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B-157360, Aug. 11, 1965

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B-157360, AUG. 11, 1965

TO THE HONORABLE W. J. DRIVER, ADMINISTRATOR, VETERANS ADMINISTRATION:

BY LETTER DATED JULY 28, 1965, REFERENCE 074B, THE DIRECTOR, SUPPLY MANAGEMENT SERVICE, HAS REQUESTED OUR DECISION CONCERNING THE ACTION TO BE TAKEN REGARDING A MISTAKE ALLEGED AFTER AWARD IN A BID SUBMITTED BY FRANK LILL AND SON, INC., UNDER INVITATION FOR BIDS NO. 65-39, ISSUED MAY 26, 1965, BY THE VETERANS ADMINISTRATION HOSPITAL, BATAVIA, NEW YORK.

THE IFB, WHICH WAS MAILED TO SIX FIRMS AND PUBLICIZED IN SEVERAL AREAS, SOLICITED BIDS TO REPLACE A BOILER AT THE HOSPITAL. THE REPLACEMENT BOILER WAS TO BE BUILT TO CERTAIN SPECIFICATIONS AND INSTALLED BY THE CONTRACTOR IN ACCORDANCE WITH STATED REQUIREMENTS WITHIN 130 DAYS AFTER RECEIPT OF NOTICE TO PROCEED.

LILL'S BID, THE ONLY BID RECEIVED IN RESPONSE TO THE IFB, WAS OPENED ON JUNE 15, AS SCHEDULED. UPON EVALUATION, THE BID WAS DETERMINED TO BE RESPONSIVE, AND THE BID PRICE OF $88,209 WAS FOUND TO BE REASONABLE. ACCORDINGLY, UPON DETERMINATION THAT LILL WAS A RESPONSIBLE BIDDER, ENGINEERING AND ADMINISTRATIVE PERSONNEL AT THE HOSPITAL RECOMMENDED TO THE HOSPITAL DIRECTOR THAT LILL BE AWARDED THE CONTRACT.

BY LETTER DATED JUNE 25, THE CONTRACTING OFFICER NOTIFIED LILL OF THE AWARD AND MADE SPECIFIC REFERENCE TO THE 130-DAY PERFORMANCE PERIOD. LETTER DATED JUNE 30, LILL TOOK EXCEPTION TO THE PERFORMANCE PERIOD AND STATED THAT IT HAD NOT BEEN AWARE OF SUCH REQUIREMENT; ALSO, THAT AT LEAST 330 DAYS WOULD BE REQUIRED FOR THE CONTRACT WORK. IN A SUBSEQUENT DISCUSSION OF THE MATTER WITH THE PROCUREMENT OFFICIALS, LILL'S ATTENTION WAS DIRECTED TO THE 130-DAY PERFORMANCE PERIOD SPECIFIED IN ITS BID PAPERS. THEREAFTER, LILL FURNISHED A WORK SCHEDULE INDICATING THAT PERFORMANCE OF THE CONTRACT WOULD REQUIRE 362 DAYS, INCLUDING 30 DAYS FOR PREPARATION OF DRAWINGS AND 90 DAYS BEFORE SHIPMENT OF THE BOILER COULD BE EFFECTED TO THE CONTRACTOR, AS EVIDENCED BY A STATEMENT FROM THE BOILER MANUFACTURER.

A REVIEW OF THE PROCUREMENT DISCLOSED THAT THE IFB WAS THE SECOND SOLICITATION FOR THE WORK IN QUESTION. IN THE FIRST SOLICITATION, BIDS HAD BEEN REQUESTED ON THE INSTALLATION OF A PACKAGE TYPE UNIT, FOR WHICH THE 130-DAY COMPLETION PERIOD WAS CONSIDERED ADEQUATE. IN THE SECOND SOLICITATION, HOWEVER, THROUGH ADMINISTRATIVE OVERSIGHT THE COMPLETION PERIOD WAS NOT INCREASED, ALTHOUGH IT IS CONCEDED THAT SUBSTANTIAL ADDITIONAL TIME WOULD BE REQUIRED FOR THE FABRICATION AND FIELD ERECTION OF A BOILER NOT OF STANDARD PRODUCTION DESIGN, AS CALLED FOR BY THE SECOND INVITATION.

