take appropriate action to insure compliance with applicable ASPR's.
5. Oral explanation furnished bidder regarding manner of award has no legal effect where IFB requires bidders to request in writing any explanation desired regarding meaning or interpretation of IFB.

6. Mailgram to procuring activity prior to award advising that " * * * should the low bid be withdrawn the specifications are quite clear as to the procedure for this basis of award for which we would be in line" should have been construed as a preaward protest, but does not affect validity of award which is not subject to question.

This matter concerns the protest of George C. Martin, Inc., against the award of a contract to A. A. Beiro Construction Co., Inc., for the construction of the Harry Diamond Laboratories Phase III Support Complex, Adelphi, Maryland. Counsel for Martin contends that the award to Beiro was illegal because of irregularities in the bid opening and award procedures, the failure of the procuring activity to act properly on Martin's preaward protest, ambiguities contained in the invitation for bids (IFB), and the failure of the contracting officer to reject Beiro's bid as nonresponsive. Counsel requests that award of one of the two base bid schedules be made to Martin, or in the alternative, that the entire contract be readvertised.

On May 17, 1974, IFB No. DACA31-74-B-0100 was issued by the Department of the Army, Baltimore District, Corps of Engineers. Amendment No. 3, dated June 3, 1974, revised the price schedule to provide for Base Bid Schedule "A," Radiation Facility with one additive item, and Base Bid Schedule "B," Explosive Load and Test Facility and Explosive Storage with three additive items. Amendment No. 3 also added the following sentence to paragraph 28.6 of the Special Provisions, Contractor Quality Control: "Note: If Schedule 'A' and 'B' are awarded in a single contract, the CQC requirements will be limited to those required by Schedule 'A.'"

Bids were opened on June 19, 1974, and counsel for Martin states that a representative of Martin attended the bid opening. Bids were submitted on both schedules by Martin, Beiro, A & M Gregos, Inc., Savoy Construction Co., Inc., and William F. Klingensmith, Inc. The Beiro bid was signed by Alexander A. Beiro as president. Martin's counsel states that neither at the opening nor in the abstract of bids was any indication given that the bid submitted by Beiro was in any way conditioned, limited or qualified.

B-182175

The record supports Martin's contention in this regard. An abstract of bids was prepared which discloses the following information.

<u>Bidder</u>	<u>Total Amount of Base Bid Schedule A</u>	<u>Total Amount of Base Bid Schedule B</u>
A. A. Beiro Construc- tion Co., Inc.	\$1,948,000	\$1,128,000
A & M Gregos	1,484,000	820,000
George C. Martin, Inc.	1,887,000	1,267,000
Savoy Construction Co., Inc.	2,348,000	1,063,000
William F. Klingensmith	2,033,920	1,428,000

As shown on the abstract, Gregos submitted the low bid on both schedules. After bid opening, however, Gregos claimed a mistake in its bid. While the claim of mistake was being considered by the Corps of Engineers, on August 9, 1974, the Corps sent a mailgram to Martin requesting a 30-day extension of the bid acceptance period which was due to expire on August 18, 1974. By mailgram of August 14, 1974, Martin, aware that the Gregos bid might be withdrawn, advised the Corps of Engineers that "* * * SHOULD THE LOW BID BE WITHDRAWN THE SPECIFICATIONS ARE QUITE CLEAR AS TO THE PROCEDURE FOR THIS BASIS OF AWARD FOR WHICH WE WOULD BE IN LINE." We note that the abstract indicated that with Gregos' bid withdrawn, Martin became the low bidder on Schedule "A," and Savoy became the low bidder on Schedule "B." Therefore, Martin expected to receive an award on Schedule "A."

After submitting clear and convincing evidence that established the existence of a mistake, Gregos was permitted to withdraw the low bid by letter from the contracting officer dated August 16, 1974. Beiro was awarded the contract for Base Bid Schedules "A" and "B" on the same date.

Two factors unknown to Martin at that time resulted in the award of the entire contract to Beiro. First, the procuring activity reports that, although Beiro's bid on Base Bid

Schedule "A" was not lower than Martin's, Beiro had conditioned its bid to require the Government to award Beiro either Schedule "A" alone or both Schedules "A" and "B." The condition consisted of the handprinted notation "ONLY IF SCHEDULE 'A' IS AWARDED" adjacent and just below the total amount inserted for Schedule "B." As mentioned above, the condition was neither read aloud at bid opening nor recorded on the abstract of bids.

