

As per further

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DECISION

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

FILE: B-202654

DATE: August 6, 1981

MATTER OF: Paragon Energy Corporation

DIGEST:

1. Protest filed after bid opening on basis of alleged impropriety in IFB evaluation procedure is untimely.
2. Award to low bidder was proper even though bidder may have overestimated savings to Government flowing from use of offered system, since savings that allegedly should have been used would not have changed standing of bidders.
3. Mere speculation that equipment offered will not meet performance specifications in IFB does not meet burden of protester to affirmatively prove case.
4. To extent that guarantee of amounts of utility usage in bid may not reflect actual performance, Government is protected by provision making contractor liable for breach of guarantee.
5. Where person signing bid is alleged to have been unauthorized, but bid is accompanied by bid bond signed by president and controller of bidding company and president of company confirmed authority after bid opening, challenge to authority is overcome.
6. Nothing in regulations requires that contracting officer hold discussion with protester before issuance of notice to proceed to contractor and Bid Protest Procedures § 21.4 and Defense Acquisition Regulation § 2-407.8 were not violated when notice to proceed was issued after protest without notifying GAO.

[Protest of Army Corps of Engineers Contract Award]

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Paragon Energy Corporation (Paragon) protests the award of a contract to Bahco Systems, Inc. (Bahco), for an emission control system to be installed on an existing boilerplant under Army Corps of Engineers (Omaha) invitation for bids (IFB) No. DACA45-80-B-0226.

Essentially, Paragon protests that the procedure provided in the IFB for the evaluation of bids was improper, that the award should not have been made to Bahco because its low bid misstated certain estimates which were used to determine the successful bid, and that the award should not have been made to Bahco because it was not signed by an authorized representative. Paragon also protests that the contracting agency should not have issued a notice to proceed to Bahco after Paragon protested the award without having first discussed the matter with Paragon as it requested or having notified our Office of the intention to issue the notice.

We do not consider that the protest has merit.

Paragon's complaint that the evaluation procedure in the IFB is improper is untimely. Our Bid Protest Procedures provide that protests based upon alleged improprieties in an IFB are to be filed prior to the bid opening. 4 C.F.R. § 21.2(b)(1) (1981). Although Paragon contends that it did not become aware of the speculative nature of the evaluation procedure until it saw Bahco's bid after the bid opening, Paragon could have become aware of the alleged defect in the evaluation procedures prior to the bid opening.

Paragon alleges that Bahco made misstatements in certain estimates called for in the bid to determine the successful bid. In that regard, the IFB provided that bids would be evaluated on the basis of (1) the cost of construction of the emission control system, (2) the guaranteed 6-month operating/testing costs and (3) the estimated cost for using the system for an additional 19.5 years. As a part of the guaranteed 6-month costs, each bidder was requested to indicate in the bid the amount of electricity at \$0.03 per kilowatt-hour, the amount of water at \$0.99 per thousand gallons and the amount of steam at \$4.54 per thousand pounds that its system would use. As a part of the

19.5 years' operating cost, each bidder was requested to indicate in the bid the amount of electricity, water and steam it estimated would be used at the above-stated rates. Also, as a part of the 19.5 years' operating cost, the bidders were requested to indicate in the bid an "economizer" credit, i.e., the cost that would be saved by the Government at the plant on steam at \$4.54 per thousand pounds due to the efficiency of the system being proposed.

Bahco bid \$3,900,000 for construction and \$23,312 for the 6-month operating costs and estimated that the Government would have a savings of \$4,436,179 during the 19.5 years of additional use for a net overall savings to the Government of \$512,867. Paragon, on the other hand, bid \$4,904,049 for construction and \$89,890 for the 6-month operating costs and estimated that the Government would have a savings of \$1,071,049 during the additional 19.5 years of service with the result that the net cost to the Government would be \$3,922,890. The spread between the \$512,867 savings estimate by Bahco and the \$3,922,890 cost estimate by Paragon is \$4,435,757.

