

**DECISION**



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

10,966

FILE: B-193793

DATE: August 9, 1979

MATTER OF: Gary Aircraft Corporation; <sup>DLG 00575</sup>  
National Fleet Supply, Inc. <sup>DLG 02534</sup>

**DIGEST:**

*[Protests Concerning Bidder Responsibility and Bid Responsiveness]*

1. Protest alleging responsibility determination of bidder by Air Force was improper, protester is only responsible bidder, and oral statements made at prebid conference cannot modify solicitation requirements will not be considered, since material issues are before court of competent jurisdiction.
2. Issue raised by protester who is not involved in pending litigation will be considered by GAO where issue is not subject of litigation.
3. Since IFB did not contain any restrictions preventing bid on F.O.B. origin basis for Government Furnished Property, with bidder assuming transportation costs, even though Government envisioned bid on F.O.B. destination basis, with Government assuming transportation costs, bid on F.O.B. origin basis is responsive and should be given further consideration in process of making award of contract.

Gary Aircraft Corporation (Gary) and National Fleet Supply Inc. (National) have filed protests, before award concerning invitation for bids (IFB) No. F41608-78-B-0417 issued by San Antonio Air Logistics Center, Department AGC0011: of the Air Force (Air Force), on October 20, 1978.

Essentially, Gary's protest is that the Air Force's responsibility determination of Lamar Electro-Air Corporation (Lamar), the prospective awardee, was improper, Gary is the only responsible bidder and oral statements made at a prebid conference cannot, in and of themselves, modify solicitation requirements. National's protest essentially is that the Air Force's determination that National's bid was nonresponsive and the subsequent rejection thereof was improper. <sup>DLG 0253</sup>

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While these protests were pending before our Office, Gary filed Civil Action No. SA79CA226 in the United States District Court for the Western District of Texas, San Antonio Division, requesting that the court enjoin the Air Force from awarding a contract, amending or modifying the IFB and from otherwise affecting the status quo in a manner adverse to Gary. In addition, Gary requested that the court declare Gary the low responsive, responsible bidder and order the Air Force to make award to Gary pursuant to the IFB. The grounds for the complaint are the same as those filed in support of Gary's bid protest.

It is the policy of our Office not to decide a matter where the material issues involved are before a court of competent jurisdiction unless the court expects, requests or otherwise expresses interest in receiving our decision. See section 20.10 of our Bid Protest Procedures, 4 C.F.R. part 20 (1979). The George Sollitt Construction Company, B-190743, January 9, 1978, 78-1 CPD 17. Gary has not requested injunctive relief pending a determination by our Office, and the court has not indicated an interest in our views. Therefore, we will take no further action on Gary's protest.

With respect to National's protest, we have held that this policy also applies to a protesting party not involved in the pending court action, where the substance of its protest is set forth in the complaint, since the court's action would take precedence and our Office could not recommend remedial action. Nartron Corporation and DC Electronics, Incorporated, 53 Comp. Gen. 730 (1974), 74-1 CPD 154. However, we believe Gary's complaint does not put in issue the substance of National's protest. Rather, National is mentioned only as one of the companies which submitted a bid and its bid was subsequently rejected as being nonresponsive to the IFB. Therefore, the remainder of our decision will be concerned with our consideration of National's protest on the merits.

The IFB solicited bids for the overhaul of the packette series engines. These engines were to be delivered by the Air Force to the contractor, who was responsible for their overhaul, as Government Furnished Property (GFP). National submitted its bid on the basis of F.O.B. origin for the delivery of the GFP engines. National's bid was determined to be nonresponsive and consequently rejected.

On June 11, 1979, a conference, attended by representatives of Gary, National, Lamar and the Air Force, was held at our Office. During this conference, the issue presented by National's protest was explained as follows:

Is National's insertion of F.O.B. origin in Provision B-15(a) prohibited by the terms of the IFB, therefore, rendering its bid nonresponsive?

