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DECISION



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

FILE: B-191019

DATE: January 23, 1978

MATTER OF: Veterans Administration Request
for Advance Decision

DIGEST:

1. A bid, once expired, may be accepted when revived by bidder provided such acceptance does not compromise integrity of competitive bidding system.
2. Where low bidder initially refused to revive its expired bid, unless bid was corrected upward because of mistake, bid may not be accepted subsequently when bidder decides to waive its mistake. Award, if otherwise proper, may be made to second low bidder whose bid was promptly revived at request of agency.

The Veterans Administration (VA) has requested an advance decision on the award of a contract for the addition to Building Number 1, VA Hospital, Huntington, West Virginia, project number 581-036.

Bids for the project were received on October 27, 1977, with the two lowest bidders being as follows:

- | | | |
|----|--------------------------------|-------------|
| 1. | Edward L. Nezelek, Inc. (ELN) | \$5,927,600 |
| | Alternate #1 (new parking lot) | 74,660 |
| 2. | Santa Fe Engineers (SFE) | 6,430,000 |
| | Alternate #1 | 46,000 |

The two remaining bids ranged upwards to \$6,904,000.

The bids provided for a 30 calendar day acceptance period, and consequently expired by their terms on November 26, 1977. The VA states that on November 1, 1977, ELN was requested to review and confirm its bid. Pursuant to that request, ELN orally advised the VA that it "had submitted a bid with errors" and requested a meeting with officials of the VA which was held on November 11, 1977. ELN presented its worksheets at that meeting and it is agreed by agency officials that

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3 items of work were not included in the bid. It is reported that price quotations had not been obtained for these missing items before the bid opening, but that the estimated costs for these items were obtained after bids were received. The record shows that the value of the work omitted from the bid was of the magnitude of \$150,000 - \$250,000.

Since ELN had not considered the 3 items in formulating its bid and therefore could provide no evidence as to the amount of its intended bid, but was able to demonstrate that a mistake had been made, the VA advised the firm that in accordance with Federal Procurement Regulations (FPR) §1-2.406-3(a)(2) (1964 ed., amend. 165) it could withdraw, but not correct, its erroneous bid. Under the circumstances, ELN decided to verify its original bid, and a letter to that effect was dictated and signed by one of the firm's representatives before he left the meeting.

According to the agency, it was unable to award the contract by the bid expiration date (November 26, 1977) and consequently requested ELN to extend the bid acceptance period to December 9, 1977. The agency states that on November 28, ELN called and advised that it was its intention to extend the bid acceptance period for the "bid actually intended," i.e., as corrected, and that ELN was told "this was not acceptable." On November 29, 1977, the VA received a telegram from ELN stating that "we are precluded from complying with your request to extend period for acceptance of our proposal * * * ."

Thereafter, in a telephone conversation, ELN indicated it still wanted to pursue bid correction and when advised by the VA that this was "not realistic," ELN advised it wanted extra time to "reconsider the situation." On that same day, SFE was contacted and requested to extend its bid acceptance period for 45 days. According to the VA, "interest was expressed but they [SFE] needed some time to make a decision."

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It is reported that on November 30, 1977, ELN telephoned the agency and stated that it "definitely decided not to extend" the bid acceptance period. Also on that date, SFE called and expressed its willingness to extend its bid for 30 days.

On November 30, 1977, ELN filed a bid protest with this Office, stating that:

"* * * [T]he bidding period for the addition to building #1 at the [VA] Hospital, Huntington, West Virginia has expired. For that reason * * * ELN, Incorporated will protest any intent on the part of the Veterans Administration to award this project to any previous bidder."

By mailgram dated December 8, 1977, ELN advised the VA that it would extend its original bid to January 8, 1978. On the same date, ELN withdrew the protest. Both ELN and SFE have subsequently extended their bids to February 15, 1978. It is SFE's contention that ELN's refusal to extend the bid acceptance period "rendered its bid void upon the expiration of the originally specified period."

We have held that in proper circumstances, the Government may accept a bid, once expired, which has subsequently been revived by the bidder. Riggins & Williamson Machine Company, Inc., et al., 54 Comp. Gen. 784, 788 (1975), 75-1 CPD ¶ 168; Guy F. Atkinson Company, et al., 55 Comp. Gen. 546, 550 (1975), 75-2 CPD ¶ 378. The reason for this rule is that since expiration of the acceptance period confers on the bidder a right to refuse to perform a contract subsequently awarded, the bidder may waive such right if, following expiration of the acceptance period, he is still willing to accept an award on the basis of the bid as submitted. 46 Comp. Gen. 371 (1966); Guy F. Atkinson Company, et al., supra.

Nonetheless, there still must be considered the effect an award to ELN would have on the competitive bid system. 42 Comp. Gen. 604 (1963). In the cited case we concluded that the award to the low bidder who had deliberately selected a 20-day acceptance period rather than the usually contemplated 60-day period, allowed his bid to expire before award, and waited more than 2 weeks to grant a bid extension when requested, would compromise the integrity of the competitive bid system because the low bidder in effect sought and gained an advantage after bid opening not sought by other bidders--the advantage of renewing its bid in short increments or allowing it to lapse as his interests dictate.

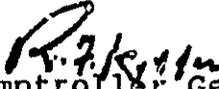
We have not previously considered a case with a combination of events such as occurred here--where a mistake is alleged, but the original bid is affirmed; where the original bid, as affirmed, lapses before acceptance and a request for extension is specifically denied by the bidder; where a protest is filed with the apparent purpose of seeking GAO sanction for cancellation and resolicitation after other bids have been exposed; and finally where the original bid is reinstated more than a week after extension was specifically denied. We think these events clearly bring the case within the rule of 42 Comp. Gen. 604, supra, in that it is apparent that ELN sought to limit the rights of the Government to award a contract as ELN's own particular interests dictated. Thus, we think ELN's on-again, off-again behavior adversely affected the integrity of the competitive bid system such that the interests of the Government would not be well served by awarding a contract to ELN.

Contrasted with the foregoing are the actions of SFE in this procurement. Although its bid also expired on November 26, 1977 (it had no reason to assume it would be awarded a contract and thus there would be no reason to extend its bid), that firm promptly agreed to the extension as requested, and assumed the risks of the marketplace for the period of that extension. Thus, we believe the SFE extension properly falls within the rationale of 46 Comp. Gen.

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371, supra, and that SFE should not be precluded from reviving its bid.

Accordingly, with respect to the question of whether the invitation should be cancelled, unless it is concluded that the prices bid by SFE are clearly unreasonable, or other factors which are not apparent on the record are discovered which would warrant cancellation, we are of the opinion that no "compelling reason" exists to cancel the invitation and resolicit at a later date. FPR §1-2.404-1 (1964 ed.).


Deputy Comptroller General
of the United States