

DECISION



Notopoulos
15 370 PL2
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-195729

DATE: November 6, 1980

MATTER OF: Cummings Brothers Electric Company, Inc.

DIGEST:

[Request for rescission of contract] due to contractor's alleged duress in execution of contract (to avoid forfeiture of bid bond) is denied where record shows that agency made lawful award under solicitation's award provisions.

This is a claim by Cummings Brothers Electric Company, Inc. for rescission of a contract awarded Cummings by the Department of the Air Force under invitation for bids (IFB) No. F31601-79-B-0006, issued by Pope Air Force Base, North Carolina. Cummings bases its request in essence on a theory of duress, alleging that the contracting officer improperly deleted two work items from Cummings' award for which the Air Force purportedly had sufficient funding; as a consequence, Cummings states that it accepted the contract only to avoid forfeiture of its bid bond. For the reasons set forth below, we conclude that the record fails to provide a basis upon which to authorize the requested relief.

The IFB's bidding schedule provided for the quotation of prices on a "basic bid item" and each of six "additive bid" items, and specified that award would be made in accordance with Provision No. 17 of the IFB, setting forth the standard "Additive and Deductive Items (1968 Apr.)" clause of the Defense Acquisition Regulation (DAR).

Prior to the opening of bids, the contracting officer stated that funds were available for the project in the amount of \$550,000. When bids were received and opened, Cummings submitted the low bid of \$522,720 on the basis of the base bid and all six additives. Accordingly, a contract was prepared for the award of the base bid and

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all six additives, and was forwarded to Headquarters, Military Airlift Command (Hq. MAC/LGO), for approval. (Provision No. 80 of the IFB provided that if the proposed award exceeded \$100,000, the contract was subject to the written approval of the Secretary of the Air Force or his duly authorized representative, and would not be binding until approved.)

On the same date the contract was forwarded for approval, a message was received from Hq. MAC/LGO authorizing award of a contract in the amount of \$469,853, the amount of Cummings' bid for the base bid and only the first four additives. Consequently, a modification was prepared deleting the fifth and sixth additives, and forwarded to Cummings for acceptance.

Cummings objected, pointing out the funding announced prior to bid opening (\$550,000) exceeded its bid for the basic item plus all six additives, and contending that it was therefore entitled to an award which included all six additives. Cummings argued it should not be compelled to accept an award which deleted the fifth and sixth additives because its profits would be unfairly diminished and it would suffer problems with its subcontractors and suppliers. However, as previously indicated, Cummings accepted the modified award to avoid forfeiture of its bid bond.

In order to receive relief under a theory of duress, a contractor must demonstrate, inter alia, a wrongful act on the part of the Government. See Paccon, Inc., ASBCA No. 7890, 1963 BCA 3659 (1963), and discussion therein. In the instant case, the legality of the Air Force's action must be determined in light of Provision No. 17, supra, which controls the determination of the bidder selected for award and the basis upon which the award may be made. In pertinent part, that provision specifies:

"The low bidder for purposes of award shall be the conforming responsible bidder offering the low aggregate amount for the first or base bid items, plus or minus (in the order of priority listed in the schedule) those additive or deductive bid items providing the most features of the work within the funds determined by the Government to be available before bids are opened.

* * * After determination of the low bidder as stated, award in the best interests of the Government may be made to him on his base bid and any combination of his additive or deductive bid for which funds are determined to be available at the time of the award * * *." (Emphasis added.)

Bidders were thereby placed on notice that as the result of possible changes in the amount of available funding between the date of bid opening and the date of award, the award would not necessarily include all of the additive items that formed the basis for the determination of the awardee, and that the Government reserved the legal right to make an award for a lesser number of additives. In this instance, the Air Force advises that prior to the granting of higher approval (which Provision 80 made a condition precedent to a legally valid award), funds were determined available only for Cummings' basic item plus the first four additives.

We therefore conclude that the Air Force's award was legal and valid under the terms of Provision No. 17, supra. Since the Air Force acted within its rights established under the IFB, Cummings has failed to show a violation of contractual rights that would entitle it to the requested relief.

The request for rescission is denied.

Larry R. Van Alen

For the Comptroller General
of the United States