

**DECISION**



10,960 PLI  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

FILE: B-194364

DATE: August 7, 1979

MATTER OF: Martel Laboratories, Inc.

DIGEST:

*[Protest Alleging Agency Used Improper Procedures In Assessing  
Technical Competence]*

1. Protest filed with our Office within 10 working days after basis for protest is known (agency's refusal to refer question of protester's responsibility to SBA) is timely pursuant to our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1979).
2. Where solicitation calls for information concerning bidder's college education, professional experience and thorough knowledge of scientific literature, such information pertains solely to bidder's responsibility.
3. Agency determination that small business concern does not have capacity to perform required work must be referred to SBA for consideration under certificate of competency procedure, since applicable law and regulations no longer allow exception to this requirement based on urgency. Agency's failure to do so was contrary to Small Business Act, 15 U.S.C. § 637(b)(7) (1976), as amended by Pub. L. No. 95-89.
4. Time limitations of Bid Protest Procedures are not applicable to claims for bid preparation costs in timely protests. Accordingly, such claim can be raised by protester during consideration of protest.
5. Protest prosecution costs are not recoverable against agency.
6. Claim for bid preparation costs is denied since agency failure to submit matter to SBA, although it violated Small Business Act, was not, in this instance, arbitrary and capricious but based upon

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erroneous belief that referral was not necessary on basis of urgency and SBA's concurrence therein.

Martel Laboratories, Inc. (Martel), a small business, protests the award of two contracts under invitation for bids (IFB) No. FSE43-9-61-53 issued on January 16, 1979, by the Department of Commerce, National Marine Fisheries Service (Commerce), for field investigation reports on permit applications, within the State of Florida, having a potential impact on fishery resources and their habitat.

The IFB divided the project into 11 items, by counties, and permitted the bidders to submit bids on any or all of the items. Paragraph 20 - Bidder Qualification, under Solicitation Instructions and Conditions, provided:

"\* \* \* Bidder must meet the following requirements or equivalent, in order to qualify for this contract:

- "a) Baccalaureate degree in biological science with emphasis on marine and/or estuarine ecology from an accredited university.
- "b) At least 2 years professional experience in applied estuarine or marine ecology, either field surveys or research.
- "c) Thorough knowledge of scientific literature dealing with estuarine and marine ecosystems in the Southeastern U.S., particularly that relating to human impacts."

Bid opening was held, as scheduled, on February 13, 1979. On February 15 Martel was informed that it was the apparent low bidder on four items if multiple awards were made and apparent low overall bidder if only one contract was awarded. However, Commerce requested additional information concerning Martel's proposed personnel to demonstrate that they

satisfy the qualifications set forth by paragraph 20, supra. On the following day Commerce received such information, which it determined inadequate, and, consequently, made a request for permission to speak with Mr. Thomas Dahl, Martel's apparent primary investigator. Shortly thereafter, a telephone interview was held with Mr. Dahl who was advised of the "unfavorable outcome," and, then, in a different telephone call Commerce explained its rationale, why Martel did not meet the requirements of paragraph 20, to another representative of Martel. We note that Commerce in its summary of the latter telephone call states that the conversation "was ended with a promise to get back with [Martel] regarding our decision."

Subsequently, Martel, in two letters dated February 19 (both hand-delivered to Commerce), expressed its concern regarding the procedures utilized by Commerce in assessing Martel's technical competence. The tenor of these letters was that Martel was capable of performing the work as specified and was extremely upset with any supposition that Martel might default. Also, Martel requested that Commerce send Martel's bid to the Small Business Administration (SBA) for a certificate of competency (COC) determination. We are aware that in one of the aforementioned letters Martel stated that it entered a protest with our Office. However, this proved not to be the case and the record is not clear as to why such was included in the letter. On March 1 Martel was advised that its bid had not and would not be submitted to the SBA. Then, Martel by letter dated March 9, and received on March 12, protested to our Office.

