

**DECISION**

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

**FILE:** B-219353 **DATE:** September 27, 1985  
**MATTER OF:** InterTrade Industries Ltd.

**DIGEST:**

1. When low bid does not specify shipping point and information is necessary to determine transportation costs in evaluation of bids on an f.o.b. origin basis, the agency may properly reject the bid as nonresponsive. An exception for bids where the shipping point can be ascertained by reading the bid as a whole does not apply where there is no other place designated in the bid from which the protester would legally be bound to ship.
2. Agency head's failure to make required Competition in Contracting Act determination for continued contract performance during pendency of protest does not provide a basis to upset an award.

InterTrade Industries Ltd. protests the rejection of its low bid as nonresponsive to invitation for bids (IFB) No. N00244-85-B-0510, issued by the Naval Supply Center, San Diego, California, for 10 large, cylindrical fenders to be used for mooring ships. In a supplemental protest, the firm additionally alleges that the Navy violated the Competition in Contracting Act of 1984, 31 U.S.C.A. § 3553(d) (West Supp. 1985), by not suspending performance of a contract awarded to Seaward International, Inc.

We deny the protests.

The IFB, issued March 29, 1985, required bidders to offer fixed prices for shipment of the fenders to San Diego on an f.o.b. origin basis. The bidding form included a space under clause 6(b) for the bidder to enter the shipping point and cautioned that bids submitted on any basis other than f.o.b. origin would be rejected as nonresponsive. Amendment No. 0004, dated May 9, 1985, added an evaluation provision from the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.247-47 (1984), indicating that the cost of transporting the fenders between the

033295

shipping point and the destination would be considered in determining the overall cost of the fenders to the government.

The procuring activity received three bids at bid opening on May 17, 1985. InterTrade was the low bidder (\$132,500), and Seaward International, Inc. was second-low (\$134,032). Because InterTrade's bid failed to identify a shipping point, the contracting officer rejected it as nonresponsive and made award to Seaward on May 22, 1985.

In its protest, InterTrade contends that although it failed to include the required information under clause 6(b), its bid--when read as a whole--reflects its intent to designate Huntington Beach, California as its shipping point. InterTrade argues that since it designated Huntington Beach as its place of performance, and since this is its only place of business, the contracting officer should have used Huntington Beach to evaluate costs on an f.o.b. origin basis. The protester also maintains that because its bid stated that the firm was a small business, the contracting officer had no reason to believe that the shipping point would be other than the firm's place of business. According to the protester, the Navy had only to check on previous ship fender contracts, performed by InterTrade and listed in its bid, to discover that all items had been shipped from the Huntington Beach plant. InterTrade emphasizes that it did not take exception to the 60-day delivery requirement or impose a different term than f.o.b. origin.

Further, the protester argues that the government was required by a mandatory FAK provision, 48 C.F.R. § 52.247-46, which was not included in the solicitation, to use InterTrade's place of performance for evaluation purposes. That regulation provides that in certain cases where a bidder does not state a shipping point, the government must evaluate the bid on the basis of shipment from the place where the offer indicates that the contract will be performed.

InterTrade also questions the agency's assertion that the shipping point is a matter of responsiveness. The protester contends that the information is not material unless the lowest ultimate cost to the government cannot be determined with certainty. According to the protester, since it was clear that InterTrade's only place of business was in California, and since the awardee, Seaward, is

located in Virginia, there was little if any possibility that award to InterTrade would result in higher costs to the government. Finally, InterTrade argues that even if the omission of the shipping point was a matter of responsiveness, it should be waived as a minor irregularity that can be corrected or waived without prejudice to other bidders.

The Navy responds that although InterTrade designated Huntington Beach as its place of performance, the bid failed to evidence a firm commitment to ship the fenders from any specific place. According to the Navy, in descriptive literature submitted with the bid, InterTrade represented that it had provided marine fenders to the Canadian Navy and to commercial users nationwide. The contracting officer therefore thought it was foreseeable that the firm might ship from a warehouse or other facility in the Canadian Maritime Provinces, Maine, Florida, or another location. In that case, transportation costs could displace the firm's standing as low bidder, since its bid was only \$1,532 less than that of the second-low bidder.

Additionally, the Navy contends that the place of performance designated in InterTrade's bid cannot serve to provide the requested information, because the place of performance may legally be changed after opening of bids, citing 48 Comp. Gen. 593 (1969).

The issue for resolution is whether InterTrade's bid manifested a firm offer to tender delivery to the government at a particular shipping point, namely its Huntington Beach plant. We are unable to conclude that a reading of InterTrade's bid in its entirety evidences such an offer.

We have held that if a bidder fails to designate an f.o.b. point of origin where one is required by an IFB, it may, in the proper circumstances, be ascertained from a reading of the bid as a whole. B-155429, Nov. 23, 1964; see also 49 Comp. Gen. 517 (1970); The R.H. Pines Corp. et al., B-209458, et al., Sept. 2, 1983, 83-2 CPD ¶ 290. This case, however, is distinguishable from that line of cases, where we held the failure of the bidder to insert a shipping point in the space provided did not render the bid nonresponsive. For example, in 49 Comp. Gen. 517, there were multiple places in the bid for a bidder affirmatively to show compliance with the f.o.b. origin requirement and thus create a legal obligation to utilize a specific

shipping point. Here, there was only one place for a bidder affirmatively to show compliance with the f.o.b. origin requirement.

