

Formica



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: EPCo Associates

File: B-238015

Date: April 13, 1990

William L. Dickey, Esq., William L. Dickey & Associates, P.C., for the protester.
Kerry L. Miller, Esq., Office of the General Counsel, Government Printing Office, for the agency.
John Formica, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In procurement for printing services, agency cannot ignore portion of bid modification intended to indicate that bid prices are reversed in determining responsiveness, as reading a bid in this manner is not consistent with principle that bid, and any accompanying bid modifications, must be read in its entirety and given a reasonable interpretation in determining responsiveness.
2. Protest against contracting officer's negative responsibility determination is denied where the determination was based on the protester's failure of a preaward test and the record contains documentation that provides a reasonable basis for the negative test results and the contracting officer's determination.

DECISION

EPCo Associates protests the rejection of its bid under an invitation for bids (IFB) designated as Program C749-S, issued by the United States Government Printing Office (GPO) for the printing of bulletins, transmittals, and acknowledgments for the Department of the Treasury.

We deny the protest.

The IFB was issued on October 30, 1989, seeking bids for a 1-year requirements contract for printing and distributing 160 to 196 orders per year, in quantities of 1 to 60,000 copies per order. The solicitation provided that bidders

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could submit a bid, based on the use of paper with 50 percent waste paper content, called a certified offer, and/or an alternative bid, based on the use of paper with any percentage of waste paper content, including the use of no waste paper. The IFB required that firms submitting bids based on the 50 percent waste paper requirement certify that the paper used in performing the contract will meet or exceed the 50 percent requirement, and instructed those bidding on the alternative basis to fill in a blank on the bid schedule indicating the percentage of waste paper content of the paper offered under the alternative item. The solicitation explained that award would be made to the low-priced responsible bidder submitting a certified bid, but provided in essence that in the event none of the bids received included the 50 percent waste paper certification, or all bids containing the certification were determined not to be fair and reasonable, award would be made to the low-priced responsible bidder submitting an acceptable alternative bid. Also, the IFB required as part of the agency's responsibility determination that the low bidder successfully complete a preaward test consisting of the preparation of proof pages in accordance with the requirements of the IFB specifications.

EPCo executed the required certification and filled in the bid schedule blanks with the following prices and percentage:

CERTIFIED OFFER - Minimum waste paper content.

	Per 1,000 leaves
(a) White Writing (20-lb)	\$ <u>6.80</u>
(b) Colored Writing (20-lb)	\$ <u>9.50</u>

ALTERNATIVE OFFER - containing 50% minimum waste paper content.

	Per 1,000 leaves
(a) White Writing (20-lb)	\$ <u>9.10</u>
(b) Colored Writing (20-lb)	\$ <u>11.80</u> <u>1/</u>

Additionally, prior to bid opening, EPCo submitted the following handwritten and signed bid modification:

"Re Program C749-S
Paper prices

1/ The underlined prices and percentage figure were inserted by EPCo. The text is from the bid schedule.

The paper prices listed first - certified offer are regular paper little or no waste paper content-the paper prices listed under alternate offer are for paper with 50% recycled/waste materials.

Robert Beay
Mgr."

The contracting officer, however, did not immediately discover the bid modification and provided EPCo as the apparent low-priced responsive bidder with the materials necessary for the completion of the required preaward test.

The contracting officer found that the proof submitted by EPCo in response to the test was defective in several respects and therefore concluded that EPCo had failed the test.

At this time EPCo's handwritten bid modification was discovered. The agency subsequently determined that the bid modification rendered the certified portion of EPCo's bid nonresponsive because it informed the contracting officer that EPCo's bid for that item contained "little or no waste paper content," despite the requirement that such paper contain 50 percent waste paper. The agency's position is based on the premise that since the alternative bid can only be considered in the absence of any reasonable certified bids, and reasonable certified bids were received, the agency was not permitted to consider for any purpose the portion of EPCo's bid concerning the alternative item. Under this theory, the agency did not consider the second portion of EPCo's bid modification which EPCo states was intended to explain that the prices inserted under the alternative bid were those it intended to insert in its certified bid.

EPCo argues that when its bid is read in conjunction with its handwritten bid modification, it is clear that there was no intent to deviate from the solicitation's 50 percent waste paper requirement, but that all the modification did was to indicate that EPCo had mistakenly reversed the prices in its original bid and that it intended to bid \$9.10 and \$11.80 for the certified portion, and \$6.80 and \$9.50 for the alternative portion.

It appears that the agency bases its position that EPCo's bid is nonresponsive solely on the first part of the firm's bid modification, which states that the prices bid for certified paper are for paper with "little or no waste paper content." It is true, as the agency argues, that the above cited language without more would indicate that EPCo's bid

is based on paper which has less than the required 50 percent waste paper content and would therefore be non-responsive. However, EPCo's bid modification also states that the prices under the alternative item are for paper with the required 50 percent waste content. It is also evident from the face of the bid that an error occurred as EPCo's unmodified bid contained higher prices on the item which should cost more and vice versa. Notwithstanding the fact that the solicitation provided that alternative bids would only be considered if there were no reasonable bids for certified paper, it makes no sense in our view for the agency to simply ignore half of the text in an otherwise proper bid modification, and determine the bid nonresponsive on that basis. Such an approach is inconsistent with the fundamental principle that to ascertain responsiveness, a bid, including any accompanying modifications, must be read in its entirety, and given a reasonable interpretation. Bruce Indus., Inc., B-232719, Jan. 25, 1989, 89-1 CPD ¶ 86.

