

DECISION

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

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FILE: B-210898

DATE: November 8, 1983

MATTER OF: American Transparents Plastic Corporation

DIGEST:

1. Contracting agency's allegation that protester failed to file comments on protest report within 10 working days is without merit, since protester was granted extension.
2. Contracting agency's allegation that protester untimely raised new issues in comments on protest report is without merit, since protester's comments were further detailed support for timely filed protest.
3. Economic price adjustment clauses must reflect some objective standard other than bidder's prices as basis upon which price adjustment will be made. Price adjustment clause in protested solicitation reflects objective standard because it is tied to Department of Labor's producer price index.
4. It is bidder's responsibility in bidding on fixed-price contract to project costs and to include in basic contract price factor covering any otherwise uncompensated cost increases.
5. Protester has burden of affirmatively proving its case. Protester failed to provide sufficient evidence to establish that producer price index does not represent actual market price for material used in manufacturing contract items.
6. Protester's allegations of ambiguities in solicitation's economic price adjustment clause are without merit, since price adjustment clause contains sufficient detail so that prospective bidders have clear and precise understanding of operation of clause.

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7. Protester's allegation that solicitation's economic price adjustment clause is unconscionably one-sided in favor of government is without merit, since it is within ambit of administrative discretion for contracting agency to offer to competition proposed contract imposing maximum risks upon contractor.

American Transparents Plastic Corporation (American Transparents) protests the standard for contract price adjustment and other alleged imperfections contained in the Economic Price Adjustment (EPA) clause of invitation for bids (IFB) 5YCO-13-83-012 issued by the General Services Administration (GSA) for Federal Supply Schedule requirements for plastic bags.

American Transparents contends that the Department of Labor's Producer Price Index (PPI) in the IFB's EPA clause which triggers the operation of the clause does not accurately reflect actual market prices and, therefore, prospective bidders are unable to reasonably assess the consequences of their bids. American Transparents also contends that the EPA clause contains several other flaws and ambiguities which together with the use of the PPI make it impossible for a bidder to develop a rational bid.

For the reasons set forth below, we conclude that the protest is without merit.

Timeliness

GSA asserts that American Transparents' protest should be dismissed because the company failed to file its rebuttal comments on the report prepared by the agency within the 10-day period specified in our Bid Protest Procedures (4 C.F.R. § 21.3(d) (1983)). However, on May 26, 1983, counsel for American Transparents orally requested an extension of time to file rebuttal comments and confirmed this request by letter dated May 27, 1983. Since our Bid Protest Procedures also provide that a protester may either file rebuttal comments or indicate an interest in receiving a decision within the 10-day period following receipt of the agency's report, we find that American Transparents' request for an extension of time to file comments within the 10-day period is by itself an expression of interest in receiving our decision. Therefore, American Transparents was entitled, at a minimum, to a decision on the basis of the record as it then existed. In any event, since the company submitted detailed rebuttal comments shortly after requesting the extension and

since no decision had been rendered at the time they were filed, we see no objection to the consideration of these comments as part of our decision.

In addition, GSA claims that American Transparents' original protest alleged only that the PPI included in the IFB's EPA clause did not accurately reflect actual market prices and that the issues set forth in American Transparents' written comments on the protest report regarding other flaws and ambiguities in the EPA clause are untimely as newly raised. However, American Transparents specifically alleged in its original protest letter that "other imperfections and ambiguities in the EPA clause" prevented the company from reasonably assessing the consequences of its bid if the EPA clause is triggered. While American Transparents did not provide any detail in its protest letter as to what exactly the other alleged deficiencies in the EPA clause were, we find that American Transparents' elaboration of them in the company's comments on GSA's protest report is nothing more than further detailed support for an already timely protest. See Kappa Systems, Inc., 56 Comp. Gen. 675 (1977), 77-1 CPD 412.

Producer Price Index

American Transparents emphasizes that it does not object to the inclusion of an EPA clause in the IFB. Rather, the company asserts that the PPI which triggers the operation of the clause bears no rational relationship to the market price movement for the low density polyethylene resin (LDPE) used to make plastic bags. According to American Transparents, there have been numerous instances over the past several years where the PPI has indicated significant price declines for LDPE while the purchasers of LDPE were experiencing sharp price increases. American Transparents further alleges that even at other times when the PPI was moving in the same general direction as other market price indicators, it was moving much more dramatically than what was actually being experienced in the marketplace. In support of these allegations, American Transparents has provided us with market price data which the company obtained from a major producer of LDPE for the period March 1981 to May 1982.

