

*Lebowitz*



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** American Management Enterprises, Inc.  
**File:** B-238134  
**Date:** February 26, 1990

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Warren P. Taylor, Esq., for the protester.  
Kerry L. Miller, Esq., Office of the General Counsel, United States Government Printing Office, for the agency.  
Linda S. Lebowitz, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest alleging specification impropriety apparent on the face of the solicitation that minimum wastepaper content requirement for paper products being purchased restricts competition is untimely when not filed prior to bid opening.
2. Protester's bid was properly rejected as nonresponsive where protester took exception in its bid to a material solicitation requirement that paper products to be furnished contain a minimum of 50 percent wastepaper.

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### DECISION

American Management Enterprises, Inc. (AME), a small disadvantaged business (SDB), protests the rejection of its bid<sup>1/</sup> under an unnumbered solicitation (designated as the Proposal for Furnishing Paper for the Public Printing and Binding and Blank Paper Ordered for the Government Departments and Establishments During the Term of Three Months, Beginning February 1, 1990), issued by the United States Government Printing Office for various lots of paper. The agency rejected AME's bid because it took exception to the solicitation's requirement that the paper products to

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<sup>1/</sup> Although the solicitation requested "sealed proposals," we note that sealed bidding procedures were contemplated and used in this procurement. For this reason, we refer to AME's submission as a "bid."

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be furnished contain a minimum of 50 percent wastepaper (recovered/recycled materials).

We dismiss the protest in part and deny it in part.

The solicitation was issued to 43 firms on November 9, 1989, and 12 firms, including AME, submitted bids by the time of bid opening on November 28. The solicitation, at paragraph 103, specifically required that bidders furnish paper for lots 13, 14, 17, 47, 50, and 50a containing a minimum of 50 percent wastepaper. This requirement was further highlighted by a special notice in the solicitation which explained that the 50 percent minimum wastepaper content applied to this solicitation as mandated by the Environmental Protection Agency (EPA) Guideline, dated June 22, 1988, 53 FR 23,546 (1988), which implements the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (1982). This special notice, referencing paragraph 103, required each bidder to enter on its bid schedule, next to its prices, the percentage of wastepaper contained in the products which it intended to furnish for the particular lot numbers. Bidders were essentially advised that failure to bid on paper products containing at least 50 percent wastepaper would result in the rejection of the bid.

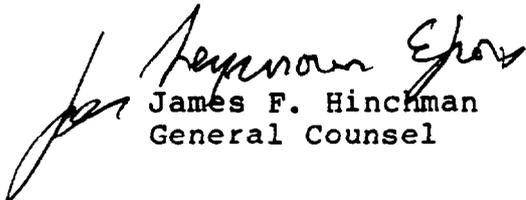
On its bid schedule, AME entered next to its prices a figure of zero percent wastepaper content for each of the above six lot numbers. Because AME did not bid on paper products containing a minimum of 50 percent wastepaper, the agency rejected its bid. By letter dated December 5, AME filed an agency-level protest, alleging that the agency had improperly set aside this procurement for firms furnishing paper products containing recovered materials and further alleging that its certification of zero percent wastepaper content was not a proper basis for rejecting its bid. By letter dated December 11, the agency denied AME's agency-level protest, and subsequently awarded contracts for various lots to the respective low, responsive and responsible bidders. On December 22, AME filed this protest with our Office.

AME essentially argues that the solicitation was defective because the EPA Guideline merely recommends, but does not require, a minimum 50 percent wastepaper content standard, and that the agency's inclusion of this standard in the solicitation as a mandatory requirement effectively eliminated for award those SDB firms, like AME, which bid on paper products not containing at least 50 percent wastepaper. AME maintains that the agency's rejection of its bid, indicating no wastepaper content for any of the six protested lots, was improper.

To the extent AME is arguing that competition was improperly restricted because of the solicitation specification requiring, as opposed to merely recommending, that paper products furnished contain at least 50 percent wastepaper, we will not consider this ground of protest because it is untimely. Our Bid Protest Regulations require that a protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1989). Here, AME's objection to the solicitation's mandatory minimum wastepaper content standard concerns an alleged solicitation impropriety apparent from the face of the solicitation. However, AME did not protest this issue to either the agency or our Office until after the bid opening date, and accordingly, this ground of protest is dismissed as untimely. KASDT Corp., B-235889, July 19, 1989, 89-2 CPD ¶ 63. In any event, we find nothing improper in the agency mandating a specific wastepaper content requirement for a particular procurement as a means of implementing the recommendation of the EPA Guideline. We point out in this regard that competition was not unduly restricted as evidenced by the fact that a total of 12 firms submitted bids.

Further, we find that the solicitation was explicitly clear, and AME does not argue otherwise, that paper products furnished in response to the six lot numbers were required to contain a minimum of 50 percent wastepaper. AME admittedly took exception to this material solicitation requirement by submitting a bid for paper products containing no wastepaper. The agency considered this to be a material solicitation requirement because paper containing recycled materials is generally more costly than non-recycled, "virgin" paper. Since AME knowingly took exception to a material requirement, its bid was properly rejected as nonresponsive. See generally General Electric Co., B-228191, Dec. 14, 1987, 87-2 CPD ¶ 585.

Accordingly, the protest is dismissed in part and denied in part.

  
James F. Hinchman  
General Counsel