Although Bahco's bid was evaluated as the most advantageous to the Government, Paragon contends that the award should not have been made to Bahco because it misrepresented certain costs. Paragon states that the fans Bahco has indicated it will use in its system are undersized so that they will have to be replaced with larger fans with resultant higher utility costs to the Government. Further, Paragon questions Bahco's indication in its bid that there will be no water and steam usage in its system during the 6-month and 19.5-year operating periods and the failure to estimate cost for these utilities. Additionally, Paragon contends that Bahco claimed an economizer credit of \$1,706,300 more than is theoretically possible.

The contracting agency and Bahco both contest Paragon's claim that the economizer credit is overstated. Assuming for the sake of argument that Paragon is correct, we find no basis to disagree with the award. As noted above, the spread between the bids of Bahco and Paragon is \$4,435,737. After deducting \$1,706,300 from that spread, there remains a \$2,729,457 difference. Paragon has not furnished any evidence to show that

Bahco has lost completely this cost advantage. We have held that an award properly was made to the low bidder where information was solicited in a bid only to determine the Government's ultimate cost and the facts indicated that there was no real likelihood that the low bid cost would exceed the second low bid cost. W. A. Apple Manufacturing, Inc., B-183791, September 23, 1975, 75-2 CPD 170. We note, too, that, while Paragon alleges that the fans Bahco has provided in its system will not meet the performance specifications because they are undersized, Paragon has provided no evidence of that fact other than its bare allegation. Mere speculation on an issue does not meet the protester's burden to affirmatively prove its case. Maxton Lock Company, B-200469, February 4, 1981, 81-1 CPD 66.

In any event, we note that under the terms of the IFB the contractor guarantees the amount of the utilities that will be used during the initial 6-month period and that to the extent that the amount is understated the amount is adjusted for the initial 6-month period and extrapolated for the remaining 19.5 years with the contractor being held responsible for the adjusted cost. Thus, to the extent that the guarantees may not reflect actual performance, the Government is protected by the provision making the contractor liable for breach of the guarantees. United States Lines, Inc., B-197894, October 20, 1980, 80-2 CPD 299.

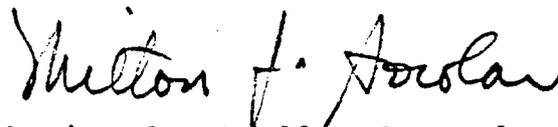
The latter rationale applies with equal force to Bahco's alleged understatement of water and steam usage. We have recognized that, in order to meet competition, a bidder may guarantee an amount to be used in evaluation which is less than actual rather than reduce the price for the item itself. W. A. Apple Manufacturing, Inc., supra.

As to the alleged signing of the Bahco bid by an unauthorized representative, we note that the contracting agency has pointed out that, even if the signer was unauthorized, the bid was accompanied by a bid bond signed by the president and controller of the company and that, since under Defense Acquisition Regulation (DAR) § 2-405 (iii)(B) (1976 ed.) an unsigned bid accompanied by a proper bid guarantee can be considered as sufficient evidence of a bidder's contention to be

bound, the circumstances here should likewise be considered as evidencing a similar intent. Further, we note that, when the challenge to the authority came to the attention of Bahco, the president of the company confirmed that the individual who signed the bid was authorized. In F & H Manufacturing Corporation, B-196161, February 7, 1980, 80-1 CPD 105, we held that the confirmation of authority could be provided by an officer of the corporation after the bid opening. Therefore, the challenge to the authority is overcome.

Regarding Paragon's complaint that the contracting officer should not have issued a notice to proceed without having first discussed the matter with Paragon as it requested or having notified our Office of the intention to issue the notice, we find nothing in the regulations that required the contracting officer to have such a discussion with Paragon and we note that section 21.4 of our Bid Protest Procedures, 4 C.F.R. § 21.4 (1981), and DAR § 2-407.8 (1976 ed.) only provide for notification to our Office when the protest is filed with our Office before award. In this case, the protest was filed with us in the interval between the award and the issuance of the notice to proceed. Thus, neither section 21.4 of our Bid Protest Procedures nor section 2-407.8 of DAR was violated.

Accordingly, the protest is denied.



Acting Comptroller General
of the United States