Second, the Corps of Engineers reports that an examination of Savoy's bid revealed that the totals inserted for Base Bid Schedules "A" and "B" were not the figures one would obtain by adding items 1 and 2 of each schedule. The procurement clerk attempted to resolve this discrepancy by striking out the totals Savoy had entered and, on each schedule, substituting the sum of items 1 and 2. This change was reflected on the abstract of bids. However, by letter dated June 26, 1974, Savoy notified the procuring activity that the figures for item 2 of Schedule "A" and item 2 of Schedule "B" had been mistakenly transposed. The original totals were correct but the \$700,000 figure that appeared in item 2 of Schedule "A" should have been inserted in item 2 of Schedule "B," and the \$450,000 appearing in item 2 of schedule "B" should have been inserted in item 2 of Schedule "A." Since Savoy's mistake was a clerical mistake apparent on the face of the bid, and since Savoy had furnished written verification of the bid actually intended, Savoy was permitted to correct the bid in accordance with the provisions of the Armed Services Procurement Regulation (ASPR) § 2-406.2 (1973 ed.). A second abstract of bids was prepared to reflect Savoy's corrected bid prices. We observe here that, like the original abstract, the second abstract contains no reference to the condition in the Beiro bid. The correction of Savoy's apparently low bid on Schedule "B" to \$1,313,000 from \$1,063,000 resulted in Beiro's bid on Schedule "B" being the lowest.

Because of these two factors, the combination of Beiro's bid for Schedules "A" and "B" constituted the lowest responsive bid available for acceptance, and Beiro was awarded both schedules. By mailgram dated August 19, 1974, to the Corps of Engineers, Martin protested the award of Base Bid Schedule "A" to Beiro on the grounds that Martin was the low bidder on Schedule "A" and that the IFB required the Government to award separately Base Bid Schedules "A" and "B."

By letter to our Office dated September 4, 1974, and subsequent correspondence, Martin and its counsel protested the award

to Beiro. After reviewing the Corps of Engineers' initial report on the protest to our Office, counsel for Martin states that it first learned that Beiro's bid was conditioned by the handprinted notation and that the Savoy bid had been corrected.

On January 16, 1975, in accordance with section 20.9 of our then subsisting bid protest procedures (4 C.F.R. Part 20 (1974)) a conference on the protest was held at our Office with representatives of all interested parties. At this conference, counsel for Martin highlighted the principal basis for the protest. Counsel contends that "The absence of any reference to this condition at the bid opening or in the Abstract of Bids raised a substantial question as to whether the condition was actually entered on Beiro's bid response at the time of the bid opening, or was subsequently inserted, and if so, when and by whom."

During the conference, to fully develop the record on this serious allegation, the parties agreed that counsel for Martin would submit to the Corps of Engineers written interrogatories for responses under oath by all persons having access to the bids. Counsel for Martin submitted a letter dated January 30, 1975, to the Corps of Engineers enclosing written interrogatories. Copies of the responses of the Corps of Engineers' personnel to the interrogatories were furnished our Office under cover letters of February 27 and March 3, 1975.

The primary issue for resolution is whether Beiro's bid was properly qualified at the time of bid opening. Assuming that it was, the record indicates that the combination of Beiro's bid for Schedules "A" and "B" constituted the lowest responsive bid available to the Government. Paragraph 19 of the IFB provided:

"AWARD ON MULTIPLE SCHEDULES: The Government further reserves the right to make award on any or all schedules of any bid, unless the bidder qualifies such bid by specific limitation; also to make award to the bidder whose aggregate bid on any combination of schedules is low."

In view of this provision and since the IFB contained no prohibition against bidding on an "all or none" basis, bidders were permitted to qualify their bids without rendering the bid

nonresponsive. Beiro's price for the total amount of Base Bid Schedule "B" which was followed by the phrase "Only if Schedule 'A' is awarded" was a permitted qualification assuming that this phrase appeared on Beiro's bid prior to bid opening. ASPR § 2-404.5 (1973 ed.) provides that, unless the IFB so states, a bid is not rendered nonresponsive by the fact that the bidder specifies that award will be accepted only on all, or a specified group, of items included in the invitation.

Where, as in the present case, an IFB permits multiple awards, our Office has held that an "all or none" bid lower in the aggregate than any combination of individual bids available may be accepted by the Government even though a partial award could be made at a lower unit cost. See Oregon Culvert Co., Inc., B-183406, June 12, 1975; General Fire Extinguisher Corporation, B-181796, November 21, 1974, 54 Comp. Gen. _____. Under the provision set forth in paragraph 19, the Government reserved the right to select the lowest price for any schedule of any bid, unless a bidder qualified its bid by specific limitation. The Government also reserved the right to award to the bidder whose aggregate bid on any combination of schedules is low. Assuming that Beiro's bid contained the written qualification at the time of bid opening, the combination of Beiro's price for Schedules "A" and "B" constituted the lowest responsive bid available to the Government. Martin's contention that the Government would save \$61,000 is conditioned upon a combination of Martin's Schedule "A" and Beiro's Schedule "B," which combination is not susceptible to award by reason of Beiro's qualification. The record discloses that, comparing any other combination of Schedules "A" and "B" of responsive and responsible bids, does not establish a price that is less than the combination of Beiro's Schedules "A" and "B."