Martel's position is that Commerce should have submitted Martel's bid to the SBA for a COC determination. Martel supports its position by arguing that paragraph 20 concerns a bidder's responsibility not bid responsiveness as argued by Commerce. Moreover, Martel contends that referral to SBA for a COC determination is nondiscretionary. Also, Martel objects to Commerce's award of the contracts notwithstanding its protest to our Office. Initially Martel requested that the contracts be terminated for the convenience of the Government. However, in light of the fact that performance of both contracts, as of June 1, was close to completion, Martel has withdrawn

this request and now asks for reimbursement of its bid preparation costs (\$465) and its protest prosecution costs (\$1,680), which includes costs of (a) filing the protest, (b) accumulating and review of relevant material, (c) filing comments, (d) attending conference and (e) legal fees.

At the conference, held in our Office on June 1, 1979, Commerce, for the first time, questioned the timeliness of the instant protest. Commerce argues that Martel had knowledge of the basis for protest, Commerce's review of Martel's technical competence, on February 19, 1979. In support of its argument, Commerce points to the following statement made by Martel in a February 19 letter:

"The irregular and unfair procedures being used by your office to review Martel's technical competence has caused us to enter a Bid Protest to the General Accounting Office as of February 19, 1979."

Therefore, Commerce contends that since section 20.2 (b)(2) of our Bid Protest Procedures (Procedures), 4 C.F.R. part 20 (1979), requires a protest to "be filed no later than 10 [working] days after the basis for protest is known, or should have been known, whichever is earlier," Martel's protest filed on March 12 is untimely. Moreover, Commerce believes that in light of the above statement, "Martel cannot now deny that it had knowledge of the basis for its protest \* \* \* on February 19, 1979."

In the alternative, Commerce argues that Martel is questioning the propriety of paragraph 20 and is therefore untimely pursuant to section 20.2(b)(1) of our Procedures since Martel did not protest prior to bid opening. Commerce's argument is based on its contention that it was apparent from the face of the IFB that Commerce was treating bidder qualifications (paragraph 20) differently from responsibility factors since such factors were set forth in a separate paragraph, number 22. Paragraph 22 - Basis of Award provides:

"Bids will be accepted on one, all or any combination of geographical areas as set forth in the Schedule (page 10). Award will be made to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered. Responsibility will be determined by the following factors:

- "a) Have adequate financial resources or the ability to obtain them.
- "b) Be able to comply with the required or proposed performance schedule.
- "c) Have a satisfactory record of performance.
- "d) Have a satisfactory record of integrity and business ethics.
- "e) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.
- "f) Any other factor deemed relevant by the Contracting Officer."

Notwithstanding the timeliness arguments, Commerce argues that its treatment of paragraph 20 as an issue of responsiveness was a "rational action." In support of its position, Commerce contends:

"The contractor must have the necessary qualifications to enable it to conduct a rapid survey and accurately discern from its field observations the ecological effects of the proposed project upon the resources and their habitat. This ability to discern the implications of the project rests directly upon the education, training, experience, knowledge of the literature, and the professional judgment of the contractor.

"Recognizing that the product of this procurement was not the reports per se, but rather the technical qualifications of the contractors personnel, the contracting officer and NMFS technical personnel fashioned the required bidder qualifications necessary to achieve the required end product.

"A close examination of the procurement shows that it can best be described as an advertised professional services contract. NMFS was not buying the field investigation reports as a product but was instead procuring the professional qualifications and expertise of the successful bidder. Since the bidder qualifications were the essential characteristics of the product being procured the contracting officer rationally determined that these characteristics were of a responsiveness nature."

With respect to the change in relief sought by Martel, Commerce believes that Martel, knowing the short performance period of the contract and that award was made to other bidders, cannot now revise its request since "it was incumbent upon [Martel] to include all of its possible remedies in its original filing with GAO."

Also, we note that on February 20, 1979, Commerce made a formal determination that "Martel is not responsive to the IFB because none of the personnel offered have the requisite qualifications to be considered for award of a contract." Commerce based this decision on its finding that:

"The qualification statements submitted by Martel with its bid and by supplement on 2/16/79 do not show that the personnel proposed to do the work have the requisite qualifications b) and c) above." See paragraph 20, supra.

