

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

FILE: B-185515

DATE: August 27, 1976

MATTER OF: CFE Air Cargo, Inc.

DIGEST:

1. GAO will consider request for reconsideration of decision filed by interested party who did not file comments during GAO's initial consideration of case where record indicates that interested party was not advised by agency of protests filed with GAO, since both Armed Services Procurement Regulation and GAO Bid Protest Procedures require that all interested parties be given notification of protest and opportunity to submit their views.
2. Although nonresponsiveness of low bid appears to have resulted from contracting official's erroneous interpretation of IFB's bid guarantee requirement, such fact does not indicate that provision was ambiguous. Therefore, prior decision holding that there was only one reasonable interpretation of provision is affirmed. Furthermore, reliance of bidder on oral explanation was at bidder's own risk since IFB required bidders to request in writing any explanation desired regarding meaning or interpretation of IFB.

CFE Air Cargo, Inc. (CFE) protests the reinstatement of invitation for bids (IFB) N62470-76-B-0560, issued by the Norfolk Naval Shipyard, and the subsequent award of a contract thereunder for the performance of janitorial services.

The Navy's action followed our decision in the matter of Atlantic Maintenance Company, Inc. (Atlantic), 55 Comp. Gen. 798 (1976), 76-1 CPD 131, in which we held that cancellation of the invitation was improper and that the low bid submitted by CFE was nonresponsive and could not be considered for award under the reinstated invitation. Thus, CFE in effect is requesting that we reconsider that decision.

Section 20.9(a) of our Bid Protest Procedures, 4 C.F.R. 20.9(a)(1976), provides that reconsideration of a bid protest decision may be requested by the protester, by any agency involved in the protest, or by any interested party who submitted comments during consideration of the protest. In this case CFE, an interested party, did not submit any comments during our initial consideration of this matter. Ordinarily

this would preclude our Office from considering CFE's request for reconsideration. See Republic Electronic Industries Corporation, B-183816, December 31, 1975, 75-2 CPD 418. However, we are persuaded that a different conclusion is called for here.

The requirement of 4 C.F.R. 20.9(a) is based on the assumption that interested parties will have been notified that a protest has been filed with the General Accounting Office (GAO) and that they may submit comments to GAO during its consideration of the protest. In this regard, section 20.3 of our Bid Protest Procedures states that our Office will notify the appropriate contracting agency that a protest has been filed and request that the agency (1) give notice of the protest to "all bidders or proposers who appear to have a substantial and reasonable prospect of receiving an award if the protest is denied"; (2) furnish copies of the protest documents to such parties along with instructions to communicate directly with our Office; and (3) furnish a documented report responsive to the protest to our Office with a copy to the protester and other interested parties. See 4 C.F.R. 20.3. In addition, Armed Services Procurement Regulation (ASPR) § 2-407.8(a)(3) (1975 ed.) requires that notice of a protest be given to all persons "involved in or affected by the protest" and that such persons be advised that they may submit their views and relevant information to the contracting officer and copies thereof directly to GAO when the protest has been filed therewith. Here it appears that CFE was not given that notification.

The record shows that Atlantic, near the close of business on December 11, 1975, protested to our Office against any award to CFE on the grounds that CFE's bid was nonresponsive to the bid guarantee requirement of the IFB. On December 15, 1975, our Office telephonically notified the Office of Counsel, Naval Facilities Engineering Command (NAVFAC), of the protest. By letter of that same date to NAVFAC, our Office forwarded a copy of the protest letter and requested that notice of the protest be given and that copies of the protest documents and the forthcoming agency report be furnished to all interested parties. NAVFAC responded on January 13, 1976, with a report stating that it had decided to cancel the invitation because the bid guarantee requirements were ambiguous. By letter of January 14, 1976, Atlantic protested the cancellation. A copy of Atlantic's letter was promptly forwarded to NAVFAC. Our decision was rendered on February 24, 1976.