IN THE OPINION OF THE ENGINEER WHO HAD JOINED IN THE RECOMMENDATION TO THE HOSPITAL DIRECTOR THAT AWARD BE MADE TO LILL, THE 130-DAY PERIOD IS NOT REALISTIC AND, THEREFORE, THE PERFORMANCE TIME SHOULD BE INCREASED, BUT ONLY TO 315 DAYS. SUCH PERIOD, IT IS EXPLAINED, ALLOWS LESS TIME FOR PREPARATION OF DRAWINGS AND CONTEMPLATES CONCURRENT PERFORMANCE OF SEVERAL PHASES OF THE WORK WHICH WILL REDUCE THE TOTAL WORK PERIOD.

IT IS THE POSITION OF THE DIRECTOR, SUPPLY MANAGEMENT SERVICE, THAT IN THEIR RECOMMENDATION TO THE HOSPITAL DIRECTOR REGARDING AWARD TO LILL, THE ENGINEER AND THE CONTRACTING OFFICER SHOULD HAVE MADE REFERENCE TO THE 130 -DAY CONTRACT COMPLETION TIME; ALSO, HAD THE CONTRACTING OFFICER BEEN PROPERLY ADVISED, HE SHOULD HAVE BEEN ON NOTICE OF THE PROBABILITY OF ERROR IN THE SPECIFICATIONS. ACCORDINGLY, THE DIRECTOR STATES THAT THE MISTAKE IS IN THE NATURE OF A MUTUAL MISTAKE AND RECOMMENDS THAT IN THE BEST INTERESTS OF THE GOVERNMENT THE PERFORMANCE TIME BE EXTENDED TO 362 DAYS, AS REQUESTED BY THE CONTRACTOR. HOWEVER, IN THE EVENT OUR DECISION DIRECTS CANCELLATION OF THE CONTRACT, OUR ADVICE IS REQUESTED REGARDING THE USE OF THE FISCAL YEAR 1965 FUNDS ALREADY SET ASIDE FOR THE WORK.

WHILE A BIDDER HAS THE RESPONSIBILITY FOR PREPARATION AND SUBMISSION OF ITS BID AND MUST BEAR THE CONSEQUENCES OF ANY UNILATERAL MISTAKE ON ITS PART, THE ADMINISTRATIVE OFFICIALS WHO DRAFT SPECIFICATIONS ISSUED PURSUANT TO THE PUBLIC ADVERTISING STATUTES LIKEWISE BEAR THE RESPONSIBILITY OF SEEING THAT SUCH SPECIFICATIONS ARE SO DRAWN AS TO STATE THE ACTUAL MINIMUM NEEDS OF THE GOVERNMENT CLEARLY, FAIRLY, AND ACCURATELY. 33 COMP. GEN. 567, 570. WHERE ERRONEOUS SPECIFICATIONS HAVE RESULTED IN UNDULY RESTRICTIVE COMPETITION, OUR OFFICE HAS HELD THAT AN AWARD UNDER SUCH SPECIFICATIONS SHOULD BE CANCELLED AND THE PROCUREMENT READVERTISED UNDER DEFINITE SPECIFICATIONS SETTING FORTH THE GOVERNMENT'S NEEDS CLEARLY TO ASSURE THE FREE AND OPEN COMPETITION CONSISTENT WITH THE PROCUREMENT INVOLVED. 43 COMP. GEN. 544, 546.