Provision B-15 F.O.B. POINT (Applicable to Government Furnished Property only) provides:

- "(a) The F.O.B. point for delivery of Government Furnished Property shall be \* \_\_\_\_\_, or as elected by the Government in the clause hereof in Part III, Section L, General Provisions, entitled 'F.O.B. Point for Delivery of Government Furnished Property.'
- "(b) The F.O.B. point for the delivery of completed end items under the contract shall be \* \_\_\_\_\_ in accordance with clause hereof in Part III Section L, General Provision, entitled 'F.O.B. Origin.'
- "\* NOTE: This point shall be as specified by the Contractor in his offer as required by the clause 'F.O.B. Point for Government Furnished Property,' and the solicitation schedule provision 'Shipping Point(s) Used in Evaluation of F.O.B. Origin Bids (or Proposals).'"

It is National's position that neither the IFB nor applicable regulations prohibited National from submitting its bid on an F.O.B. origin basis, assuming the transportation costs for GFP. National argues that the IFB must clearly and explicitly warn bidders if their bids are to be restricted. In addition, National states:

"\* \* \* the point of GFP delivery is to be the location filled in by the bidder or the point elected by the Government under the clause 'F.O.B. Point for Delivery of Government Furnished Property' (DAR §7-104.69). Thus, the bidder is given the option of choosing an F.O.B. point, which presumably could be either F.O.B. destination or F.O.B. origin. Reinforcing this view is the phrasing of the 'F.O.B. Point for Delivery of Government Furnished Property' clause itself. That clause provides that '. . . any Government property furnished to the Contractor for use within the United States . . . will be delivered by the Government at a point to be specified by the Contractor in his bid (or proposal).' National Fleet did specify such a point -- Kelly Air Force Base."

Furthermore, National points to IFB provision D(f)(4) to support its position that the entry of F.O.B. origin in provision B-15(a) was not prohibited, but sanctioned, by the IFB. Provision D(f)(4) provides:

"Transportation costs shall be evaluated on the basis of the lowest overall cost to the Government taking into account the distances between point(s) of destination. For evaluation purposes these points will be considered to be the Contractor's plant and Kelly, AFB TX."

The Air Force's position is essentially set forth as follows:


"The purpose of the entry in Provision B-15(a) was to establish the contractor's receiving point for GFP so that transportation costs could be evaluated in making the award. Prospective bidders were on notice by Provision L-53 of the IFB that GFP would be delivered to a point as specified by the contractor and that the Government would pay these transportation

costs. They were further on notice by Provision D(f) that the transportation costs would be added to offers for the purposes of bid evaluation and contract award. National Fleet's entry of F.O.B. origin in Provision B-15(a) can only be interpreted to mean Kelly Air Force Base since bidders were advised by Provision D(f)(4) that for purposes of cost evaluation, the GFP would originate at Kelly AFB. Therefore, by inserting F.O.B. origin, National Fleet provided that they, rather than the Government, would pay the transportation costs of the GFP. In so doing, National Fleet took exception to and imposed a condition modifying the solicitation terms and conditions."

The Air Force believes such was a material deviation from the IFB's requirements and, therefore, rejection of National's bid as being nonresponsive was correct.

We disagree. For the following reasons, we believe that National's bid is responsive and should be given further consideration in the process of making an award of the contract. Although the Air Force envisioned the insertion of F.O.B. destination (the bidder's plant) for GFP and, therefore, was going to assume the costs of transportation, the IFB did not contain any restrictions preventing National, or for that matter any bidder, from bidding on an F.O.B. origin basis. Moreover, even if there was this restriction, an F.O.B. origin bid, in this instance, would not shift any risk of loss and/or damage or increase in costs to the Air Force. See 38 Comp. Gen. 708 (1959). Rather, it has the opposite effect--the bidder is not taking exception to the IFB, but is assuming the risk of loss and/or damage of the GFP from the origin point to the bidder's plant and, also, assuming the transportation costs. Therefore, the costs of transportation need not be a factor when evaluating National's bid.

However, since the material issues of Gary's protest are before a court of competent jurisdiction and concern responsibility, the Air Force should bring our finding to the court's attention and proceed accordingly.

  
Acting Comptroller General  
of the United States