

5540.
DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20540

FILE: B-191019

DATE: February 27, 1978

MATTER OF: Edward L. Nezelek, Inc.

DIGEST:

1. Protest based on asserted omissions of fact in prior decision issued in response to a request for an advance decision filed by the Veterans Administration is essentially a request for reconsideration of the prior decision.
2. Where material facts upon which original decision was based are not shown to be erroneous and where no additional material information is provided pursuant to request for reconsideration, original decision is affirmed.

Edward L. Nezelek, Inc. (ELN) protests the award of a contract to Santa Fe Engineers for the addition to Building No. 1, Veterans Administration (VA) Hospital, Huntington, West Virginia. The protest is a response to our decision in Veterans Administration Request for Advance Decision, B-191019, January 23, 1978, 57 Comp. Gen. ____, 78-1 CPD ____, in which we held that ELN's bid should not be considered for award. The basis of the protest is "that there have been serious omissions of most significant facts that have not been disclosed to the Comptroller General" in our prior decision. That decision was based on a request for an advance decision filed by the VA on December 30, 1977. ELN was aware of the VA request and was afforded an opportunity to submit comments. While ELN now avers that it did not have a copy of the VA submission, it specifically declined to furnish comments when requested to do so, and did not pursue the matter until after the original decision was received. We believe, therefore, that the protest is essentially a request for reconsideration of the prior decision and it will be so considered.

Our decision found that subsequent to bid opening, ELN was requested to review and confirm its bid of \$5,927,600 on November 1, 1977; that thereafter, ELN orally claimed it had "submitted a bid with errors"; that a meeting was held at the VA on November 11, at

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which time it was agreed by the parties that ELN had omitted three items of work from its bid, and that the estimated costs for these items (of the magnitude of \$150,000-\$250,000) were obtained by ELN after bid opening; that since ELN had not considered the missing items in its bid, it could provide no evidence as to its intended bid, and that it was therefore advised by the VA that it could withdraw, but not correct, its "erroneous" bid. We also found that ELN decided to verify its original bid at the November 11 meeting, and that it did so in writing on that same date; that the VA was unable to award the contract by the date bids were to expire (November 26), and that when requested to extend the bid acceptance period, ELN stated that it was its intention to extend the bid acceptance period for the "bid actually intended"; that when advised by the VA that this was not acceptable, ELN advised the VA by telegram which was received on November 29, that "we are precluded from complying with your request to extend period for acceptance of our proposal"; that thereafter, ELN indicated it still wanted to pursue bid correction, but was told by the VA that this was not "realistic"; that the second low bidder, Santa Fe Engineers, extended its bid when requested to do so by the VA. We noted that ELN filed a protest with this Office on November 30, and that on December 8, it agreed to extend its bid and withdrew its protest. We did not consider events after December 8, although we were aware that both the ELN and Santa Fe bid acceptance periods were extended thereafter as requested by the VA.

ELN claims that "at no time was there any formal or written or any element of mistake manifested to the VA. It claims that the meeting was held on November 11 "to discuss the price", and that the "meeting at best was exploratory and constituted a discussion of the confirmation request". ELN claims its decision to confirm was predicated on the imminent award to ELN, and that had it not received this "virtual assurance" it may have "opted to act differently." ELN does not deny that the three items were missing from its bid--it states

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that it was advised at the November 11 meeting that the "intended bid was the determinate factor", and that it "utilized the vehicle of nonextension of its bid to manifest its intended bid." ELN also asserts that it thereafter agreed to extend its bid at the request of the VA, and that the VA agreed to accept the extended bid. ELN claims that by "acceptance" of its extended bid, prior defects were cured.

We do not believe we are called upon to decide whether the word "mistake" was ever used by ELN in its various conversations with the VA contracting personnel, for it is clear from the current submission to this Office that ELN did not submit the bid it says it intended. Nor does the assertion that the VA allegedly solicited the bid extension granted on December 8 alter our prior conclusions. The basic facts upon which our decision was based remain the same. As we stated in the prior decision:

"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 an 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 * * * 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."

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Since ELN has offered no material information which had not previously been considered in our original decision, that decision is affirmed.

Deputy

R. F. Kistler
Comptroller General
of the United States