



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Victor Graphics, Inc.

File: B-238290

Date: April 20, 1990

Paul G. Dembling, Esq., and Dennis A. Adelson, Esq., Schnader, Harrison, Segal & Lewis, for the protester. Stuart M. Foss, Esq., Office of the General Counsel, U. S. Government Printing Office, for the agency. David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's bid for printing paper was properly rejected as nonresponsive where solicitation as a whole required bidders to agree to furnish paper with 50 percent waste paper content, and protester's bid offered zero percent content.

2. Award to lowest bidder offering to comply with mandatory solicitation requirement for 50 percent waste paper content, even though there was lower bid not meeting requirement, is consistent with Resource Conservation and Recovery Act of 1976 and Environmental Protection Agency implementing Guideline; although narrative accompanying Guideline indicates EPA's view that higher price for paper meeting minimum waste paper content requirement is unreasonable, neither statute nor Guideline prohibits paying such a premium.

DECISION

Victor Graphics, Inc., protests the award of a contract to United Book Press, Inc., under invitation for bids (IFB) No. C264-S, issued by the United States Government Printing Office (GPO) for the printing of the "Index Medicus," a publication of the National Institutes of Health. Victor challenges the rejection of its bid as nonresponsive to a solicitation requirement that the paper products to be furnished contain a minimum of 50 percent waste paper (i.e., recovered/recycled materials).

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We deny the protest.

The solicitation, issued on October 17, 1989, included a clause in the bid schedule that required bidders to "certify that the paper supplied under any contract resulting from this solicitation, will meet or exceed the minimum percentage of recovered materials below"; the clause went on to specify a minimum 50 percent waste paper content and provided a space for the offeror to indicate its proposed percentage. Elsewhere, the bid schedule advised that offerors "failing to certify to the minimum percentage content shall be determined nonresponsive." At bid opening on November 14, two of the three bidders certified compliance with the waste paper requirement by entering a figure of 50 percent on their bid schedules; Victor, on the other hand, specified in its bid schedule a figure of zero percent waste paper content. Accordingly, although Victor's bid was low, it was rejected as nonresponsive. Upon learning of the ensuing award to United, Victor filed an agency-level protest. When that protest was denied, Victor filed this protest with our Office.

While acknowledging that the awardee was able to obtain paper with 50 percent waste paper content, Victor maintains it was advised by several suppliers that such paper was not readily available within the specified delivery schedule. Victor argues that its bid nevertheless was responsive to the solicitation based on the following provision from section 1 of the solicitation:

"WASTE PAPER CONTENT: In the performance of any contract resulting from this solicitation, the use of waste paper to the maximum extent possible is required, provided that such waste paper content meets the performance standards (contracting officer to state standards or delete the proviso). Offerors who can not certify to the minimum content standards are requested to provide, for information purposes, the percentage of waste paper content that is available to them."

Victor interprets this provision as permitting bidders to offer paper with less than 50 percent waste paper content where paper with a higher content is not readily available. Victor also contends that GPO's insistence on 50 percent waste paper here is a departure from its past practice of awarding to firms certifying less than the minimum specified waste paper content; Victor states that it has been the contractor for this project for 6 years, notwithstanding that it has always certified that it will provide paper with a zero percent waste paper content.

Victor's interpretation of the waste paper content requirement, and its conclusion that its bid was responsive, are untenable. When a dispute exists as to the actual meaning of a solicitation provision, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation; to be reasonable an interpretation must be consistent with such a reading. See Aerojet Ordnance Co., B-235718, July 19, 1989, 89-2 CPD ¶ 62.

Although, we agree that section 1, when read by itself, did not establish a firm 50 percent waste paper content requirement, the solicitation read as a whole, giving effect to all provisions, did establish such a firm requirement. The bid schedule itself expressly required offerors to certify to a minimum 50 percent waste paper content, and explicitly warned that bids failing to certify to the minimum would be determined nonresponsive. Reading section 1 in light of this mandatory language, we think the only reasonable reading of section 1 is that bidders were required to use waste paper "to the maximum extent possible," with a minimum of 50 percent waste paper. Section 1 did not state that firms unable to meet the requirement would be deemed responsive, which would have been inconsistent with the express language to the contrary in the bid schedule; rather, section 1 merely "requested" noncompliant firms to indicate the percentage waste paper content they could offer "for information purposes." Presumably, GPO would use this information in determining to what extent the 50 percent requirement should be used in the future.

As for the agency's alleged past practices, the first page of the solicitation instructed bidders to pay special attention to areas which differed from the predecessor contract, and specifically referred to the provisions governing the use of recovered materials. (In any case, an agency's past practice is not a basis for questioning its application of otherwise correct procurement procedures. General Elec. Co., B-228191, Dec. 14, 1987, 87-2 CPD ¶ 585.)

