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*Pellet  
Protest*



**DECISION**

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

FILE: B-201484.3

DATE: December 21, 1981

MATTER OF: J & J Maintenance, Inc. - Reconsideration

**DIGEST:**

1. Protest by the third low bidder alleging that the two lowest bids are nonresponsive, filed with the contracting agency more than 10 working days after the bid opening but before the protester knew that the agency considered either bid responsive, is timely. Subsequent protest to GAO within 10 working days of the protester's notification of the agency's denial of its protest will be considered timely.
2. Contention that the contracting agency should not consider the allegedly nonresponsive low bid is dismissed as academic because, based on a purported mistake in bid, the bid has been withdrawn.
3. Protest asserting that the awardee cannot perform the required work at the alleged "buy-in" price bid is without merit because the Government may accept a below-cost bid. Allegation further involves questions of bidder responsibility which GAO does not review except in circumstances not presented here and also matters of contract administration which are the responsibility of the contracting agency, not GAO.
4. Where the low bid prices for the basic year and 2 option years are the same for each year, the protester has failed to show that the bid is mathematically unbalanced and there is no basis to determine that the bid is materially unbalanced and unacceptable.

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5. Although the awardee's bid which stated monthly prices for estimated square footage to be serviced instead of unit prices based on the square footage is correctable as an apparent clerical mistake under Defense Acquisition Regulation (DAR) § 2-406.2, the contracting agency's correction under DAR § 2-406.3 is not legally objectionable and the erroneous unit pricing method did not render the bid nonresponsive.
6. Protester's request for a conference is denied because GAO Bid Protest Procedures do not explicitly provide for a conference on request for reconsideration, and the matter can be resolved without a conference.

J & J Maintenance, Inc. (J & J), requests reconsideration of our decision in J & J Maintenance, Inc., B-201484.2, May 20, 1981, 81-1 CPD 393, dismissing as untimely its protest against the award of a contract to any other bidder under invitation for bids (IFB) No. F41800-80-B-0525 issued by the San Antonio Contracting Center, Kelly Air Force Base, Texas.

We held J & J's protest--that the two lowest bidders were nonresponsive and that their bids were unbalanced, nonresponsive and constituted "buy-in" bidding--was untimely because the firm initially protested to the contracting agency more than 10 working days after the September 9, 1980, bid opening from which J & J should have known the bases of its protest. In so doing, we noted that while J & J's September 26 protest letter to the Air Force referred to an earlier oral protest and mailgram to the agency, the letter included no evidence of those communications and the Air Force informally advised our Office that its contract file did not show that the contracting agency received such communications.

J & J asks that we reconsider the timeliness of its protests on the basis of a confirming mailgram sent to the San Antonio Contracting Center on September 13, 1980, which states that the firm is protesting any award to either Urban Enterprises, Incorporated (Urban), or American Maintenance Company (American), and that

its detailed protest will follow in letter form. J & J also takes exception to the manner in which the Air Force responded to its request for information about Urban's protest against the same solicitation (Urban Enterprises, B-201484, May 12, 1981, 81-1 CPD 371), reviewed and denied its September 26 protest, and awarded the contract to American. These events occurred prior to the protester's receipt of our May 20 decision.

The Air Force maintains that its contract file does not show that the mailgram was received and states that it was addressed to Post Office Box Number 2218, rather than 8218 which is the correct address of the San Antonio Contracting Center. The incorrect address, the Air Force believes, explains the contracting officer's failure to receive the mailgram and the delay in receipt of the protester's September 26 letter. The Air Force contends that J & J has not supplied any additional facts to demonstrate that our decision was in error and concludes that our determination that the protest was untimely should be affirmed, citing Gross Engineering Company--Reconsideration, B-193953, June 6, 1979, 79-1 CPD 396.

Although we originally held that J & J should have protested to the Air Force within 10 working days after bid opening, the timeliness of its protest to the agency is properly measured from the time J & J learned that the Air Force considered either of the lower bidders' bids acceptable rather than from the bid opening. Werner-Herbison-Padgett, B-195956, January 23, 1980, 80-1 CPD 66. In the interim, J & J had the right to anticipate that the Air Force would comply with the IFB requirements in making the award. AM International, Inc., AM Micrographics Division, B-203497, August 24, 1981, 81-2 CPD 170. The fact that J & J was aware that grounds of protest might exist by September 13 or 26, the dates of its correspondence to the Air Force, did not require the filing of a defensive protest.

A protester is not charged with knowledge of a basis of protest until the contracting agency conveys to the protester a position adverse to the protester's interest. There is no evidence in the record that J & J was advised prior to October 14, the date the contracting officer received J & J's protest, that the Air Force considered the bids in question responsive. Moreover, the contracting

agency was not advised until October 24, 1980, of a mistake in bid which resulted in withdrawal of Urban's low bid. The agency's action in this regard was, in fact, consistent with J & J's protest. J & J's protest, filed with the contracting agency on October 14, 1980, was therefore timely. Peter Gordon Company, Inc., B-196370, July 18, 1980, 80-2 CPD 45; Werner-Herbison-Padgett, supra.

J & J's protest to our Office was timely filed 2 days after the agency's denial of its protest at that level. 4 C.F.R. § 21.1(a)(1) (1981); Fowler's Refrigeration and Appliance, Inc.--Reconsideration, B-201389.2, May 11, 1981, 81-1 CPD 368. However, for the reasons discussed below, we conclude that all of J & J's contentions are either inappropriate for our consideration or are without merit.

Because we denied Urban's protest against the Air Force determination that Urban could not correct an alleged mistake in its bid and should withdraw the bid, Urban Enterprises, supra, J & J's protest against the agency's consideration of that bid is academic and this aspect of the protest is dismissed. See Engine and Equipment Company, Inc., B-199480, May 7, 1981, 81-1 CPD 359; McNab, Incorporated, B-195105, January 29, 1980, 80-1 CPD 78.

