



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20541

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B-178609

December 28, 1973

Anderson, Russell & Kill, P.C.
Rockefeller Center
600 Fifth Avenue
New York, New York 10020

Attention: Jarold Oshinsky, Esq.

Gentlemen:

We refer to your letter dated September 19, 1973, and prior correspondence, on behalf of the Keene Corporation (Keene), protesting against the award of a contract to Advanced Industries, Inc. (Advanced), under invitation for bids (IFB) DSA700-73-B-2274, issued by the Defense Construction Supply Center, Columbus, Ohio.

The invitation, issued on March 7, 1973, solicited bids on two items comprising a quantity of tank and pump units in accordance with the specification listed. Item 0001 represented a first-year-program requirement for a total of 237 units. Item 0002 represented the multiyear-program requirements for fiscal years 1973, 1974 and 1975 that would result in a total quantity of 712 units. At bid opening on April 6, 1973, Advanced submitted the low bid for item 0001; however, its bid for item 0002 was found to be nonresponsive, the correctness of which is not now questioned by any party.

After careful consideration of the record and your legal arguments in opposition to the award, we must deny Keene's protest for the reasons stated below.

The solicitation pointed out that the Government reserved the right to waive informalities and minor irregularities in offers received (standard form 33A, paragraph 10, "AWARD OF CONTRACT"). This was in accordance with paragraph 2-405 of the Armed Services Procurement Regulation (ASPR) entitled "Minor Informalities or Irregularities in Bids" which states:

"A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on price, quality,

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quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to, bidders. The contracting officer shall either give to the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid, or, waive any such deficiency where it is to the advantage of the Government. Examples of minor informalities or irregularities include:

* * * * *

- (ii) failure to furnish required information concerning the number of the bidder's employees or failure to make a representation concerning his size status;

* * * * *

- (v) failure to furnish an affidavit concerning affiliates, if required pursuant to 2-201(a)B(ii) and (b)(xvii); and
- (vi) failure to execute the certifications with respect to Equal Opportunity and Affirmative Action Program, as set forth in 12-806(b)(1)(B) and (2)."

The principal issues raised in Keene's protest challenge the administrative determinations made under the authority of this provision.

Keene's primary argument is that an award to Advanced would not result in an enforceable contract under common law and accepted procurement principles. Specifically, you state that Advanced (incorporated in Missouri), contrary to its representations on page 2 of standard form 33 (SF 33), was not a corporation when it submitted its bid, since its charter had been forfeited, and, therefore, Advanced's bid was a nullity under Missouri laws. Consequently, you urge that this defect could not be corrected after bid opening because the conformance of a bid with advertised requirements must be evaluated solely at the time of bid opening. Therefore, you argue that the misstatement of Advanced's corporate status rendered its bid nonresponsive. Further, you maintain that Advanced cannot be considered a "corporation by estoppel" because, inter alia, the Government had knowledge of the forfeiture of its corporate charter prior to any award and has not acted to its detriment in reliance upon Advanced's representation that it was a corporation.

The record reveals that the Secretary of State of the State of Missouri declared that the charter of Advanced was forfeited as of January 1, 1972, for failure to file the Annual Registration Report and Anti-Trust Affidavit for the year 1971. Advanced maintains that it was unaware of the forfeiture since the notice was sent to its former attorney who failed to reform the corporation. It states that during the forfeiture period, the corporation operated openly and filed timely Federal and Missouri tax returns. Advanced obtained a rescission of its corporate charter forfeiture on June 19, 1973. Subsequently, the stockholders and directors of Advanced ratified on June 25, 1973, all acts by the directors and officers done in the corporate name during the period of the forfeiture.

Respecting Advanced's identity as a bidder, we recognize that under the firm bid rule applicable to formal advertising procedures a bidder must be denied any opportunity to determine unilaterally its right to award. We do not believe that Advanced could rely on its charter forfeiture to preclude an award to it as the lowest bidder under the solicitation. As far as we can determine from the record, Advanced is not disabled from performing a Federal contract. In fact, it is currently completing contract DSA 700-71-C-9536 covering similar units. For Advanced to deny its existence as an entity, whether corporate or otherwise, which could be held liable for its contract obligations would be at odds with its actions both before and after bid opening. Even if Advanced improperly identified itself in its bid as a corporation, it is recognized that a contract executed by a person or corporation under an assumed name is nevertheless valid if unaffected by fraud. Resnick v. Abner B. Cohen Advertising, Inc., 104 A. 2d 254 (1954). We see no indication of fraud here. Admittedly a bid is an offer rather than a contract. However, we believe that the rule has application in this kind of situation; and an award in the name of a nonexistent corporation has been held valid. See B-155919, February 4, 1965, copy enclosed. Therefore, we believe that award may properly be made to Advanced.

Kaene also alleges that Advanced's bid was nonresponsive due to its noncompliance with the Equal Opportunity requirements of the solicitation and because of its failure to provide complete freight cost data. The record reveals that the determination was made that Advanced was considered eligible for award despite its failure to complete representation No. 6 on page 7 of SF 33. Subparagraph (vi) of ASFR 2-405, supra, specifically states that this is a minor informality or irregularity which may be cured or waived. B-174307, April 10, 1972; B-174932, March 3, 1972. We also believe that the failure to insert a freight

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classification in clause B-6 on page 4 of the solicitation was a minor irregularity since such classifications are readily available in standard publications utilized by the railroad and trucking industries.

Advanced's telegraphic reduction of its bid is questioned and you maintain that it is not a responsible bidder because it quoted a price at which it might incur a loss. We have found no impropriety with the manner or method of the telegraphic modification of the bid. In addition, there is no evidence that Advanced would incur a loss; nevertheless, we have held that an anticipated loss in the performance of a contract does not justify rejection of an otherwise acceptable bid. See 49 Comp. Gen. 311 (1969).

Finally, the argument is made that the solicitation's evaluation criteria were totally unacceptable and prejudicial to Keene because they were unnecessarily vague and ambiguous. Although we believe this allegation is not substantiated by the record, we will not consider it since our bid protest procedures state that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening shall be filed prior to bid opening. See 52 Comp. Gen. 20 (1972). Such allegations were clearly apparent prior to bid opening and are therefore untimely.

Sincerely yours,

R.F. KELLER

'Deputy' Comptroller General
of the United States

Enclosure