Victor also contends that the agency's enforcement of the 50 percent minimum waste paper content requirement violates procurement provisions of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6962 (1982), and the Environmental Protection Agency's (EPA) implementing regulations, "Guideline for Federal Procurement of Paper and Paper Products Containing Recovered Materials," 40 C.F.R. part 250 (1989). As Victor notes, the RCRA requires agencies to procure paper with the "highest percentage of recovered materials practicable," 42 U.S.C. § 6962(c)(1),

but excepts from this requirement items "only available at an unreasonable price," 42 U.S.C. § 6962(c)(1)(C). The Guideline recommends a minimum 50 percent recovered materials content for most paper, but conditions this recommendation upon availability at a reasonable price. 40 C.F.R. § 250.21(b)(4). In the explanation published in the Federal Register along with the EPA Guideline, the EPA indicates that it believes the price of an item containing recovered materials is unreasonable if it is greater than the price of a competing product made of virgin material. 53 Fed. Reg. 23,559 (1988). Victor argues that because United's price for a 50 percent waste paper product was 11.5 percent higher than Victor's price for 100 percent virgin paper, it was unreasonable and should have led to rejection of the bid and award to Victor based on its low price.

GPO was not required to reject United's bid as unreasonably priced. First, once an agency has reasonably determined to include a minimum waste paper content requirement in a solicitation, the RCRA does not preclude the agency from accepting a bid responsive to the waste paper requirement merely because a bid nonresponsive to the content requirement may be priced lower. The section of the RCRA cited by Victor concerning unreasonable price (42 U.S.C. § 6962(c)) establishes only a permissive exception to the general requirement for items composed of the highest percentage of recovered materials practicable; it does not prohibit award at a higher price to a firm agreeing to meet the waste paper requirement.

Further, EPA itself recognizes in the implementing Guideline that the Guideline is "only advisory in nature," and is intended "to assist procuring agencies in complying with the requirements of . . . the RCRA." 40 C.F.R. § 250.1(a). According to the agency, "each procuring agency may decide whether a 'reasonable price' includes a price preference." 53 Fed. Reg. 23,559. EPA recognized that the relative prices of paper products made with virgin or recovered fibers would probably fluctuate in both directions, and concluded that the reasonable price provision of the RCRA, 42 U.S.C. § 6962(c)(1)(C), means that "there is no projected or observed long-term or average increase over the price of comparable items that do not contain recovered materials." (Emphasis added.) *Id.* In other words, as interpreted by the EPA itself, the RCRA provisions concerning availability at a reasonable price do not preclude award to a bidder

offering to meet the content requirement at a price higher than the price for paper not meeting the requirement.^{1/}

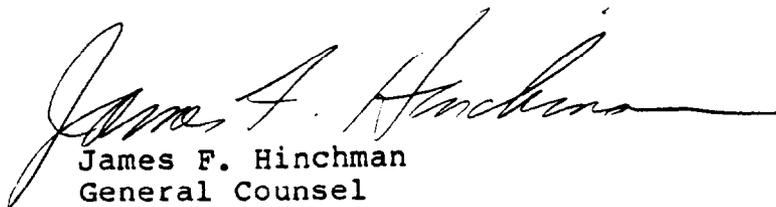
Although Federal Acquisition Regulation § 14.407-2 requires a contracting officer to make a determination of price reasonableness before awarding a contract, in view of the solicitation requirement for immediate delivery and the statutory policy in favor of procuring products with recovered materials (42 U.S.C. § 6962), we find no basis for objecting to payment of an 11.5 percent premium for paper with recovered materials as unreasonable. See generally Picker Int'l, Inc., B-232430, Dec. 12, 1988, 88-2 CPD ¶ 583.

Victor also asserts that because the EPA Guideline merely recommends, but does not require, a minimum 50 percent waste paper content standard, the agency's decision to enforce the requirement improperly restricts competition, as evidenced by the fact that only three firms submitted bids. As the solicitation clearly required a 50 percent minimum waste paper content, Victor's argument essentially challenges the terms of the solicitation, and as such is untimely.

^{1/} Victor cites the decision in National Recycling Coalition, Inc. v. Reilly, 884 F.2d 1431 (D.C. Cir. 1989), as holding that EPA's interpretation of the unreasonable price provision in the RCRA is binding on GPO here. That decision is consistent with our conclusions here. The court found that it was unclear what Congress intended by the phrase "unreasonable price," and that EPA's interpretation expressed in the narrative accompanying its Guidelines--that a price is unreasonable if it exceeds the price of a competing product made of virgin material--was "permissible" and "consistent with the [RCRA's] overall purpose." Id. at 1437. The court did not hold that agencies are precluded by the RCRA from paying a premium for products with recovered materials; rather, it described the requirements of the statute in permissive terms, stating that the RCRA "provides that a procuring agency is not required to purchase products containing reclaimed materials if it determines that such items are only available at an unreasonable price." (Emphasis added.) Id. at 1434. Indeed, the court noted that the EPA itself had argued that its Guideline consists merely of recommendations that "the procuring agencies are free to accept or disregard."

4 C.F.R. § 21.1(a)(1) (1989). In any case, agencies may require a specific wastepaper content as a means of implementing the recommendation of the EPA Guideline. See American Management Enters., Inc., B-238134, supra.

The protest is denied.



James F. Hinchman
General Counsel