



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eastern Trans-Waste of Maryland, Inc.

File: B-250991

Date: March 2, 1993

Peter Paul Mitrano, Esq., for the protester.
Paul D. Warring, Esq., Department of Air Force, for the agency.
Carolyn D. Talley, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where there are conflicting statements regarding the timeliness of a protest, the General Accounting Office will resolve any reasonable doubt in favor of the protester and find the protest timely under the Bid Protest Regulations, unless the agency provides proof sufficient to support its allegations.
2. Bidder, who is not eligible for award under an invitation for bids for refuse collection services because the bidder would not be considered a responsible contractor to perform at its bid price in view of the substantial increase in landfill/dumping fees in the 5 month period from bid opening, for which the bid price cannot properly be increased, is not an interested party under the Bid Protest Regulations eligible to protest the cancellation of the solicitation.

DECISION

Eastern Trans-Waste of Maryland, Inc. (ETW), a small business, protests the Department of Air Force's post-bid opening cancellation of invitation for bids (IFB) No. F49642-92-B-0006 for refuse collection, disposal and recycling at Bolling Air Force Base, Washington, D.C.

We dismiss the protest because ETW is not an interested party.

The Air Force received nine bids in response to the IFB by the April 27, 1992, bid opening and ultimately determined

ETW the apparent low responsive bidder.¹ On September 15, the Air Force learned, through conversations with a Small Business Administration (SBA) representative, about significant increases in the cost of landfill/dumping fees, which were not accounted for in the bids. The SBA representative advised the contracting officer of potential problems that ETW or any small business would have in absorbing the unforeseen increases in landfill/dumping fees, which represented a relatively large percentage of the bidders' costs. Since the Air Force found that the solicitation failed to provide a method for the Air Force to compensate the awardee for these increased costs, it canceled the IFB effective September 25, and is obtaining the services through the section 8(a) program.

ETW argues that the agency did not have the required cogent and compelling reason to cancel the IFB because amendment No. 0002 to the IFB provided an adequate basis for paying the awardee's costs associated with the increased landfill/dumping fees. In amendment No. 0002, the Air Force responded to questions from potential bidders. In response to one question, the Air Force stated that contractors would be reimbursed any certified increases in landfill/dumping fee rates during the contract.

The Air Force initially contests the timeliness of ETW's protest that was filed with our Office on October 19. The Air Force claims that ETW received notice of the cancellation of the solicitation during a September 28 telephone conversation with the contract specialist, and that since ETW's protest was filed more than 10 working days later, it is untimely under our Bid Protest Regulations. See 4 C.F.R. § 21.2(a)(2) (1992). ETW responds that it first received notice of the cancellation on October 2, upon receipt of amendment No. 6 to the IFB, which canceled the IFB, and that its protest is therefore timely filed. While the protester acknowledges that there was a previous telephone conversation between its representative and the contract specialist (although ETW claims it occurred on September 30), it denies that its representative was advised of the cancellation in that conversation, and asserts that he was only told that ETW would be advised of the agency's position in writing. Both the agency and the protester have submitted detailed affidavits in support of their positions, which flatly contradict each other. In instances such as this where the agency and the protester have provided conflicting statements regarding the timeliness of a protest, we will resolve any reasonable doubt in favor of the protester and find the protest timely, unless the agency

¹There was some question by the agency whether ETW was a responsible contractor to perform at its bid price.

provides proof sufficient to support its allegations. Eklund Infrared, B-238021, Mar. 23, 1990, 90-1 CPD ¶ 328; GEBE Gebaeude und Betriebstechnik, GmbH, B-231048, July 7, 1988, 88-2 CPD ¶ 20. Here, the agency's evidence, disputed by the protester, is not sufficient to conclusively demonstrate that the protester received notice of the protested action any earlier than October 2. We therefore resolve all doubts in favor of the protester and find its protest, filed within 10 working days of October 2, to be timely.

However, we do not think that ETW is an interested party eligible to protest the cancellation of the IFB, since the record reasonably shows that ETW cannot perform the work at its bid price, and expects to have its bid price adjusted to reflect the increase in landfill/dumping fees that has occurred since bid opening.

As indicated above, the SBA investigation found that the Lorton Landfill had substantially raised its fees. The Air Force confirmed that the Lorton Landfill would increase the landfill/dumping fee from \$41.65 to \$64.39 per ton, a 50 percent increase. SBA counseled the Air Force that the bidders, in particular ETW, did not include this unanticipated fee increase in their bids, and would not have the financial capability to absorb this additional cost in their bid prices and still successfully perform the contract. SBA estimated that the fee increase would appreciate ETW's costs by more than one third, such that it did not believe ETW had the capability to perform at its bid price. Thus, it is clear that SBA, which has conclusive authority in small business responsibility matters, does not consider ETW to be a responsible contractor to perform the contract at ETW's bid price. Given the massive increase in landfill/dumping fees, which represent a large percentage of the bidder's costs, nothing in the record suggests that ETW could successfully perform the contract at its bid price.

It is apparent from ETW's argument that amendment No. 2 allows for an upward price adjustment for increases in landfill/dumping fees that ETW expects that its bid price will be increased to account for the increase in landfill/dumping fees that occurred since bid opening. However, it would violate competitive bidding principles to allow ETW to increase its bid price based on these changed economic circumstances to include factors that it did not intend to

include with its bid; this would be tantamount to allowing the submission of a second bid. Steenmeyer Corp., 61 Comp. Gen. 384 (1982), 82-1 CPD ¶ 445; Zeta Constr. Co., Inc., B-244672, Nov. 5, 1991, 91-2 CPD ¶ 428; GTA Containers, Inc., B-234395.3, July 12, 1989, 89-2 CPD ¶ 37.²

We conclude that ETW is not eligible for award under the IFB because it is not responsible to perform at its bid price and it cannot have its bid price increased. Therefore, ETW is not an interested party eligible to protest the IFB's cancellation.

Under the bid provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988), only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective bidder whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit of relief sought by the protester, and the party's status in relation to the procurement. Black Hills Refuse Serv., 67 Comp. Gen. 261 (1988), 88-1 CPD ¶ 151. A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. Here, since ETW is not eligible for award under the IFB, it lacks the requisite economic interest to protest the IFB's cancellation.

The protest is dismissed.



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²Similarly, an agency may not make award of a contract with the intent to modify it to reflect material changes that occurred after the submission of bids and prior to award. See Suburban Indus. Maintenance Co., B-189027, Sept. 16, 1977, 77-2 CPD ¶ 198.