GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-222476.5

December 23, 1986

The Honorable J. James Exon
United States Senate

Dear Senator Exon:

This responds to your letter of November 19, 1986, expressing your continued concern regarding the rejection of a bid submitted by Nebraska Aluminum Castings, Inc. (NAC) under Department of the Army solicitation No. DAAK01-85-B-B060. Since the date of your letter, we have issued a further response to NAC (B-222476.4, Nov. 25, 1986) addressing the issues raised in the firm's most recent submissions to this Office, and further advising NAC that we are closing our file in the matter. A copy of our response is enclosed for your information and convenience.

As noted in our November 25 letter, our Bid Protest Regulations, 4 C.F.R. part 21 (1986), do not provide for the continued consideration of a protest matter that has been decided on the merits and then reaffirmed upon reconsideration. We remain convinced that the firm's bid was properly rejected as nonresponsive due to the fact that it was materially unbalanced as to first article pricing.

In this regard, as you indicate in your letter, there is no precise mathematical formula available to define what is or is not a materially unbalanced bid. Generally, however, settled case law dictates that a bidder is expected to prepare its bid by pricing the various elements of the bid to reasonably reflect the actual costs associated with those elements. Thereby, the government, in accepting the bid will not be forced to incur the undue financial risk which would arise from a grossly unbalanced bidding scheme. For example, if a bidder is bidding on a multi-year contract for essentially the same supplies or services, the bid, even if low overall, may be found to be materially unbalanced if the price charged for the base year of performance is excessively high and the prices charged for the option years are excessively low, and the government reasonably doubts that it will fully exercise those options.

In that situation, the financial risk to the government becomes unacceptable because the government potentially will have to pay a much higher price than necessary for the base year, an inflated price which will not be offset by the nominal prices charged for the option years if the options in fact are not exercised.

Similarly, NAC's bid under this solicitation was materially unbalanced because the prices the firm charged for the 10 first article units (which were no different from the production items) were grossly disproportionate to the actual value of those units, considering all reasonable costs that could be associated with their production and testing. The financial risk to the government was such that if the first article units had been accepted and paid for, but the government, for whatever reason, then terminated the contract, the government would have spent $225,100 for 10 compasses, the total production-unit price for which would have been a mere $191.70. Apart from NAC's apparent reliance upon erroneous advice, the record, including NAC's own cost figures, reveals no proper basis for the first article prices actually charged. Although it is unfortunate that NAC may have relied upon such advice to its detriment, the government as a rule is not bound by the improper oral advice of its personnel. Without question, NAC bore the responsibility of submitting an acceptable bid, and its failure to do so simply cannot be held against the government in this situation.

We believe that our November 25 letter addresses the issue of the allegedly improper bid extensions. Please note that all the other bidders, not only Stocker & Yale, Inc., were requested to extend their bids. Although the bids of these firms technically may have expired at the time the Army requested the extensions, the bids were immediately revived by the bidders, and we found no prejudice to any party as a result of this action. In any event, the question of the propriety of these bid extensions had no bearing upon NAC's entitlement to the contract award because the firm's bid was nonresponsive and, therefore, not for acceptance despite any timely extensions NAC may have granted.

You have indicated your view that NAC is entitled to damages from the Army because of what has occurred here, and, accordingly, that this Office can order the Army to reimburse the firm. We respectfully must disagree with your position.

The Competition in Contracting Act of 1984, 31 U.S.C. § 3554(c)(1) (Supp. III 1985), provides that the Comptroller General may declare an appropriate interested party entitled to its protest costs, including attorney's fees, and its bid

or proposal preparation costs, upon a determination by the Comptroller General that a solicitation, proposed award, or award of a contract does not comply with statute or regulation. In the present matter, however, we have found no violation of statute or regulation concerning the rejection of NAC's bid and the resultant contract award to Stocker & Yale. Therefore, since our decisions have been adverse to NAC, we have no authority to declare NAC entitled to the recovery of either its protest or bid preparation costs. See R.H.G. Systems, Inc., B-224176, Oct. 2, 1986, 86-2 CPD ¶ ___, aff'd on reconsideration, B-224176.2, Nov. 19, 1986, 86-2 CPD ¶ ___ (copies enclosed).

We share your concern that all bidders must be treated fairly in accordance with the governing procurement statutes and regulations. However, NAC has not shown that the firm was unreasonably excluded from this procurement. Accordingly, we see no relief available to NAC that would be consistent with our statutory bid protest function.

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel

Enclosures