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**DECISION**



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

*[Protest of Navy Contract Award]*

FILE: B-201389

DATE: March 25, 1981

MATTER OF: Fowler's Refrigeration and Appliance, Inc.

**DIGEST:**

1. Government is not estopped to deny existence of contract because record does not show that claimant reasonably relied on Government representations in question or that claimant was excusably ignorant of true facts.
2. Protest of agency's failure to cancel solicitation on basis that lowest bid was excessive compared to Government estimate is untimely since it was not filed with GAO within reasonable time after opening of bids.
3. Allegation that unit prices contained in price schedules submitted by protester bidder under canceled solicitation were made available to competitors for resolicitation of requirement is denied by Navy. In circumstances, it is concluded that protester has not met burden of proving accuracy of allegation.

Fowler's Refrigeration and Appliance, Inc. (Fowler), protests the cancellation of invitation for bids (IFB) No. N62470-80-B-2925 to service miscellaneous machinery at Norfolk Naval Shipyard and the Navy's proposed award for the service under a revised IFB. Both IFB's were issued by the Naval Facilities Engineering Command. Fowler claims that a contract by estoppel was formed between Fowler and the Navy after bid opening on the first solicitation; in the alternative, Fowler protests that the second solicitation should have been canceled because the unit prices used to compute its bid on the initial solicitation were made available to its competitors on the second solicitation and the bids on the second solicitation were excessively high (more than 20 percent above the Government estimate).

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Based on our review and analysis of the record, we deny the estoppel claim; we also dismiss in part and deny in part the protest under the second solicitation.

#### Background

Bids for the contract were opened by the Navy on June 17, 1980. The following day, the Navy began processing the Fowler bid, the apparent low bid, by requesting submission of price schedules to break down its total bid price. Fowler claims it was also "requested [on June 18] to be ready to go to work on July 2, 1980" and was "further advised that [it] needed an interim security clearance and would be escorted from Inspection Branch in confidential areas." On June 23, 1980, the Navy received a protest by another bidder, J. R. Williams, Inc., alleging that the apparent low bidder did not have security clearance as required by the IFB. Fowler received a telephone call that same day advising the company of the protest; Fowler was also advised of the protest by a copy of an internal Navy letter dated June 24 which requested that a security clearance on the company be initiated. The bottom of the copy included a handwritten note which asked the company to have available "information \* \* \* on employees who will need clearance." Attached also was a copy of the Navy's response to J. R. Williams, Inc.; the response acknowledged the initiation of security clearance for Fowler, but noted that no award of the contract had been made.

On July 10, 1980, the procuring activity was advised that the requested security clearance could not be processed for any bidder in accordance with regulations "on need to know." Nevertheless, the procuring activity still considered a security clearance necessary since workers would be passing through "controlled areas" under the IFB's description of services. The Navy then decided to cancel the IFB. Although the Navy's August 16 letter of cancellation stated the basis for cancellation was that all bids were excessive, the actual reason, as later revealed by the Navy, was that the inability to get security clearance for any bidder required "removing features of the IFB requiring security clearance." The Navy determined that after making such changes it would be in the best interests

of the Government, and would also serve the interest of fairness to all bidders, to cancel and readvertise. A revised IFB was subsequently issued and bids were received on October 7, 1980; Fowler was the second lowest bidder under the revised IFB.

#### Estoppel Claim

Fowler claims that it was led to believe it would receive the award and that the Government is estopped to deny the existence of a contract under the first solicitation. Under this claim, the Navy states that the "protester" is not only seeking bid preparation costs but costs allegedly incurred for workmen's compensation insurance and the purchase of a truck, in reliance on receiving the award under the first IFB.

The Government may be estopped to deny that a contract exists with a bidder if the following elements are present:

- (1) the Government knows the facts;
- (2) the Government intends that its conduct shall be acted on or the Government so acts that the bidder has a right to believe that the Government's conduct is so intended;
- (3) the bidder is ignorant of the true facts; and
- (4) the bidder relies on the Government's conduct to his injury.

ITE Imperial Corporation, Subsidiary of Gould, Inc.,  
B-190759, August 14, 1978, 78-2 CPD 116.

In support of its claim, Fowler primarily relies on the alleged advice given to the company on June 18, noted above, by a Navy representative. The representative allegedly told the company to "be ready [by] July 2" and informed the company that an interim security clearance (apparently enabling the company's workers to be escorted through confidential work areas) was "needed" for the work. Since the company might never have obtained an interim clearance, we consider that Fowler should have reasonably realized that the Navy did not intend a binding contract--authorizing

work preparation expenses--to arise as of June 18, even if the company was otherwise encouraged to "be ready [by] July 2." In this connection, we also note that the company, in another letter to our Office, states that on June 18 it was asked only "if [it] could start work on July 2." To the extent the advice was interpreted to mean that a binding contract had arisen in the absence of the clearance, we think that Fowler should have reasonably requested immediate clarification as to whether an award had, in fact, been made. Since Fowler did not request this clarification, the company did not have a right to reasonably believe that the Navy intended the company to incur expenses as of June 18 under a binding contract.)

As to the correspondence, noted above, which was received by Fowler from the Navy in late June, we think it is sufficient to note that one of the letters specifically stated that "no award of the referenced contract" had been made as of June 24; moreover, the letter clearly reinforced the notion that the issuance of a security clearance was necessary before an award could be made. Thus, this correspondence does not support the company's estoppel claim. Further, we see no other evidence in the record concerning events after late June 1980 which reasonably should have led Fowler to believe that the June 24 "no award" status had changed.

Thus, Fowler was not excusably ignorant of the true facts and did not reasonably rely on the Navy's conduct to its injury. Therefore, there is no basis in the record to conclude a contract by estoppel came into existence. Consequently, the claim is denied.)

Revised IFB

Fowler has two protests relative to the second solicitation. It urges that Navy should have canceled the second solicitation because the lowest bid was more than 20 percent above the Government estimated price.) Fowler points to the fact that Navy initially justified cancellation of the first solicitation on the basis that the bids were "substantially in excess" of the Government estimate, although they were only 16 percent more. Fowler also contends that the bidding on the second solicitation should be invalidated because

the "unit prices per man-hour" of the company's price schedules for IFB-2925 were made "available" to the company's competitors prior to the submission of bids on the revised IFB.

[Fowler's protest that the Navy improperly chose not to cancel the second solicitation although the lowest bid was more than 20 percent above the Government estimated price is dismissed as untimely.] We have held that a protester's failure to diligently pursue the matter by seeking within a reasonable time the information which reveals the basis for protest requires a rejection of the protest as untimely. National Council of Senior Citizens, Inc., B-196723, February 1, 1980, 80-1 CPD 87. Bids were opened on October 7 under the revised IFB but this protest was not filed until December 1, 1980, nearly 2 months after the basis could have been discovered if inquiry as to the amount of the Government estimate had been made. Thus, the time taken to ascertain this aspect of the protest was unreasonably long.

Fowler's contention that the October 7 bidding should be invalidated because the unit prices of its price schedules were made available may also be untimely, but it is not known when knowledge of this action was acquired or should have been acquired. In any event, the Navy denies that any "access" to the schedule of prices was permitted outside authorized Government personnel. We regard the Navy's denial of "access" as including a denial that the unit prices were made "available" to any of the company's competitors. In this circumstance, we consider that Fowler has not met its burden of proving the accuracy of the allegation.)

Accordingly, (the protest is dismissed in part and denied in part.)

*Milton J. Rowland*

Acting Comptroller General  
of the United States