J & J contends that American's bid prices are unreasonably low and that American cannot perform the work required at the price bid. Although "buying-in" is discouraged, the practice is not illegal, and the Government may accept a below-cost bid. See Defense Acquisition Regulation (DAR) § 1-311 (1976 ed.); Lite Industries, Inc., B-200646, January 30, 1981, 81-1 CPD 55. We have long held that the possibility of a "buy-in" is not a proper ground upon which to protest the validity of an award. American Marine Decking Systems, Inc., B-203748, July 8, 1981, 81-2 CPD 23; Inter-Con Security Systems, Inc., B-189165, June 15, 1977, 77-1 CPD 434. J & J's protest on this ground is denied.

To the extent J & J questions American's capability to perform the work, the protester challenges the agency's determination that American is a responsible contractor and raises matters of contract administration. Our Office

does not review affirmative determinations of responsibility except in circumstances not present here. Transco Security, Inc., of Ohio, B-200470, April 15, 1981, 81-1 CPD 287. Whether American will perform the agency's maintenance requirements in accordance with the IFB specifications is a matter of contract administration which is the responsibility of the contracting agency, not GAO. Lite Industries, Inc., supra. Therefore, we will not consider these grounds of J & J's protest.

The IFB calls for bid prices to perform the specified maintenance services for 1 year and two 1-year option periods and provides that bids are to be evaluated for award by adding the total price for the three performance periods, less any prompt-payment discount offered by the bidder. Further, the IFB warned that any bid which is materially unbalanced as to prices for the base and option periods may be rejected as nonresponsive and defined an unbalanced bid as one based on significantly overstated and understated prices for some segments of the work. J & J contends that American's bid is materially unbalanced and should have been rejected as required by the IFB.

J & J asserts that American's bid prices are inadequate to cover the expenses necessary to perform the services at the man-hour rates required by the IFB. The protester argues that American's low bid prices make it unlikely that the firm will be able to perform the work during the option years so the Air Force will lose the benefit of the lower option-year prices. J & J concludes that the variance between the base and option prices makes the bid materially unbalanced.

The Air Force states that award was made to American on the basis of its low total price, in accordance with the evaluation method specified in the IFB. The agency insists that J & J's contention that the bid is materially unbalanced because of the variance between the base and option year prices is clearly without basis since American bid essentially the same amount (\$501,373.72 gross or \$463,770.51 net) for the base and the option periods.

Our analysis of unbalanced bidding is twofold. First, the bid is evaluated mathematically to determine whether each bid item is assigned its share of the cost of work plus profit, or whether the bid is

based on nominal prices for some items and enhanced prices for other items. The second aspect of the analysis is an assessment of the cost impact of a mathematically unbalanced bid to determine if it is materially unbalanced--whether award will not reasonably result in the lowest ultimate cost to the Government. Kollmorgen Corporation, B-201254, February 3, 1981, 81-1 CPD 63. J & J has simply failed to show that American's bid is mathematically unbalanced; therefore, there is no basis upon which to determine that the firm's bid is materially unbalanced. Propserv Incorporated, B-192154, February 28, 1979, 79-1 CPD 138; S.F. & G., Inc., dba Mercury, B-192903, November 24, 1978, 78-2 CPD 361. J & J's protest on this ground is denied.

The protester further argues that American's bid is nonresponsive because the firm failed to supply unit bid prices for three bid items. The IFB required that bids include unit prices for each item and provides that failure to do so shall be cause for rejection of the entire bid.

Unlike the rest of the bid items, the items in question were to be bid on a square foot rather than a monthly basis. The Air Force explains that American erred by multiplying its unit price per square foot per month multiplied by the estimated quantity and inserting the resulting amount in the bid schedule. The agency considers American's failure to properly insert a unit price per square foot, an apparent clerical error on the face of the bid because the unit price could easily be derived by dividing the extended item price by 12 and by the estimated quantity. The Air Force nevertheless treated the matter as a mistake in bid pursuant to DAR § 2-406.3 (1976 ed.). American was permitted to correct its unit prices, but no change was made in its total bid price.

We agree with the Air Force that American's error could properly be corrected. However, we have long held that the precise type of unit pricing error involved here constitutes an apparent clerical mistake which may be corrected by the contracting officer prior to award under the less stringent procedure authorized by DAR § 2-406.2 (1976 ed.) and that this erroneous unit pricing

method does not render the bid nonresponsive. Atlantic Maintenance Company, 54 Comp. Gen. 686, 690 (1975), 75-1 CPD 108. The fact that the correction was effected under the wrong regulatory provision is neither legally objectionable nor does it affect our decision that the error was properly correctable.

As to J & J's complaint concerning its request for information regarding the Urban Enterprises protest under the Freedom of Information Act, 5 U.S.C. § 552 (1976), our Office has no authority under the act to determine what information other Government agencies must disclose, and J & J's remedy was to appeal to the Secretary of the Air Force or to a court of competent jurisdiction. 5 U.S.C. § 552(a)(4) (1976); Dynatrend, Inc., B-192038, January 3, 1979, 79-1 CPD 4; Cacciamani Bros., B-194434, July 20, 1979, 79-2 CPD 45.

Finally, J & J requested a conference in connection with the request for reconsideration. Because our Bid Protest Procedures do not provide for a conference on a request for reconsideration, we will grant one only where the request cannot be resolved without one. In our judgment, this is not such a case. See Porta Power Pak, Inc.--Reconsideration, B-196218.2, July 17, 1980, 80-2 CPD 38.

The protest is dismissed in part and denied in part.

*Harry R. Van Cleave*  
For Comptroller General  
of the United States