We think this case is more like 48 Comp. Gen. 593 (1969), aff'd. 48 Comp. Gen. 689 (1969), where the bidder left an IFB provision similar to the one here blank and inserted information as to the location of its plant only in connection with the "inspection and acceptance" clause. Since the latter entries were subject to change at the bidder's option after bid opening, we held that failure to designate a shipping point in the only place provided rendered the bid nonresponsive.

InterTrade did not, in our opinion, show compliance with the f.o.b. origin requirement elsewhere in its bid. The insertion of Huntington Beach under place of performance (producing facilities location) had no bearing on delivery and was subject to change at the bidder's option. We therefore do not believe that the place of performance entry can be substituted for the missing information. Without this information, the ultimate cost to the government cannot be determined.

Even though InterTrade did not take exception to the 60-day delivery requirement, we have held that where an IFB requires an insertion of material information (such as price, descriptive data, or point of origin) relating to responsiveness, the failure of the bidder to provide the information must be treated as if the bidder had taken exception to a material provision of the IFB, thereby rendering its bid nonresponsive. 48 Comp. Gen. at 692-3. Accordingly, we find no merit to the argument that the failure to indicate the shipping point was a minor irregularity that could be waived without prejudice to other bidders. We have consistently held that the waiver of deviations that affect price or go to the substance of the bid is prejudicial to the other bidders and the competitive system. 48 Comp. Gen. at 598, aff'd. 48 Comp. Gen. 689.

InterTrade relies on our decision in B-155429, supra, in which we held that it was fair to assume that a small business bidder intended to designate its only plant in Saratoga Springs, New York as its shipping point for purposes of evaluation on an f.o.b. origin basis. Although InterTrade states that it also is a small business, we view this case as distinguishable from the Saratoga case because

InterTrade represented in its descriptive literature that it provided ship fenders to national and Canadian points. We agree with the Navy that, given the scope of the protester's business, it was reasonable to think that InterTrade might ship the fenders from a location other than Huntington Beach and thus might not remain the low bidder.

Further, we find no merit to the protester's argument that the contracting officer should have known from InterTrade's previous contracts that the firm's shipping point was Huntington Beach. A bid's responsiveness must be determined from the bid itself. Le Prix Electrical Distributors, Ltd., B-206552, July 6, 1982, 82-2 CPD ¶ 18. The contracting officer could not presume an intention on the bidder's part with respect to a material term that was not reflected in the bid. Id.

Additionally, we do not view the alleged mandatory provision, 48 C.F.R. § 52.247-46, as in fact mandatory. The provision is required when an agency contemplates evaluation of shipments from various shipping points. 48 C.F.R. § 47.305-3(b)(4)(ii). Read as a whole, the regulation appears to refer to shipments by one offeror from various shipping points, which was not the case here. In any event, as the Navy states, a mandatory provision that has been omitted from an IFB may not be constructively read into the solicitation. Rainbow Roofing, Inc., 63 Comp. Gen. 452 (1984), 84-1 CPD ¶ 676.

For the foregoing reasons, InterTrade's protest regarding rejection of the bid as nonresponsive is denied.

On August 21, 1985, InterTrade supplemented its protest, alleging that it had just learned, as a result of a Freedom of Information Act request, that the Navy violated the Competition in Contracting Act of 1984 (CICA) by not suspending performance of the contract pending our decision on the protest, and that the head of the procuring activity had not made the required determination that performance should proceed.

The CICA requirements for suspension of award or performance pending a protest are among provisions of the Act that currently are the subject of a constitutional dispute. Initially, the Attorney General refused to recognize the "stay" provisions on the ground that they violated the separation of powers doctrine; he advised

B-219353

6

executive branch agencies not to comply with the provisions. However, on May 28, 1985 in Ameron, Inc. v. U.S. Army Corps of Engineers, 610 F. Supp. 750 (D. N. J. 1985), the court held the disputed CICA provisions constitutional and directed government-wide compliance with CICA. In response to that decision, on June 3 the Attorney General issued a press release stating that he would advise executive branch agencies to comply with the "stay" provisions pending an appeal of Ameron. Notice of the revised Department of Justice guidance appeared as an amendment to the FAR in the Federal Register on June 20, 1985. See Federal Acquisition Circular 84-9, 50 Fed. Reg. 25,680 (1985).

It appears from documents that InterTrade submitted in connection with its supplemental protest that the Navy attempted to comply with the CICA "stay" provisions 1 day after the Federal Register notice was published, since it requested the awardee to suspend performance in a letter dated June 21, 1985. However, it also appears that when the letter was received by the awardee on June 27, 1985, the fenders already had been delivered.

Although the CICA "stay" provisions went into effect on January 15, 1985, we have noted previously that pursuant to the Attorney General's view, executive agencies were not complying with the stay provisions and that the matter was the subject of litigation. See Lear Siegler, Inc., B-218188, Apr. 8, 1985, 64 Comp. Gen. \_\_\_\_\_, 85-1 CPD ¶ 403; IBI Security Services, Inc., B-218565, July 1, 1985, 85-2 CPD ¶ 7. While it appears performance would have been suspended here had the Navy earlier sought to comply with the CICA, an agency's failure to delay award or, as in this case, to suspend performance prior to final resolution of a protest, traditionally does not constitute a basis for upsetting an otherwise proper award. See PNM Construction, Inc., B-215973, Nov. 30, 1984, 84-2 CPD ¶ 590; M.C. Hodom Construction Co., Inc., B-209241, April 22, 1983, 83-1 CPD ¶ 440.

The protests are denied.

*Harry R. Van Cleve*

Harry R. Van Cleve  
General Counsel