American Transparents argues that because, in the company's opinion, there is a "highly uncertain effect" of using the PPI as the trigger for the EPA clause, it is impossible for a bidder to develop a bid under the IFB which

factors in projected inflationary/deflationary changes in the LDPE market. American Transparents claims that, while a bidder can look to trends being experienced in its purchases of LDPE and market projections by industry analysts, the bidder can have no assurance that the PPI will reflect these trends and projections. From this, American Transparents concludes that GSA cannot evaluate the bidders' bids on an equal basis because the agency has no way of knowing how or even whether prospective bidders are dealing with the fluctuations in the LDPE market. American Transparents further concludes that an EPA tied to the PPI is akin to an impermissible liquidated damages clause because it quite likely will operate to penalize contractors with price reductions when, in fact, the contractors are experiencing price increases in LDPE.

As a substitute pricing index for the IFB's EPA clause, American Transparents suggests that GSA should use the index published each month in the independent trade journal, Plastics World. American Transparents alleges that this index specifically differentiates among the several different grades of LDPE, whereas the PPI does not. American Transparents also alleges that Plastics World develops its index prices for LDPE by comparing market price data from producers of LDPE with data received from purchasers of LDPE, whereas the PPI uses data developed only from LDPE producers. Thus, American Transparents takes the position that the index published in Plastics World more accurately reflects the market price movement of LDPE.

GSA states that Federal Procurement Regulations § 1-3.404-3 (1964 ed. circ. 1) allows agencies to include price escalation or adjustment clauses in fixed-price contracts where there is serious doubt as to the stability of market conditions which will exist during an extended period of production and where certain contingencies can be identified. GSA goes on to state that the price adjustment clause included in the IFB provides for adjustments in the contract price, either upward or downward, if, during performance of the contract, the base index of polyethylene resin increases or decreases by 5 percent or greater on the Department of Labor PPI. GSA emphasizes that resin is a major element of the cost of producing plastic, representing approximately three-fourths of the total cost. According to GSA, an administrative decision was made to include the EPA in the IFB because of the continuing variations since 1979 in the market price of resin.

With regard to the use of the PPI as the triggering mechanism for the application of the EPA, GSA argues that, contrary to American Transparents' assertions, the PPI is an accurate, objective index for LDPE. GSA states that the Department of Labor compiles the PPI for resin from information obtained from four manufacturers of resins who submit their actual sales data, voluntarily, on a confidential basis each month. GSA goes on to state that, based on this information, the Department of Labor calculates the changes in resin prices from the previous month and takes a weighted average. A formula is then used to calculate the PPI. In this regard, GSA points out that the PPI does not represent a price, but rather the percentage of change in the price of resin from month to month.

GSA further states that other published indexes for resin have been considered, but they are either recently established, thus having no history for determining their accuracy, or include the publisher's own subjective judgment on future market conditions. In this regard, GSA states that, in recent conversations with the publisher of Plastics World, the publisher revealed that, in evaluating data from surveys of manufacturers and purchasers of resin, he rejects some quotations if he thinks they are incorrect. In GSA's opinion, the inclusion of the publisher's judgment of whether a price quotation is correct adds a "subjective quality" to the data that makes the magazine's index "less objective." Also, GSA points out that the resin index in Plastics World has only been published since April 1982, which GSA feels is an insufficient period of time for the government to be able to adequately determine the index's accuracy.

GAO Analysis

Price escalation clauses must reflect some objective standard other than the bidder's own prices as the basis upon which the price adjustment will be made. Roarda, Inc., B-204524.5, May 7, 1982, 82-1 CPD 438. Otherwise, bidders could indiscriminately raise their prices after contract award and thus increase their entitlements under the price escalation clause. Under such circumstances, it would be impossible for the government to ascertain which bidder was entitled to award since there would be no way for the government to determine the lowest ultimate cost. See Hampton Metropolitan Oil Co.; Utility Petroleum, Inc., B-186030, B-186509, December 9, 1976, 76-2 CPD 471.

Citing our decision in Roarda, Inc., supra, American Transparents argues the IFB's EPA clause is tied to a PPI which affords no objective basis for correlating the actual market price movement of LDPE with price adjustments on any contracts awarded under the IFB. We disagree. The IFB's EPA is not tied to any bidder's individually submitted prices as a basis for economic adjustment. The PPI which is published by another federal agency is applicable equally to all the bidders on the IFB.