While we do not agree with the agency's reason for rejecting EPCo's bid, we need not decide whether other reasons for questioning the responsiveness of the protester's bid exist, because we agree with GPO that EPCo may reasonably have been rejected as nonresponsive because of its failure of the preaward test.

The record shows that the contracting officer found that the proof submitted by EPCo in response to the preaward test required by the solicitation was defective because: (1) the Department of the Treasury seal was blurred and difficult to read; (2) the point size, or size of the type, and the leading, or thickness of the type, were not in accordance with the test's instructions, and; (3) the paragraphs were not flush, as required. The contracting officer did not make a formal nonresponsibility determination based on the test results because according to the agency he subsequently concluded that the bid was nonresponsive. Nevertheless, it has been the agency's position throughout the protest that had EPCo's bid been considered responsive, it would have rejected EPCo as nonresponsive because of its test results.

Here, the preaward test was clearly related to the bidder's responsibility, and a contracting agency has broad discretion in making responsibility determinations, which is of necessity a matter of business judgment. Automated Datatron Inc., 68 Comp. Gen. 89 (1988), 88-2 CPD ¶ 481. Such judgments must, of course, be based on fact and reached in good faith; however, such decisions are generally within the discretion of the agency since it must bear the brunt of

difficulties experienced in obtaining the required performance. Id. Therefore, we will not question a nonresponsibility determination unless the record shows bad faith on the part of agency officials or there is a lack of any reasonable basis for the determination. Id.

Here, EPCo disputes the results of only the preaward test concerning the Department of the Treasury seal, contending that the seal on its proof was blurred because the seal provided by the agency to be used by EPCo in producing its proof was itself defective. EPCo does not address the agency's determination that EPCo's samples were defective as to type size and thickness, and because of the lack of flush paragraphs. Nor does the protester argue that these matters are unimportant. Since these matters appear to have been an important part of the contracting officer's conclusion that EPCo's samples were unacceptable, we think that the agency had a reasonable basis on these factors alone upon which to find EPCo nonresponsible. See Eagle Bob Tail Tractors, Inc., B-232346.2, Jan. 4, 1989, 89-1 CPD ¶ 5.

In any event, we do not find EPCo's arguments regarding the seal to be persuasive. The protester maintains that it was given a deficient seal by GPO and was not allowed sufficient time within which to remedy the problem and to submit a properly completed proof. EPCo further argues that after the admittedly deficient proof was submitted it was not given a reasonable opportunity to cure the defects, which in the "normal course of business" GPO had provided under prior procurements.

First, the solicitation specifically provided that the preaward test must be completed within 24 hours of the availability of the test materials, and warned that the failure to successfully complete the preaward test within that 24-hour period may result in a finding of nonresponsibility. There was no provision in the solicitation test requirements for curing defective proof pages after their submission.

As far as the protester's argument that it was supplied with a defective seal is concerned, there is nothing in the record indicating that EPCo informed the agency either upon receipt of the test materials or during the 24 hour test period that the Treasury Seal provided by GPO was defective. Instead, it submitted its proof which it admits was subpar and now complains that its poor performance was the fault of the government supplied seal.

We think that in view of the rather strict solicitation provisions concerning the timeliness of the test, it was

incumbent upon the protester to raise its complaints concerning the GPO supplied Treasury Seal either before or of the preaward test. See Maremont Corp., 55 Comp. Gen. 1362 (1976), 76-2 CPD ¶ 181. We believe that by failing to raise this alleged problem until after its proof failed the test, it bore the risk that its failure would not be excused.

Similarly, in view of the fact that there is no provision for an opportunity to cure defects in the test procedures, we do not believe that the agency was required to do so. In this regard, while an agency may allow a prospective awardee a reasonable period within which to cure problems related to its responsibility, Westec Air, Inc., B-230724, July 18, 1988, 88-2 CPD ¶ 59, this is not required, and a contracting officer may properly base a nonresponsibility determination on the evidence in the record without affording the prospective awardee an opportunity to explain or otherwise defend against the evidence. Allan Scott Indus., B-225210.2, Feb. 12, 1987, 87-1 CPD ¶ 155. Additionally, EPCo's contention that under prior procurements GPO has provided bidders with an opportunity to cure defects does not, in the absence of any specific procedures allowing bidders to cure defective proofs in this case, obligate the agency to so do here. See Channel Disposal Co., Inc., B-215486, Aug. 17, 1984, 84-2 CPD ¶ 191.

Finally, we reject EPCo's contention that the issue of its responsibility should not be considered in this protest on the basis that the agency "never truly reached the question of the alleged defects" in the proof it submitted. The portions of the record concerning EPCo's test results, the contracting officer's conclusion that EPCo was nonresponsible, and the agency's position throughout the protest that had it not rejected EPCo's bid as nonresponsive it would have rejected EPCo as nonresponsible because of its test results, clearly indicate that the agency fully considered the defects in the proof EPCo submitted.

Accordingly, the protest is denied.


for James F. Hinchman
General Counsel