



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Nebraska Aluminum Castings, Inc.--
 Second Request for Reconsideration
File: B-222476.3
Date: November 4, 1986

DIGEST

1. Prior decision is reaffirmed where protester's second request for reconsideration advances no new arguments why the prior decision should be reversed or modified.
2. Request for an administrative conference will not be granted in connection with a decision on reconsideration where the request should have been made during the original protest proceedings in accordance with the General Accounting Office's Bid Protest Regulations and where a conference clearly would serve no useful purpose.

DECISION

Nebraska Aluminum Castings, Inc. (NAC) has filed a second request for reconsideration of our prior decision in Nebraska Aluminum Castings, Inc., B-222476, June 24, 1986, 86-1 CPD ¶ 582, aff'd on reconsideration, B-222476.2, Sept. 23, 1986, 86-2 CPD ¶ _____. In that decision, we concluded that the Department of the Army had properly rejected NAC's bid under invitation for bids No. DAAK01-85-B-B060 as materially unbalanced because the firm's first article prices were grossly inflated. This reflected our earlier decisions in Edgewater Machine & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 CPD ¶ 630 and Riverport Industries, Inc., 64 Comp. Gen. 441 (1985), 85-1 CPD ¶ 364, aff'd on reconsideration, B-218656.2, July 31, 1985, 85-2 CPD ¶ 108, which held that a bidding scheme which grossly front-loads first article prices as a means to obtain unauthorized contract financing renders the bid materially unbalanced per se so as to require its rejection as nonresponsive. The rationale is that an award to a firm submitting greatly enhanced first article prices will provide funds to the firm early in the period of contract performance to which it is simply not entitled if payment is to be measured on the basis of the actual value of the first articles (i.e., the legitimate

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costs associated with the production and testing of the first articles for acceptability) and, therefore, presents the same evils as a prohibited advance payment. See Riverport Industries, Inc.--Request for Reconsideration, B-218656.2, July 31, 1985, 85-2 CPD ¶ 108.

We found that NAC's bid was materially unbalanced because the \$22,510 price charged by the firm for each of the 10 first article units was more than 1,000 times greater than the \$19.17 unit price of the 100,002 production items. NAC's own cost figures contradicted its assertion that the first article prices were reasonable and established that NAC had sought to recoup most of its equipment and tooling costs in the first article period, even though that equipment and tooling, in large part, would be used to manufacture the production items as well as the first articles. Therefore, the costs involved properly should have been amortized over the life of the contract. By not doing so, NAC materially unbalanced its bid so that an award to the firm would have given it funds during the first article period which would have been essentially an interest-free loan from the government.

We affirmed this conclusion in our September 24 decision on reconsideration, and we find no new arguments advanced in NAC's second request for reconsideration which would cause us to reverse or modify our original decision. See Department of Labor--Reconsideration, B-214564.2, Jan. 3, 1985, 85-1 CPD ¶ 13.

We note, for example, that unbalanced bidding--nominal prices for certain elements of the bid and enhanced prices for others--is not a relatively unknown concept of federal procurement law, as NAC alleges, but rather dates back many years. See Mobilease Corp., 54 Comp. Gen. 242 (1974), 74-2 CPD ¶ 185; Crown Laundry & Dry Cleaners, Inc., B-208795.2, et al., Apr. 22, 1983, 83-1 CPD ¶ 438; Chrysler Corp., B-182754, Feb. 18, 1975, 75-1 CPD ¶ 100. Although earlier cases dealt with unbalanced bidding in relation to the pricing of option years or estimated quantities, see Porta-John Corp., B-218080, Mar. 19, 1985, 85-1 CPD ¶ 325, our Riverport and Edgewater decisions utilized this fundamental concept to find that grossly inflated first article prices would serve to unbalance the bid to the extent that it must be rejected as nonresponsive, even if the bid were low. We believe that Riverport and Edgewater merely affirm the well-settled view that unbalanced bidding may give rise to an irregularity of such a substantial nature that fair and competitive bidding will be affected. See 49 Comp. Gen. 330 (1969); Oswald Bros. Enterprises, Inc., B-180676, May 9, 1974, 74-1 CPD ¶ 238.

The acceptance of a bid with first article prices greatly exceeding the actual value of the units would be detrimental to the competitive system because such a bidding scheme allows the bidder to enjoy an advantage not enjoyed by its competitors for the award--the use of interest-free money for contract start-up purposes--and because the financial risk to the government, in the event of contract termination after the first articles have been accepted and paid for, is significantly increased. Therefore, even though the solicitation at issue here may have contained no express notice cautioning bidders that first article pricing should reflect only reasonable production and testing costs, the rejection of NAC's bid without such notice is required in order to maintain the integrity of the competitive system. Moreover, NAC's continued assertion that this lack of notice was prejudicial is not compelling where the bid was egregiously unbalanced on its face.

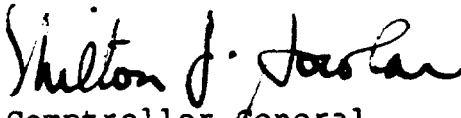
In this regard as well, we note that our decision in Riverport, and its subsequent affirmation on reconsideration, were both issued prior to the bid opening date for this solicitation. Therefore, we reject NAC's argument that our June 24 decision was impermissibly retroactive in effect.

We also find no merit in NAC's position that alleged advice from agency personnel--that the firm's bid would be acceptable as structured--now binds the government to that advice and compels an award to be made to the firm. Assuming that erroneous advice to that effect was given, where a solicitation puts offerors on notice not to rely on the oral advice of agency personnel, an offeror must suffer the consequences of its reliance upon such advice. Jensen Corp., 60 Comp. Gen. 543 (1981), 81-1 CPD ¶ 524; Systemetrics, Inc., B-220444, Feb. 14, 1986, 86-1 CPD ¶ 163. Here, the solicitation incorporated the standard clause set forth in the Federal Acquisition Regulation, 48 C.F.R. § 52.214-6 (1985), which provides that oral explanations or instructions given before the award of a contract will not be binding. Therefore, the government is simply under no obligation to accept NAC's bid despite the mistaken advice allegedly given.

Finally, NAC has requested that an administrative conference be convened in this matter. We decline to grant the request. Our Bid Protest Regulations, 4 C.F.R. § 21.5 (1986), provide that conferences should be requested at the earliest possible time in the protest proceedings to enable them to be scheduled within 5 working days of the protester's receipt of the agency's administrative report. Here, the Army's report on the original protest was furnished to NAC nearly 6 months

ago. Hence, to grant NAC's conference request at this point would be inconsistent with the Regulations. Moreover, our Regulations do not expressly provide for conferences with respect to reconsideration requests, 4 C.F.R. § 21.12, and we generally do not grant conferences on reconsideration, especially where, as here, we do not believe that any useful purpose would be served. See Sea-Land Service, Inc.--Reconsideration, B-208690.3, Apr. 13, 1983, 83-1 CPD ¶ 393. In this regard, we have fully and fairly considered the issues raised in NAC's protest against the rejection of its bid under the solicitation in question.

Our prior decisions are affirmed.

for 
Comptroller General
of the United States