Counsel for Martin contends that the answers to interrogatories, in conjunction with the known facts of what transpired at the bid opening, lead to the conclusion that the qualification "Only if Schedule A is awarded" did not appear on the Beiro bid form at the bid opening and the circumstances warrant a finding of bid tampering. Further, counsel contends that, in view of this, the Government was required to consider Martin's August 14, 1974, mailgram as a preaward protest.

We have reviewed the evidence contained in the answers to the interrogatories for the purpose of determining whether Beiro's

bid was, in fact, qualified at the time of bid opening. We have carefully considered all the evidence submitted bearing on this question and we do not agree with Martin's allegation. The answers, to the interrogatories submitted to several Government employees by counsel for Martin, do not establish that any Government employee noticed Beiro's qualification at or just after bid opening or when the abstracts were prepared. Moreover, the failure of the bid opening officer to read the qualification aloud or the abstracts preparer to note the qualifications are represented as "oversights." There is no affirmative evidence to show that the qualification was not on Beiro's bid at bid opening.

At least one employee of the Government states that he noticed the qualification on or about June 23, 1974 (4 days after bid opening), on the first occasion that he saw Beiro's bid form while reviewing the bids of Gregos, Martin and Beiro to determine their responsiveness. Other Government employees state that they noticed Beiro's qualification on the first occasion that they saw Beiro's bid form which was subsequent to bid opening. There is no statement from any of the employees submitting interrogatories which would indicate that at the time of bid opening Beiro's bid did not contain the qualification at the time the bid was submitted. In response to the interrogatory "Do you have any knowledge of any irregularities or improprieties in the handling of bids under this procurement or of any other matters which should be brought to the attention of the General Accounting Office in connection with this protest?" all Government employees answered in the negative.

In view of the seriousness of Martin's contention that the Beiro qualification may have been added after bid opening, we requested the United States Secret Service, Special Investigations Division, to examine Beiro's original bid form to determine whether Alexander A. Beiro, the president of Beiro who signed the bid, had inserted the qualification and, if possible, when the handprinted qualification may have been affixed to the bid. In addition, we requested information as to the source and timing of the affixation of the handprinted initials "AAB" which appeared on the bidding schedule. By letter dated April 28, 1975, the Secret Service advised that it would be necessary to have comparable handprinted specimens of Mr. Beiro before proceeding with an

analysis. The report further advised that a study of the original bidding schedule failed to reveal any evidence that would suggest when the handprinted qualification was placed on the bid and that it was doubtful whether this question could be answered through document examination.

Following receipt of the report from the Secret Service, counsel for Beiro agreed to our request that Alexander A. Beiro appear at our Office and submit handwriting specimens which we advised Beiro would then be submitted to the Secret Service for examination. It should be noted that the handwriting specimens of Beiro were voluntarily furnished our Office by Alexander A. Beiro even though he had previously furnished our Office with an affidavit stating that, prior to the bid form being taken to Baltimore by another employee of the company, Beiro inscribed the qualification in his own hand. Beiro's handwriting specimens were submitted to the Secret Service, which reported on May 5, 1975, that Beiro wrote the initial "AAB" on the face and the reverse of the original and duplicate bidding schedules and handprinted the notation "Only if Schedule 'A' is awarded" on the reverse of the original and duplicate price schedules.

In view of the Secret Service reports which state that the Beiro qualification and initials were placed on the bid by Beiro we must conclude that no Government employee added the Beiro qualification after bid opening. We recognize that no independent evidence has been presented to establish whether the qualification was affixed to the bid before opening as Beiro asserts, or after, as suggested by Martin. However, our Office has exhausted the administrative measures available. In the absence of affirmative evidence indicating that the qualification of Beiro's bid was affixed after bid opening, we conclude that Beiro's bid was properly qualified and as such was the lowest responsive total bid available to the Government.

Martin contends that even assuming the qualification appeared on the Beiro bid form at bid opening the failure to read aloud and properly record the qualifications were clear violations of ASPR § 2-402.1 and § 2-403 (1973 ed.). Martin states that since these violations went to the heart of the award of this procurement and call into question the integrity of the competitive bidding process followed here, the award should be held illegal.

Although ASPR § 2-402.1 (1973 ed.) requires that when practical bids should be read aloud to all persons present and ASPR § 2-403

requires the abstract of bids to contain any information required for bid evaluation, the failure of the procuring activity to read aloud and properly record Beiro's qualification was a deviation of form, not of substance, and therefore does not affect the validity of the award.