FROM THE FACTS STATED, IT IS APPARENT THAT WHILE LILL'S BID OFFERED TO MEET THE IFB REQUIREMENTS, LILL DID NOT EXPECT TO PERFORM WITHIN THE SPECIFIED PERIOD, WHICH THE GOVERNMENT CONCEDES IS UNREALISTIC. THEREFORE, NOTWITHSTANDING LILL WAS NEGLIGENT IN FAILING TO QUESTION THE PERFORMANCE TIME REQUIREMENT BEFORE SUBMITTING ITS BID, IT IS OUR VIEW THAT LILL MAY NOT BE HELD TO THE REQUIREMENT WHICH IS NOW CONCEDED TO BE IMPOSSIBLE.

IT IS ALSO APPARENT, HOWEVER, THAT TO GRANT LILL THE REQUESTED EXTENSION OF PERFORMANCE TIME WOULD CONSTITUTE ACCEPTANCE OF AN OFFER VARYING MATERIALLY FROM THE ADVERTISED SPECIFICATIONS AND WOULD BE PREJUDICIAL TO THOSE FIRMS WHICH MIGHT HAVE SUBMITTED BIDS BUT FOR THE UNDULY SHORT PERFORMANCE PERIOD. IN THE CIRCUMSTANCES, WE ARE OF THE OPINION THAT CANCELLATION OF THE CONTRACT WITH LILL, ON WHICH NO WORK HAS BEEN PERFORMED, AND INITIATION OF A NEW PROCUREMENT UNDER SPECIFICATIONS SETTING FORTH A REALISTIC PERFORMANCE PERIOD ARE REQUIRED IN THE BEST INTEREST OF THE GOVERNMENT.

IT IS ALSO NOTED THAT AWARD IN THIS CASE WAS MADE AFTER EXPIRATION OF THE DAVIS-BACON WAGE RATES FURNISHED BY THE SECRETARY OF LABOR FOR THIS PROJECT, WHICH ACTION WAS NOT IN ACCORDANCE WITH OUR DECISION TO YOU IN B- 152313, JUNE 7, 1965.

AS TO THE USE OF THE FISCAL YEAR 1965 FUNDS WHICH WERE SET ASIDE FOR THE PROJECT PRIOR TO THE AWARD TO LILL, THE GENERAL RULE IS THAT IN ORDER TO OBLIGATE A FISCAL YEAR APPROPRIATION FOR PAYMENTS TO BE MADE IN A SUCCEEDING YEAR, THE

CONTRACT IMPOSING THE OBLIGATION MUST HAVE BEEN MADE WITHIN THE FISCAL YEAR SOUGHT TO BE CHARGED AND FOR A BONA FIDE NEED OF SUCH FISCAL YEAR. 33 COMP. GEN. 57, 61. IT IS ALSO OUR POSITION, WITH RESPECT TO THE REQUIREMENT IN SECTION 1311 (A) OF THE SUPPLEMENTAL APPROPRIATION ACT, 1955, 31 U.S.C. 200 (A) (1) FOR A BINDING WRITTEN AGREEMENT TO OBLIGATE AN APPROPRIATION OR FUND FOR SPECIFIC GOODS TO BE DELIVERED, REAL PROPERTY TO BE PURCHASED OR LEASED, OR WORK OR SERVICES TO BE PERFORMED, THAT IN A SITUATION SUCH AS THIS, WHERE AN AWARD IS DETERMINED TO BE INVALID, NO BINDING AGREEMENT EXISTS WITHIN THE MEANING OF THE STATUTORY PROVISION. 38 COMP. GEN. 190. ACCORDINGLY, SINCE THE 1965 FISCAL YEAR FUNDS WERE NOT OBLIGATED PRIOR TO JUNE 30, 1965, SUCH FUNDS NO LONGER ARE AVAILABLE FOR OBLIGATION FOR THE PROJECT IN QUESTION.

THE FILE FORWARDED BY THE DIRECTOR, SUPPLY MANAGEMENT SERVICE, IS RETURNED AS REQUESTED.