American Transparents contends that an EPA tied to the PPI makes it impossible to develop a rational bid. The purpose for including an EPA clause is to protect bidders to some extent against unexpected price increases and to reduce the necessity for contingency amounts in their bid prices. However, to the extent that the EPA clause does not achieve that result from the bidder's standpoint, it is the bidder's responsibility to project costs and to include in the basic contract price a factor covering any otherwise uncompensated cost increases. Barker & Williamson, B-208236, November 17, 1982, 82-2 CPD 454. We have held that it is "within the ambit of administrative discretion to offer to competition a proposed contract imposing maximum risks upon the contractor and minimum administrative burdens on the agency." Massman Construction Co., B-204196, June 25, 1982, 82-1 CPD 624.

In any event, the protester has the burden of affirmatively proving its case. Reliable Maintenance Service, Inc.,--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. From our review of the record, we find that American Transparents has failed to establish that the PPI is an inaccurate reflection of actual market prices for LDPE. Even assuming that the March 1982 to May 1982 LDPE prices that American Transparents has given us of the major producer of LDPE is accurate, the company has provided nothing from which we can conclude that the prices of this one company are representative of the LDPE industry as a whole. The record shows there are a number of producers and distributors of LDPE. Rather, American Transparents asserts only that it has tried to ensure objectivity by not using its own cost experience and by focusing on a particular period of time when it did not have a requirements contract with GSA for plastic bags. Finally, we also note that GSA takes the position that the prices of any one purchaser or distributor cannot be used as a basis of comparison without also taking into account the quantities being purchased or sold, the discounts involved, and the period of contractual commitment involved.

American Transparents also makes a comparison of the PPI with the LDPE indices in Plastics World for the period May 1982 through April 1983. However, American Transparents' use of this magazine's indices for comparison suffers from the same evidentiary problem as the company's other data from a major producer of LDPE; that is, there is nothing to indicate that the prices published in Plastics World are representative of the overall LDPE market. As stated above, GSA believes that the interjection of the magazine publisher's own judgment in rejecting some of the price quotes he receives from consideration adds too much of a subjective quality to the magazine's published data. Moreover, since the Plastics World indices had only been published since April 1982, GSA had a basis to conclude that there had been insufficient time to adequately assess their accuracy.

Other Alleged Defects in the IFB's EPA Clause

American Transparents asserts that there are the following other flaws in the IFB's EPA clause:

- A. There is no basic PPI index available to bidders at the time they prepare and submit their bids.
- B. The EPA clause is ambiguous concerning the changes in the PPI that trigger the operation of the clause.
- C. The EPA clause is silent as to what happens when no PPI is published by the Department of Labor in any given month.
- D. The EPA clause provides no indication whether an original or revised PPI is to be used.
- E. The EPA clause is unconscionably one-sided in GSA's favor.

A. Availability of the Base Index

The IFB's EPA clause provides that the PPI released for the "contract date" shall be used as the base for determining upward or downward price adjustments of LDPE. The clause further defines "contract date" to mean "the date/month of bid opening." American Transparents asserts that this approach to setting the base PPI does not allow the bidders to know what the applicable PPI is when they prepare and submit their bids. American Transparents points out the

LDPE PPI for the month that bid opening occurred was not issued until after bid opening. Consequently, American Transparents argues that bidders are reduced to guessing what the base PPI will be when they submit their bids. American Transparents further argues that neither other market indicators nor the bidder's own cost experience can be used to take into account potential adjustments in the price of resin because the PPI bears no rational relationship to price movement in the marketplace.

In view of the fact that we have found above that American Transparents has failed to establish that the PPI bears no relationship to the actual market price of resin, we see no reason why the company could not use either other market indicators or its own cost experience in purchasing resin when preparing its bid under the IFB. Further, we note, as pointed out by GSA, that the PPI is a number, not a price, and, as such, the PPI has little value to a bidder who must submit a bid. Only the fluctuations in the base PPI number during the period of contract performance are relevant to the determination of any adjustment in the contract price.

B. Operation of the EPA Clause

The IFB's EPA clause provides that contract prices shall be subject to adjustment whenever the indexes for succeeding months increase or decrease 5 percent or more from the index for the base month. American Transparents contends that the EPA clause is ambiguous because it contains no reference to whether the succeeding months' indexes refer to only the indexes for the months following contract award or whether they also include the months between bid opening and contract award. American Transparents emphasizes that it is always possible that contract award will not be made until several months after bid opening. According to American Transparents, it is impossible to tell from the language of the EPA clause whether the changes in the PPI prior to award will be included in computing economic price adjustments.

We find American Transparents' arguments to be without merit. Obviously, the EPA clause can provide a method of contract price adjustment only during the period of actual contract performance. Until awards are made to particular bidders, there are no price changes in contract materials for the contracting officer to monitor. Moreover, the record shows that GSA implemented Contract Management Letter

No. 17, dated November 9, 1982, which specifically indicates that the "succeeding months" referred to in the EPA clause are the months of contract performance. GSA states that this contract management letter establishes procedures to assist contracting officers in implementing the EPA clause. We find that this interpretation in GSA's contract management letter reasonably follows from the language of the EPA clause.