Then, Commerce made a determination that receipt of the field investigation reports was urgently needed to enable Commerce to reply to the Corps of Engineers and thus reduce the possibility of adverse changes to the wetlands. Consequently, Commerce awarded the contracts without referring Martel's material or that of any other disappointed bidder to the SBA for a COC.

With respect to the timeliness issue, we disagree with Commerce's arguments. On February 19, Martel, in two letters, objected to what it characterized as Commerce's irregular bid evaluation procedures for assessing its technical competence and requested that its bid be submitted to the SBA for a COC determination. It is apparent that the catalyst for these letters was Commerce's telephone interview, described by Martel as "a three-question quiz," with Mr. Dahl. Nevertheless, it is clear from Martel's letters that Martel's primary concern was having Commerce submit the question of its responsibility to the SBA, and, thus, finally settle this matter. Moreover, we note that Martel's letters do not question the propriety of paragraph 20 nor set forth any specific complaint concerning Commerce's bid evaluation. It appears that Martel, in its letters, was expressing its frustration with Commerce and pushing for SBA's resolution of this matter. Why Martel mentioned that it protested to our Office is unclear, but that does not alter the thrust of the letters. In addition, Martel in its June 5 response to the conference, when specifically addressing the timeliness issue, stated:

"It was the failure to refer the matter to SBA that is \* \* \* the basis for the GAO protest under consideration. Martel did not become aware of \* \* \* [Commerce's] decision not to seek an SBA review until a telephone conversation of March 1, 1979 with the \* \* \* contracting officer."

The record is clear that March 1 is the first time Martel was told that Commerce would not be submitting the question of its responsibility to the SBA. Based on the foregoing, the protest received in our Office on March 12 was timely filed within 10 working days of the date upon which the grounds for protest were known.

Concerning Martel's objection to the award of the contracts notwithstanding its protest to our Office, we are advised that the contracts were awarded on February 26, 1979. Therefore, since Martel's protest was not filed until March 12, award of the contracts was made prior to Martel's protest to our Office.

The main issue in this protest is whether the question of Martel's responsibility should have been submitted to the SBA for a COC determination. In other words, does paragraph 20, supra, refer to responsibility, ability or capacity to perform all of the contract's requirements within the limitations prescribed in the invitation, or is it concerned with the responsiveness of a bid, whether a bidder has unequivocally offered to provide the requested performance in total conformance with the terms and specifications of the invitation? See J. Baranello and Sons, 58 Comp. Gen. \_\_\_\_ (B-192221, May 9, 1979), 79-1 CPD 322.

For the reasons that follow, we find that paragraph 20, supra, refers to responsibility. It is well settled that solicitation provisions requiring the submission of information necessary to determine compliance with specified bidder experience requirements, which includes formal training, pertain solely to the bidders' responsibility and that such information need not be submitted with the bid but may be furnished up to the time of award. Thermal Control, Inc., B-190906, March 30, 1978, 78-1 CPD 252. This is so regardless of solicitation language requiring inclusion of the information for the bid to be responsive, because a contracting agency cannot make a matter of responsibility into a question of responsiveness by the terms of the solicitation. Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051, 1055 (1976), 76-1 CPD 294; 52 Comp. Gen. 389, 391-392 (1972). Therefore, clauses "a" (Baccalaureate degree) and "b" (professional experience) pertain to a bidder's responsibility. With respect to clause "c" (thorough knowledge of scientific literature) we conclude that such also refers to a bidder's responsibility. It is clear that whether a bidder has a thorough knowledge of these factors has a direct bearing on the bidder's overall capacity to perform the prospective contract.

In any event, the record indicates that Martel, as required, submitted, with its bid, a bidder's qualification sheet which listed seven of Martel's senior biologists available for this project and their education, ecological experience, knowledge of



scientific literature and years of professional experience. Also, we note that Martel's bid did not take any exceptions to the requirements set forth in the IFB. Therefore, Martel's bid was responsive and the only question remaining was Martel's responsibility.

