



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

B-177165

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May 23, 1973

The Honorable John W. Warner
The Secretary of the Navy

Dear Mr. Secretary:

This is in reply to the letter dated March 28, 1973, reference ELEX 000/ER:cmc Ser 94-000, from the Director of Contracts, Naval Electronic Systems Command (NAVELEX), requesting our opinion as to the validity of the award of contract N00039-72-C-0274 to R. F. Communications, Inc. (RFC).

We believe the solution to this problem turns on whether there existed a valid subsisting offer which NAVELEX could have accepted on February 28, 1973, the date the contract document was executed by the contracting officer.

RFC's bid was the only one received prior to the scheduled bid opening on August 29, 1972, in the second step of the two-step formally advertised procurement. The RFC bid was, by its terms, valid for 60 days. RFC protested to this Office, by telegram of October 2, 1972, the Navy's cancellation of the solicitation prior to contract award and the proposed resolicitation of bids which the Navy considered necessary because of certain alleged ambiguities in the solicitation. Prior to our decision to you of January 31, 1973, B-177165, sustaining the protest, RFC submitted a number of unsolicited extensions of its bid. The validity of its bid was successively extended to the following dates: November 17, 1972; December 1, 1972; December 31, 1972; January 15, 1973; January 25, 1973; and January 31, 1973.

On the day of our decision of January 31, NAVELEX placed a call to RFC's Washington Office to request a 30-day extension and since the firm's representative was unavailable, a message requesting such extension was left for him. The record before us does not show that RFC expressly granted such extension. Instead, its representatives visited NAVELEX on February 5, 1973, and inquired as to what action the Navy intended to take in view of our decision sustaining the protest. RFC was advised that Navy intended to award a contract. The

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record also indicates that at the February 5 meeting it was RFC's position that its bid had expired on January 31, 1973, that it would not be extended beyond that date and that the bid could no longer be accepted.

The NAVELEX letter states that, pursuant to the decision of January 31, it prepared to award a contract to RFC and requested funds from the cognizant comptroller organization in the amount of the original bid by RFC. As a result of interim reprogramming actions, funds in that amount were not immediately available but were made available on February 28, the date the contract was executed. While it was understood that RFC believed that an award after January 31 did not result in a binding contract, NAVELEX has taken the position that in submitting the protest to this Office for resolution RFC impliedly granted a bid extension for the period of time necessary to implement a decision which is favorable to the protestor. It is suggested that any other result would make a sham of the protest procedure.

We have taken the position that the protest of a procurement to this Office within the offeror's acceptance period could be viewed as continuing the protestor's offer in being, pending disposition of the protest (50 Comp. Gen. 357 (1970)) and, if proper, for a reasonable time thereafter, even without an express extension of the bid. As a general proposition we believe this position is essentially sound since a bidder's entry of a protest would be meaningless if his bid were allowed to expire on the following day. B-154236, June 26, 1964. However, it is our opinion that the period for which such an extension should be considered binding upon the protesting bidder must be decided on the basis of all of the circumstances involved.

An award may be made to a protestor who indicates an intent to keep his bid open, by virtue of his timely filing of a protest or by actual bid extensions or by both of such measures. However, circumstances which dictate the time required for a decision and its fulfillment cannot always be predicted with any certainty when the protest is filed. When that time is long, changes in conditions may cause the protestor to terminate an offer which was being continued in effect by reason of his protest or to cease granting extensions beyond the original acceptance period.

In the present case, RFC expressly granted extensions of its bid for more than three months beyond the original 60-day acceptance period.

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The last two extensions, for ten and six days, respectively, indicated that time was becoming critical. From the record, we are unable to find any affirmative evidence of an intent by RFC to extend its offer beyond January 31. In its letter to HAVILEX of March 14, RFC explained in detail the changes in production and manufacturing economics surrounding its bid which would result in a loss contract to RFC if an award was accepted at the bid price. These contentions have not been disputed by the Navy.

Accordingly, in view of the particular circumstances of this case, we conclude that the RFC offer was not effectively extended beyond January 31, contrary to the firm's wishes, solely by virtue of the protest filed with this Office. It is therefore our opinion that the attempt on February 28 to award a valid contract to RFC on the basis of its original bid price was ineffective.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
 of the United States