C. Failure to Publish the PPI

American Transparents alleges that based upon past experience with the publication of the PPI, there will be at least 1 month during the year when the index is not published by the Department of Labor. American Transparents argues that while the IFB's EPA clause states that the prior month's PPI will be used as the base index when no index is published for the month that bid opening occurs, no comparable language exists in the clause as to what will happen in the months following bid opening when no PPI is published. American Transparents goes on to argue that there is a "foreseeable hole in the operation of the EPA clause" which in American Transparents' opinion introduces a significant risk of distorting any increases or decreases in the PPI. The company emphasizes that if no PPI is published in a particular contract month and that month happens to be a critical transition month in the price movement of LDPE, the following month's PPI could likely produce a greatly exaggerated LDPE price adjustment in that month. American Transparents charges that such exaggerated price adjustments have a "dramatic, unanticipated and unreasonably sudden impact on the contractor."

We find that the language of the IFB's EPA clause clearly indicates that there must be a published PPI in any given month of contract performance in order for the contracting office to determine if any price adjustment should be made. Thus, there is no ambiguity in the EPA clause as to the effect of nonpublication of the PPI. With respect to American Transparents' objection of having to bear the burden of a possible dramatic shift in LDPE prices in the month following nonpublication of the PPI, we find that this is well within the ambit of the contracting agency's discretion to impose maximum risks upon the contractor. See Massman Construction Co., supra.

D. Use of the Revised PPI

American Transparents calls our attention to the fact that, in addition to issuing an original PPI on or about the fifteenth day of each month, the Department of Labor sometimes makes correction for errors and revises that PPI 4 months afterwards. American Transparents further notes that the IFB's EPA clause does not state whether it is based on the original PPI or the revised PPI. American Transparents contends that this is an important omission because there may be important differences between the original PPI and the revised PPI. According to the company, there is nothing in the EPA clause to foreclose final accounting adjustments after the fact if the revised PPI differs significantly from the original PPI.

From our reading of the EPA clause, we find that it is reasonable to conclude that only the original PPI issued during each contract month will be used by GSA in making any price adjustments pursuant to the IFB's EPA clause. The clause refers to indexes for "succeeding months" as the basis for comparison with the base PPI in existence on the contract date. Moreover, American Transparents admits that one can "infer" from the operation of the EPA clause that the original PPI is to be used. American Transparents also admits that it has been the past practice of GSA to use the original PPI in determining whether to make price adjustments under the EPA clause.

E. Alleged Unconscionability of the EPA Clause

American Transparents contends that the EPA clause is unreasonably one-sided in favor of the government. American Transparents claims that, rather than being a protection for contractors from radical increases in the prices of contract materials, the EPA clause is being used to cut a contractor's anticipated revenues in mid-contract. As an example of the alleged one-sided nature of the EPA clause, American Transparents points to paragraph (c) of the clause which provides that the contractor waives its rights if it fails within 15 days to notify the contracting officer of any PPI increase triggering the operation of the EPA. American Transparents points out that the government, on the other hand, does not waive any of its rights to a contract price decrease even if no action is taken by the contracting officer until after the final contract payment is made. Finally, American Transparents objects to the fact that the EPA clause provides a ceiling of 30 percent for upward adjustments of the contract price, but places no floor for the downward adjustment of the contract price.

We recognize that the IFB's EPA clause places more risks on the contractor than on the government. We note that, despite the risks cited by American Transparents, the government received 31 bids under the IFB. In any event, we cannot conclude that the risks imposed by the government are so one-sided as to be outside of the government's overall right to impose the maximum risks upon the contractor. Massman Construction Co., supra. The language of the EPA clause itself shows that the purpose of the government's not imposing any time limitations on downward price adjustments was to prevent a contractor from being overpaid and to collect as soon as possible any excess paid to a contractor.

As to the EPA clause's 30-percent ceiling on upward price adjustments, we know of no statutory or regulatory requirements, and American Transparents has cited none, which provide that changes in a contractor's material costs be passed through to the government in full. See Echelon Service Company, B-208720.2, July 13, 1983, 83-2 CPD 86. We find that an upward price adjustment ceiling of 30 percent is reasonable. There is nothing in the record to indicate that LDPE prices fluctuate any more than this percentage.

We deny American Transparents' protest.

for 
Comptroller General
of the United States