The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Leland Limited, Inc.--Reconsideration

File: B-224175.2

Date: February 17, 1987

DIGEST

1. Prior decision is affirmed on reconsideration where the request for reconsideration does not establish that the decision was based on errors of fact or law.

2. Recommendation that contract be terminated is withdrawn on reconsideration where agency continued performance because it was notified of the protest more than 10 days after award, and agency now establishes that termination is not in the government's interest. Protester, however, is entitled to bid preparation and protest costs.

DECISION

The Defense Logistics Agency (DLA) requests that we reconsider our decision Leland Limited, Inc., B-224175, Dec. 24, 1986, 86-2 C.P.D. ¶ ___, in which we sustained a protest by Leland Limited, Inc., of the contract award to Sparklet Devices, Inc., under DLA invitation for bids (IFB) No. DLA700-86-B-0077. We held that DLA improperly had evaluated bids under the solicitation, which was for carbon dioxide cylinders used to inflate pneumatic flight vests, and we recommended that Sparklet's contract be terminated and a contract under the IFB be awarded to Leland. DLA argues that our decision on the merits of the protest is wrong and that, in any case, it is not in the government's interest to terminate Sparklet's contract at this time.

We affirm the decision, but we withdraw our recommendation.

The solicitation incorporated by reference the provisions at Department of Defense (DOD) Federal Acquisition Regulation (FAR) Supplement, 48 C.F.R. § 252.225-7001 and -7006 (1985), which implement the Buy American and Trade Agreements Acts. The Buy American Act, 41 U.S.C. §§ 10a-10c (1982), and its regulations, provide a preference for domestic items in government procurement by requiring the application of a

percentage factor to the offer of a foreign end product. Under the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582 (1982), and its implementing regulations, the provisio: of the Buy American Act do not apply to eligible products originating in designated countries in certain situations. According to the procedure for evaluating offers in part 25 of the FAR, the Buy American Act differential is not applied where the eligible offer is $149,000 or more.

Leland bid $130,311 to supply cylinders from Japan, which qualify as designated-country end products under the Trade Agreements Act. Because Leland's total bid price did not exceed the Trade Agreements Act threshold of $149,000, DLA concluded it had to apply the Buy American Act differential of 50 percent, after deducting duty, to Leland's price. Sparklet, the only other responsible bidder, bid $160,189 to supply a domestic end product. Sparklet was found to be the lowest responsive, responsible bidder, and was awarded a contract.

We sustained Leland's protest because we agreed that its bid was evaluated incorrectly. We noted that the FAR provision at 48 C.F.R. § 25.402(a) implements the intention of the Trade Agreements Act of 1979 to forego the Buy American Act preference for domestic products where a specified group of foreign countries is involved by providing that "agencies shall evaluate offers at or over the dollar threshold . . . without regard to the restrictions of the Buy American Act . . . ." We recognized that DLA's evaluation of bids was consistent with a literal reading of the FAR, but we stated our view that it is unreasonable to assume that pursuant to the regulation an agency must evaluate any bid below the $149,000 threshold by applying the full Buy American Act differential of 50 percent. The result of DLA's method of bid evaluation was that not only would a bid like Leland's be evaluated higher than a domestic end product bid of $160,189, but it would be evaluated higher than a bid based on cylinders of Japanese origin at $149,000, since DLA would not apply a differential to such a bid. It was our position that if an eligible foreign-item bid of $149,000 would win a competition against a domestic bid of $160,189, it only made sense that an eligible foreign-item bid of $130,311 also would win. We concluded:

> "Thus, the proper reading of the regulation, in terms of its background and purpose, is that while bids below the threshold are subject to a differential, the differential is applied, in evaluating them against domestic-item bids, only up to the threshold. That is, to achieve a

> reasonable result under the FAR, a bidder offering an eligible product at a bid price below the specified threshold should be evaluated, against a domestic bid, with the Buy American Act differential added, but the total evaluated bid may not exceed the dollar threshold."

We therefore sustained the protest and recommended termination of Sparklet's contract and award to Leland. We also recommended to the FAR Secretariat that FAR, 48 C.F.R. § 25.402(a), be clarified consistent with the way we think it should be read.

DLA complains that its actions violated no law or regulation since, as even our Office recognized, the bid evaluation was consistent with a literal reading of the FAR. The agency argues that the contracting officer could not impose his own or another interpretation on an unambiguous regulation and, therefore, acted properly in evaluating Leland's bid.

We understand DLA's concern and we recognize the difficult position a contracting officer might be in when faced with a situation like Leland's. Nevertheless, we think regulations must be read reasonably, and we do not agree that a literal reading that leads to an evidently unintended and clearly anomalous result should be relied on to support that result, especially where another apparent reading leads to a proper result. In requesting reconsideration, DLA does not refute our analysis of the FAR, and we see no reason to retreat from a reasonable reading of the regulation in favor of an unreasonable, albeit literal, one. We therefore affirm our prior decision in that respect.

DLA further argues that even if we were to affirm our decision, it is not in the government's interest to terminate Sparklet's contract. Because Leland filed its protest more than 10 calendar days after the award, DLA did not suspend performance pending our decision on the matter. See The Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d)(1) (Supp. III 1985). The agency states that it informally has verified a claim by Sparklet that the firm has incurred direct costs of $60,000 with indirect costs doubling that amount, so that the government would incur substantial costs upon termination. DLA further states that the present supply condition for the items establishes that more units are urgently needed, and that terminating Sparklet's contract, which required delivery in 240 days (or no later than April 22, 1987), and affording Leland a comparable amount of time to complete delivery would have a clear detrimental effect on DLA's supply position and mission.

In determining the appropriate corrective action on an improperly awarded contract when the agency is not required to suspend performance, we consider all the circumstances surrounding the procurement, such as the seriousness of the procurement deficiency, the degree of prejudice to other interested parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation on the contracting agency's mission. 4 C.F.R. § 21.6(b) (1986).

On reconsideration, we do not believe that termination of Sparklet's contract is in the best interest of the government. In similar situations, we have found that the advanced stage of the procurement and high termination costs--we have no basis to question DLA's determination of such probable costs here--support a finding that termination is not feasible. See NI Industries, Inc.--Reconsideration, B-218019.2, Aug. 8, 1985, 85-2 C.P.D. ¶ 145. Therefore, we withdraw our previous recommendation.

We find, however, that the protester is entitled to protest and bid preparation costs. The reasonable costs of filing and pursuing a protest, including attorneys' fees, may be recovered where the agency has unreasonably excluded the protester from the procurement, except where our Office recommends that the contract be awarded to the protester and the protester receives the award. 4 C.F.R. § 21.6(e). Additionally, the recovery of costs for bid preparation may be allowed where the protester was unreasonably excluded from the competition and no other practicable remedy is available. Id.; Consolidated Construction, Inc., B-219107.2, Nov. 7, 1985, 85-2 C.P.D. ¶ 529. Our previous finding, which we affirm, is that DLA's bid evaluation method improperly precluded Leland from receiving the award. Therefore, the firm is entitled to recover its protest and bid preparation costs in these circumstances. The Department of the Navy, et al.--Request for Reconsideration, B-220327.2 et al., Apr. 23, 1986, 86-1 C.P.D. ¶ 395.

Our prior decision is affirmed, and our recommendation is withdrawn. Leland should submit a claim to DLA to be reimbursed for the firm's protest and bid preparation costs. 4 C.F.R. § 21.6(f).

Milton J. Socolar

for Comptroller General
of the United States