



Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: Coastal Expanded Metal Company, Inc.

File: B-254229

Date: November 30, 1993

R. Thompson Wright, Esq., and Richard J. Votta, Esq., Nichols, Caffrey, Hill, Evans & Murrelle, and Robert D. Battin, Sr., for the protester.

Hugh J. Hurwitz, Esq., Department of Justice, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency official incorrectly informed protester prior to submission of its bid that samples which it had submitted under an earlier procurement had been approved and could be used to satisfy a requirement for bid samples under current solicitation, when in fact testing of the items had not yet been completed, protester was not unfairly deprived of the opportunity to submit additional samples under current solicitation since there is no reason to think that it would have submitted modified samples had it been correctly informed that testing was still ongoing.

DECISION

Coastal Expanded Metal Company, Inc. (CEMCO) protests the rejection of its bid under invitation for bids (IFB) No. 1PI-B-0485-93, issued by the Department of Justice, Federal Prison Industries, Inc. (UNICOR)¹ for expanded metal to be used in building prison partitions. UNICOR rejected CEMCO's bid because the protester failed to submit acceptable bid samples. CEMCO contends that it did not include samples with its bid because an agency official incorrectly informed it prior to bid opening that samples which it had submitted for testing in conjunction with an earlier procurement for the same item had been approved.

¹Federal Prison Industries operates under the trade name UNICOR and is a wholly-owned government corporation within the Department of Justice, under the federal prison system.

The protester maintains that it should be given another opportunity to submit conforming samples.

We deny the protest.

The IFB, which was issued on March 15, 1993, with an opening date of April 15, contemplated the award of a requirements contract for expanded metal panels of a variety of different sizes. The solicitation required the submission of five samples of one size panel to demonstrate compliance with the IFB's technical requirements.

Approximately a month prior to issuance of this IFB, which was for UNICOR's annual requirement for expanded metal, UNICOR had issued an RFP for a 3-month requirement of expanded metal. This solicitation also required the submission of panel samples. Two days prior to the RFP's closing date, CEMCO submitted the required samples to the contracting officer's technical representative (COTR). The protester subsequently decided not to submit an offer under the RFP because it could not manufacture the items in time to meet the first scheduled delivery date. CEMCO asked the COTR to test its samples anyway, so that, if approved, they could be used for the forthcoming solicitation for the annual requirement, or, if not approved, CEMCO could submit new samples with its bid for the annual requirement. According to CEMCO, the COTR stated that he would test the samples, but that it would take a week or two.

The protester reports that it then contacted the contracting officer and explained that it had arranged with the COTR to have its samples tested. According to CEMCO, the contracting officer stated that he saw no reason that the samples could not be tested and, if approved, used for the new solicitation, but that he would need something in writing from the COTR to the effect that the samples had been approved for the tests to apply to the new bid.

CEMCO contacted the COTR several times by telephone over the course of the next 3 weeks to determine the status of the testing. The protester maintains that on April 8, the COTR stated during a telephone conversation with its sales manager that he had tested CEMCO's samples and determined them adequate. The protester further maintains that the COTR promised to fax a letter to the contracting officer setting forth this approval by April 12 or 13.

CEMCO submitted a bid prior to the April 15 opening date, but did not include bid samples with it. Since the protester's bid was the lowest of the seven received, it anticipated that it would receive the award. By letter dated June 17, however, the contracting officer notified CEMCO that its bid had been rejected because its bid samples

had been determined unacceptable and that award had been made to Metalex Corp.

On June 28, CEMCO filed an agency-level protest objecting to the rejection of its bid. UNICOR denied the agency-level protest on July 12, whereupon CEMCO protested to our Office.

CEMCO argues that it failed to submit samples with its bid because it had been informed prior to bid opening that the samples which it had submitted in conjunction with the earlier solicitation had been approved. The protester maintains that since it would have submitted samples with the bid but for this misinformation, it should now be given an opportunity to do so and be awarded the contract if the samples are approved.


The COTR denies any recollection of having informed CEMCO on April 8 that its samples had been approved. The COTR notes that he did not in fact complete the testing of CEMCO's samples until April 26, and that he thus would not have been in a position to discuss the results on April 8.

We need not resolve this issue because even if the protester was in fact incorrectly informed on April 8 that its samples had been approved,² the record does not establish that the protester was prejudiced thereby. If the testing of the earlier samples had been completed prior to bid opening and had the protester been told that the samples were unacceptable, the protester arguably would have submitted other samples with its bid that could be found acceptable. However, since testing was not completed until after bid opening, we see no reason to think--and the protester does not assert--that the protester, knowing that testing had not been completed, would have submitted a modified set of samples with its bid. Therefore, the result would have been

²There is a possible explanation for the miscommunication. According to a memorandum from the COTR to the contracting officer dated April 30, in which he summarized the results of the tests which he had conducted on the samples of the 5 lowest bidders under the IFB, one of the bidders submitting acceptable samples was a company with a name similar to that of the protester, i.e., Central Expanded Metal, Inc. The COTR may have understood at the time of the April 8 telephone conversation with CEMCO's sales manager that he was speaking with a representative of Central Expanded Metal, whose samples he had completed testing and determined acceptable.

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the same had the miscommunication not occurred--the
protester's bid would have been rejected because its samples
would have been unacceptable.

The protest is denied.


James F. Hinchman
General Counsel