The question of a small business concern's responsibility is required to be referred to the SBA pursuant to the Small Business Act, 15 U.S.C. § 637(b) (7) (1976), as amended by Pub. L. No. 95-89, 91 Stat. 557, effective August 4, 1977. Under this act, the SBA is empowered to certify conclusively to Government procurement officials with respect to all elements of responsibility. See Com-Data, Inc., B-191289, June 23, 1978, 78-1 CPD 459. Until recently, the Federal Procurement Regulations (FPR) permitted an exception to this statutory requirement based on urgency so long as a level above that of the contracting officer concurred in the decision to make award to other than the low bidder. See FPR § 1-1.708-2(a)(1) (1964 ed. amend. 174). However, the Small Business Act, as amended by Pub. L. No. 95-89, makes no exception for urgency as a ground for not referring the question of a small business' responsibility to the SBA. Therefore, effective June 14, 1978, FPR was amended to eliminate the urgency exception it had previously allowed. See FPR § 1-1.708-2(a)(1) (1964 ed. amend. 192).

Clearly, then, Commerce, after having essentially determined that Martel was not responsible, had no basis for not referring the question of Martel's responsibility to the SBA. However, in view of the present stage of the procurement, we cannot request that Commerce send Martel's bid to the SBA for its consideration of whether issuance of a COC is appropriate in this case since to do so would only be an academic exercise and serve no useful purpose. Nonetheless, by separate letter we are pointing out to the Secretary of Commerce the deficiencies in this procurement to prevent a recurrence in the future.

In regard to Martel's revision of the relief it seeks, Commerce has objected essentially on the grounds that such revision is untimely. We disagree. The

time limitations found in our Procedures do not apply to bid preparation claims. See generally: Scot, Incorporated, 57 Comp. Gen. 119, 124 (1977) 77-2 CPD 425--wherein we sustained a protest, but were unable to grant remedial aid, and advised the protester that we would consider a claim for bid preparation costs if submitted and properly documented as to the amount. However, we will only consider such claims in connection with timely protests. DWC Leasing Company, B-186481, November 12, 1976, 76-2 CPD 404.

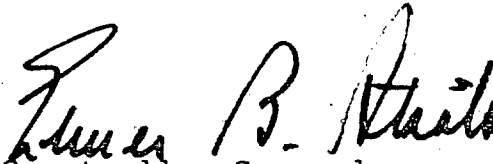
Concerning Martel's request for protest prosecution costs, we have held that the costs of pursuing a protest are not compensable. Documentation Associates - Claim for Proposal Preparation Costs, B-190238, June 15, 1978, 78-1 CPD 437. Accordingly, Martel's claim for such costs is denied.

With respect to Martel's request for bid preparation costs, we have held that such costs may not be recovered unless the agency's actions were arbitrary and capricious towards the bidder-claimant. Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344. However, not every irregularity will give rise to the right to be compensated for the expenses of undertaking the bidding process. T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345. There is a second requirement applied by our Office that the complained-of agency actions deprived the bidder-claimant of an award to which it was otherwise entitled. United Power & Control Systems, Inc.; Department of the Navy--Reconsideration B-184662, December 27, 1978, 78-2 CPD 436; Morgan Business Associates, supra.

In Keco Industries, Inc. v. United States, 492 F.2d 1200, 1204 (1974 Ct. Cl.), the court, while amplifying its position that the ultimate standard is whether the agency was arbitrary or capricious, stated that a "proven violation of pertinent statutes or regulations can, but need not necessarily, be a ground for recovery." Here, it is clear that Commerce's failure to submit this matter to the SBA did violate the Small Business Act, supra. Thus, the question before us is whether such violation was arbitrary and capricious. The record discloses that Commerce contacted the SBA concerning this issue, although the reasoning is not

clear since it apparently believed the bid nonresponsive. As a result, Commerce advises that "SBA expressed an interest in being given an opportunity to review the case but stated that the matter would not be referred to them if the file was documented as to urgency of award \* \* \*." (Our emphasis supplied.) Under these circumstances, we find that Commerce's action was not arbitrary and capricious but based upon its and SBA's erroneous belief that referral to SBA was not required.

Accordingly, Martel's claim for bid preparation costs is denied.

  
Luther B. Smith  
Comptroller General  
of the United States