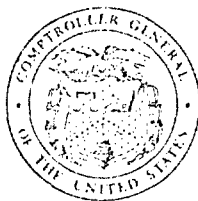


DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

FILE: B-185148

DATE: March 23, 1976

MATTER OF: National Construction Company

60664

98461

DIGEST:

1. Assuming that initial protests to procuring agency were timely filed under Bid Protest Procedures, GAO does not agree that protester was entitled to receive "full information" relating to funding available for award under cancelled IFB and all events surrounding alleged award to another concern under IFB before filing protest with GAO because agency made known its final positions on protests two weeks prior to release of information. Therefore, since protest was received more than ten working days after company received agency's final views on protest, protest must be considered untimely filed under section 20.2(a) of Bid Protest Procedures and not for consideration.
2. Based on review of record, GAO does not agree that Department acted arbitrarily toward bidder-claimant so as to support claim for bid preparation and attendant costs.

National Construction Company (National) has protested the July 21, 1975, award of an Air Force contract to Treehaven Steel Buildings, Inc. (Treehaven), under invitation for bids (IFB) No. F22608-75-09048 which was issued on June 20, 1975, by Columbus Air Force Base, Mississippi, for the construction of a "security police facility." Of the five bids received and opened under the IFB on July 18, 1975, Treehaven's base bid (\$168,900) was the lowest received, National's base bid (\$174,500) was the next lowest bid received.

National's initial protest to GAO stated that it had been the "low responsible bidder on an outstanding IFB [No. F22608-75-09011] for the identical project." Specifically, National stated that the scope of work under IFB-09048 had previously been set forth in IFB-09011 (cancelled in May 1975)--albeit in an allegedly defective way. The original IFB was defective, National urged, because the "work was so structured that the base bid without alternates would produce a useless facility."

In its report on the protest, the Department explains that after receipt of National's March 1975 protest to the contracting officer

under IFB-09011, it reconsidered its "base bid-alternate bid" structure. Upon review, the Air Force agreed with National that an award on the base bid only would not provide a useable facility. Because of this view, the contracting officer decided not to make award to Treehaven, the lowest bidder for the base bid work only, as he originally intended. (The contracting officer denies National's further assertions that an award was actually made to Treehaven and that IFB-09011 was not properly cancelled.) Moreover, the contracting officer decided that he could not make award to National, the lowest bidder for the base bid item plus additive items under IFB-09011, even though sufficient funds for a combined award (base and additive items) became available after bid opening. The contracting officer decided that he could not award to National because of the IFB provision governing bid evaluation which stated:

"The low bidder for purposes of award shall be the \* \* \* bidder offering the low aggregate amount for the \* \* \* base bid item, plus \* \* \* those additive \* \* \* items \* \* \* within the funds determined by the Government to be available before bids are opened. \* \* \* After determination of the low bidder \* \* \* award \* \* \* may be made \* \* \* on his base bid and any combination of \* \* \* additive [items] \* \* \* for which funds are \* \* \* available at the time of award, provided that award on such combination of bid items does not exceed the amount offered by any other \* \* \* bidder for the same combination of bid items."

This provision, in the contracting officer's view, required a determination that Treehaven's status as the low base bidder eligible for award at the time of bid opening could not be changed because of the receipt of additional funding after award.

Because of the contracting officer's analysis, the Air Force cancelled IFB-09011 and resolicited the project under IFB-09048.

Notwithstanding National's previous argument to the contracting officer that IFB-09011 was defective, the company now argues that it was improper to resolicit the requirement under IFB-09048 since the resolicitation allowed bidders the chance to better National's low bid under IFB-09011. The proper alternative, National urges, would have been to award it a contract for the base bid work and all alternate items under IFB-09011.

The Air Force considers National's protest to be untimely filed under our Bid Protest Procedures because of National's failure to file a protest with our Office within 10 working days after National had been notified of the denial of its protest to the contracting officer. The contracting officer points out that by letter of September 8, 1975, counsel for National was notified of the Department's findings on the company's July 28, 1975, protest to the contracting officer but that our Office did not receive the protest until October 8, 1975. (The contracting officer identifies three separate protests filed by National dated March 21, April 30, and July 28 concerning the IFB's.)

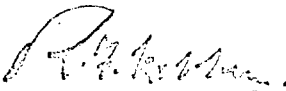
National argues that "had [it] been given the full information to which it was entitled [from the Air Force] at the time of its original [March 21] protest" it would have submitted an earlier protest to GAO. The "full information" referred to by National relates to information concerning National's belief that the contracting officer actually awarded a contract to Treehaven under IFB-09011--allegedly without obtaining a "required bond"-- and information about the funds available for award under IFB-09011. Since National did not receive this "full information" until the Department furnished it by letter dated September 23, 1975, the company asserts its October 8 protest to GAO was timely.

Assuming that National's protests to the agency were initially timely filed under our Bid Protest Procedures, we do not agree that National was entitled to receive the referenced "full information" conveyed by the September 23 letter before submitting a protest to our Office. On the contrary, the September 8 Air Force letter specifically advised National of the Department's final positions that cancellation of IFB-09011 was proper regardless of the funding actually available to the contracting officer after bid opening and that no award had ever been made to Treehaven under IFB-09011. Consequently, we do not agree that National needed to know the precise amount of funding available to the Department and all the events surrounding the alleged "award" to Treehaven under IFB-09011 before filing a protest with our Office. Since National's October 8 protest was received more than 10 working days after the company received the Department's September 8 letter, it must be considered untimely filed under section 20.2(a) of our Bid Protest Procedures and it will not be considered on the merits.

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National also asserts a claim for an unspecified dollar amount for bid preparation and attendant costs. The standard for determining whether to allow recovery for bid preparation costs is whether the procurement agency's actions were arbitrary and capricious toward the bidder-claimant. T & H Company, B-181261, June 9, 1975, 75-1 CPD 345; The McCarty Corporation v. United States, 499 F.2d 633 (Ct. Cl. 1974). Based on our review of the record, we do not agree that the Department acted arbitrarily toward National. Specifically, we find rational support for the Department's decision to cancel IFB-09011 based on its view that the IFB was defectively worded to such an extent that an award pursuant to the bid evaluation provision of the IFB might result in a useless facility. Neither do we find that the subsequent resolicitation of the requirement under a reworded IFB was arbitrarily made.

Claim denied.

  
Deputy Comptroller General  
of the United States