Throughout the pendency of Atlantic's protests, it appears that the only notice of protest furnished to CFE was provided on December 12, 1975, when the president of CFE and the Shipyard's Officer in Charge of Construction met to discuss an alleged mistake in CFE's bid. At that meeting CFE was advised that a protest against award to the firm had been filed. However, the record does not indicate, nor does the Navy allege, that CFE was ever provided with a copy of the protest letter or was made aware of the fact that the protest was filed with GAO (rather than with the contracting officer) and that it could furnish comments directly to GAO. Furthermore, although the Navy states that a copy of its report was forwarded to CFE, that firm denies receiving it, and we note that the report itself indicates that a copy was forwarded only to Atlantic. It also appears that CFE was never advised of Atlantic's subsequent protest against the Navy's determination to cancel the IFB. Rather, it appears only that CFE was advised of the Navy's intention to cancel the invitation and that such cancellation would "effectively set aside any protest concerning the award." CFE states that on that basis it decided not to protest the cancellation and instead to submit a bid on the resolicitation.

Under these circumstances, which strongly suggest that CFE was not apprised of the protest proceedings initiated in regard to the subject procurement, we do not believe CFE should be precluded from requesting reconsideration of our decision.

As indicated above, the Navy decided to cancel the invitation because it believed the solicitation, on its face, was ambiguous with respect to the bid guarantee requirement (the ambiguity concerned whether the bid guarantee was to be 20 percent of the monthly bid price or 20 percent of the total contract price). We disagreed, and held that in the context of a bid package contemplating contract award for a 12-month period there was "no ambiguity * * * in the bid documents when viewed as a whole," and that the requirement could only reasonably be read as referring to the total contract price. We further held that since CFE submitted a bid guarantee equal only to 20 percent of its monthly bid, its bid could not be considered for award.

CFE's request for reconsideration is based primarily on the oral advice it received from a Navy contracting official prior to bid submission with respect to the bid guarantee requirement. According to CFE, it contacted the Shipyard at the telephone number designated in the IFB for all bidder inquiries regarding the specifications, to inform the Navy that CFE was intending to submit a check in lieu of a bid bond in response to the IFB's bid

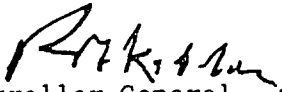
security requirement and to ask what amount the check was to be. CFE was initially told by the Contract Specialist that the check was to be in the amount of 20 percent of the total bid for the required performance period of 12 months but was later called back by the same Contract Specialist and advised that the amount required was only 20 percent of the firm's monthly bid. On the basis of this new information, CFE states that it changed the amount of its original check to reflect the lesser amount indicated by the Contract Specialist. Thus, it appears from the record that CFE was prepared to submit a check with its bid in the amount specified by the IFB's bid guarantee requirement but chose to rely upon information supplied by the designated Navy contracting official which resulted in the submission of a non-responsive bid. CFE asserts that these actions of the Contract Specialist testify to the ambiguous nature of the IFB and warrant a reversal of our prior decision.

At the outset, we point out that our Office was not aware of the above conversations during our initial consideration of this matter. In this regard, NAVFAC reports that it too was not privy to either of the conversations prior to the submission of its report or at anytime during our consideration of the protest. We do not believe, however, that a reversal of our decision is warranted.

We remain of the view that the IFB was not ambiguous and that the only reasonable interpretation of the bid guarantee requirement is that it be in the amount of 20 percent of the total amount bid. While CFE was given incorrect information, we think CFE relied on that information at its own risk. Paragraph 3 of the "Instructions To Bidders" form included with the IFB clearly stated that oral explanations or instructions given before the award of the contract would not be binding and that any explanation desired by a bidder regarding the meaning or interpretation of the IFB must be requested in writing and with sufficient time allowed for a reply to be rendered (in writing) prior to bid submission. In view of this provision, any question CFE may have had regarding the amount of the bid guarantee required by the IFB should have been submitted in writing prior to bid opening. George C. Martin, Inc., 55 Comp. Gen. 100 (1975), 75-2 CPD 55; Sheffield Building Company, Incorporated, B-181242, August 19, 1974, 74-2 CPD 108. Since CFE did not do so, we think it must suffer the consequences of its reliance upon the erroneous advice of the Contract Specialist. In this regard, we have held that "erroneous advice given by * * * contracting personnel cannot act to estop the agency from rejecting a bid as nonresponsive" when it is "required to do so by law." 54 Comp. Gen. 271, 275 (1974), 74-2 CPD 194.

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Accordingly, our decision of February 24, 1976, is affirmed. We are, however, recommending to the Secretary of the Navy that he take steps to insure that the notice provisions of the bid protest procedures are strictly complied with in the future.


Acting Comptroller General
of the United States