We share Martin's concern that the failure of the bid opening officer to mention Beiro's "all or none" qualification at the bid opening and the failure of the two abstracts to indicate that Beiro's bid contained such a qualification creates an appearance of impropriety in the bidding procedure. Accordingly, we are recommending, by letter of today, to the Secretary of the Army that appropriate steps be taken to insure that all procuring activity personnel involved with bid opening procedures comply with those portions of the ASPR applicable to bid opening procedures. What occurred here can only serve to undermine the confidence of potential bidders for Government contracts. However, there is no affirmative evidence to warrant the termination of the Beiro contract.

Martin contends that Beiro's qualification was a change in its bid which was not initialed as required by the IFB and therefore Beiro's bid was not properly for consideration. We do not agree with this contention. The instructions to bidders, Standard Form 22, provides at paragraph 5(a) that:

"If erasures or other changes appear on the [bid] forms, each erasure or change must be initialed by the person signing the bid."

The qualification was part of Beiro's bid as originally submitted and was not a change which was required to be initialed. Further, assuming, arguendo, that the handwritten qualification was a change, the record indicates that the bidding schedule of Beiro's bid containing the qualification was, in fact, initialed. Moreover, even if Beiro had failed to initial the change the deviation could have been waived as a minor informality and would not have been cause for rejection of the bid as nonresponsive. See Corbin Sales Corporation, B-182978, June 9, 1975.

Martin further argues that the "Special Bid Conditions" set forth in the "Notes to Bidders" section of the IFB required separate award for Schedules "A" and "B." In this regard, the IFB states:

"(a) The bidder(s) offering the lowest total base bid amounts for schedules A and B combined, if within the total project funds determined by the Government to be available before the bids are opened * * *."

Martin states that, prior to submitting its bid, it was assured by the "Issuing Office" of the Corps of Engineers that the intent of the above-cited provision was that award of bid items "A" and "B" would be made separately if it resulted in a savings to the Government. We do not agree that this provision required separate awards for Schedules "A" and "B." Under this provision the low bidder or bidders for purposes of award would be the bidder or bidders offering the lowest total base bid amount for Schedules "A" and "B" combined. Further, paragraph 19, Award on Multiple Schedules, of the IFB specifically provides:

"The Government further reserves the right to make award on any or all schedules of any bid, unless the bidder qualifies such bid by specific limitation; also to make award to the bidder whose aggregate bid on any combination of schedules is low."

Under this provision, the Government reserved the right to make an award to the bidder submitting the lowest overall bid. Any oral explanation Martin may have received to the contrary would have no legal effect in view of the provision contained in paragraph 1 of the Instructions to Bidders which clearly stated that oral explanations or instructions given before the award of the contract would not be binding and that any explanation desired by a bidder regarding the meaning or interpretation of the IFB must be requested in writing. In view of this provision, any questions regarding the manner in which award would be made should have been submitted in writing prior to bid opening.

Martin also contends that Beiro's bid was nonresponsive on the ground that its qualification "Only if Schedule 'A' is awarded" which was handprinted just below Beiro's total amount for Base Bid Schedule "B" was at best an ambiguous qualification. We do not agree with this contention. The only reasonable interpretation of this qualification is that Beiro would accept

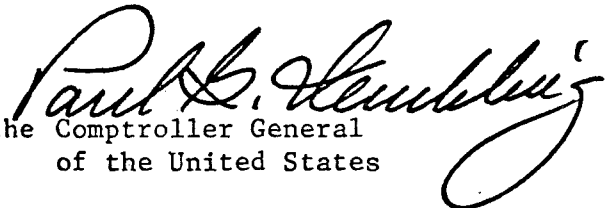
an award for Schedule "B" only if the firm also received an award for Schedule "A." If Schedule "B" had been awarded to someone other than Beiro, its bid for Schedule "A" would stand alone and, if low, would have resulted in an award to Beiro for Schedule "A."

We agree with Martin's contention that its mailgram of August 14, 1974, sent to the Baltimore District Corps of Engineers should have been considered as a protest prior to award. This mailgram stated in pertinent part:

"* * * WE FURTHER WISH TO ADVISE THAT SHOULD THE LOW BID BE WITHDRAWN THE SPECIFICATIONS ARE QUITE CLEAR AS TO THE PROCEDURE FOR THIS BASIS OF AWARD FOR WHICH WE WOULD BE IN LINE."

Although Martin's mailgram did not state that its firm was protesting the award, the implication is clear that Martin expected to receive an award if the low bid was withdrawn and that its mailgram would constitute a protest if it did not receive an award. Our Office has held that for the purposes of GAO consideration, a request by a disappointed bidder for our review of the procurement need not contain the exact words of protest before it can be characterized and considered as a bid protest. See Johnson Associates, Inc., 53 Comp. Gen. 518 (1974). However, in view of our conclusion that there is no legal basis to question the award to Beiro, failure of the procuring activity to consider the August 14 mailgram as a preaward protest does not affect the validity of the award.

For the reasons stated, the protest is denied.


For the Comptroller General
of the United States