



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

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B-178747

December 28, 1973

The Honorable James O. Fletcher
Administrator, National Aeronautics
and Space Administration

Dear Dr. Fletcher:

By letter dated September 18, 1973, and prior correspondence, the Director of Procurement has transmitted reports to this Office in connection with the protests filed on behalf of Super Building Maintenance (Super) and Coastline Maintenance Company, Incorporated (Coastline) under invitation for bids (IFB) No. 2-20093(JS-2), issued by the Ames Research Center, Moffett Field, California, for janitorial services.

By decision dated July 16, 1973 (B-178747), we denied Super's initial protest against the proposed award to Action Industries (Action). However, at that time, Coastline's protest against that proposed award had not been resolved. In addition, by letter dated July 20, counsel for Super requested reconsideration of our July 16 decision.

Notwithstanding these unresolved protests, contract No. NAS2-7719 was awarded to Action on June 21. It was the procuring activity's position that Action's refusal to extend the acceptance period of its bid pending our resolution of the protests necessitated a prompt award for these services. On the other hand, we are informed that Action claimed that it was accepting the award under duress, maintaining that the award was illegal because the June 1 start date specified in the solicitation was not met. After negotiations were conducted with Action concerning the problems which arose because of the extremely short notice to commence performance, the procuring activity concluded that no valid and binding contract existed with Action. In view of this conclusion, the activity decided to terminate the contract with Action and to award the contract to Diamond Janitorial Service and Supply Company (Diamond) as the next low responsive bidder under the original solicitation. Although Coastline bid the next lowest price, the activity determined that its bid was nonresponsive by virtue of that firm's failure to acknowledge the receipt of an amendment to the solicitation. This determination has been protested by counsel for Coastline.

[Protest of Nonresponsive Determination]

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Award was made to Diamond on July 27, for services from July 30, 1973 through July 29, 1974. We are informed that the procurement activity justified this second award under the original solicitation on the basis that no valid award had been previously made to Action. The record indicates that it further concluded that since it had received NASA Headquarters approval for the initial award to Action, notwithstanding the pending protests, that such approval would also apply to the later award to Diamond.

Subsequently, NASA Headquarters reviewed these actions and concluded that the original award to Action was valid. However, before the activity could be notified of this conclusion, Action had already ceased performance pending termination and the second award had been made to Diamond. Accordingly, the activity was instructed to terminate the Action contract for the convenience of the Government.

Since in the opinion of NASA Headquarters a valid contract was in existence with Action at the time of the award to Diamond, Headquarters determined that the contract with Diamond was invalid. However, since Diamond had accepted the award in good faith and had begun performance, it was concluded that an interim contract should be negotiated with Diamond for the necessary custodial services through October 29, 1973. This contract has been extended through December 1, 1973. We are informed that the requirements for these services are being recompeted.

By letter dated August 1, 1973, counsel for Coastline protested against the award to Diamond based on the contention that Coastline was lowest bidder after Action. It is counsel's position that the rejection of the Coastline bid because of that firm's failure to acknowledge receipt of the amendment is evidence of discrimination against Coastline. Counsel asserts that Coastline orally acknowledged the amendment within 24 hours of bid opening and that the amendment was, in fact, figured into the Coastline bid price.

We have consistently held that the failure of a bid to include an acknowledgment of an amendment which affects the price, quantity or quality of the procurement cannot be waived and that such a bid must be considered nonresponsive. See 37 Comp. Gen. 785 (1958). Concerning counsel's contention that Coastline orally acknowledged the receipt of the amendment after bid opening it must be emphasized that in resolving questions of responsiveness, a bidder's intention to be bound by all the terms of the amendment must be determined from the bid itself. See 50 Comp. Gen. 11 (1970). Since the amendment

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provided for the inclusion of clauses required by the Service Contract Act and the Fair Labor Standards Act, we perceive no basis for objecting to the contracting officer's determination that the Coastline bid was nonresponsive. See B-173416, December 21, 1971.

Counsel for Super has objected to the activity's failure to notify that firm of the award to Diamond, in view of Counsel's earlier protest against any proposed award to Diamond. In his initial protest letter dated May 23, 1973, counsel took the position that Diamond's bid should be rejected since that firm is not a small business. By letter dated May 25, 1973, the activity informed counsel that the portion of Super's protest concerning the small business status of Diamond would not be considered since Diamond was not, at that time, an apparently successful bidder. Notwithstanding the above, by letter dated June 14, 1973, the contracting officer forwarded Super's objection to Diamond's status to the Small Business Administration (SBA). By letter dated June 18, the SBA informed the contracting officer that Super's protest would not be considered because the protester did not submit specific detailed evidence supporting its claim as required by SBA Rules and Regulations, Part 121 and NASA PR 1.703 (1) (b) (1). On July 12, 1973, when it became evident to NASA personnel that an award might be made to Diamond they sought written confirmation of an earlier "informal" size opinion from SBA that Diamond was a small business concern. By letter of the same date the SBA rendered in writing the informal opinion that Diamond "appears to be a small business concern." Thereafter, by letter dated August 24, 1973, to the SBA, counsel for Super supplied documentation in connection with its protest of Diamond's small business status. On October 5, the SBA formally determined that Diamond is a small business and denied Super's protest.

Counsel insists that the activity has mishandled Super's protest of Diamond's small business status. In this regard, we note that activity personnel failed to notify Super of the award to Diamond as required by NASA PR 2.408-1. It is our view that this failure might have added to the confusion already surrounding this procurement. However, in view of the fact that the SBA has denied Super's size protest, we do not believe Super has been unduly prejudiced by NASA's omission.

The NASA report of September 18 notes that this procurement contains certain departures from sound procurement practice, including release of the NASA cost estimate to bidders during a pre-bid

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conference. Therefore, your agency has decided to recompute this procurement as soon as possible. Finally, under the circumstances we do not feel that the interim settlement with Diamond was unreasonable considering the vital nature of the services.

Sincerely yours,

R.F.KELLER
[Deputy] Comptroller General
of the United States