

ANDREW GALLAGHER
P.L.#1

01310

DECISION



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

FILE: B-186590

DATE: November 17, 1976

MATTER OF: Hendricks Printing Company - Request for
Reconsideration

DIGEST:

1. Allegation that dollar amount of work orders under prior contract--as indicated in cost data shown to protester by agency at bid protest conference--demonstrates that solicitation's quantity estimates were inaccurate is not timely objection when first presented in request for reconsideration of decision denying protest. Data referred to was never made part of written protest record before GAO, as protester's written comments submitted after conference neither mentioned dollar figure nor indicated that GAO should obtain referenced data from agency for inclusion in written record.
2. Under Federal Procurement Regulations, signing of contract may be deemed to be affirmative determination that prospective contractor is responsible with respect to contract involved. Also, GAO no longer reviews affirmative determinations of responsibility except for circumstances not prevailing in present case.
3. Decisions relied on by protester did not demonstrate how present case would not come within general rule applied in unbalanced bidding cases--i.e., that mathematically unbalanced bid may be accepted if agency, upon examination, believes solicitation's estimated quantities are reasonably accurate representation of actual anticipated needs. On reconsideration, decision which denied protest against acceptance of mathematically unbalanced bid is affirmed.

Hendricks Printing Company (Hendricks) has requested reconsideration of our decision which denied its protest against the Government Printing Office's (GPO) acceptance of an unbalanced bid (Hendricks Printing Company, B-186590, September 7, 1976, 76-2 CPD 224).

Hendricks has presented the same legal arguments which were considered in reaching our earlier decision, but raises several new factual allegations. The requester contends that at the bid protest conference on this case on August 5, 1976, a GPO representative displayed handwritten cost figures showing that the actual orders under the prior year's contract totaled about \$45,000. This, Hendricks alleges, shows that the quantity estimates in GPO's invitation for bids (IFB)--which were reportedly based upon the prior year's requirements--were actually about 100 percent off. The award of the current contract was made at a net bid price of \$79,033.61.

Decisions of our Office are based on the written record, and a bid protest conference is not a formal hearing at which testimony is taken from witnesses. See Julie Research Laboratories, Inc., 55 Comp. Gen. 374, 388 (1975), 75-2 CPD 232, and decisions cited therein. The cost data which Hendricks states was displayed by GPO during the conference was never submitted to GAO and thus never became a part of the written record in this case. Hendricks' written comments submitted after the conference, by letter dated August 9, 1976, made reference to a GPO pricing list of purchase orders. However, the letter did not cite a \$45,000 figure, nor did it submit a copy of the list, or indicate that our Office should obtain the list from GPO for consideration as part of the record in reaching a decision on the protest. Under the circumstances, we do not believe the allegation concerning the \$45,000 figure has been raised in a timely manner. A related point is Hendricks' belief that it is unfair to expect a protester to obtain and furnish information showing that the Government's quantity estimates are inaccurate. However, we have indicated that, in general, the burden is on the protester to obtain the information necessary to make out its case, and have noted in this regard that the protester has a disclosure remedy available to it under the Freedom of Information Act, 5 U.S.C. § 552 (1970). See Allen and Vickers, Inc., 54 Comp. Gen. 1100 (1975), 75-1 CPD 399. Cf. Michael O'Connor, Inc., et al., B-183381, July 6, 1976, 76-2 CPD 8, a case where the protester obtained and presented information which was sufficient to make out a case against the reported accuracy of a solicitation's quantity estimates.

Hendricks also contends there is no evidence that GPO made an affirmative determination that the successful bidder is a responsible prospective contractor. In this regard, we note that pursuant to Federal Procurement Regulations § 1-1.1204-1(a) (1964 ed. amend. 95), the signing of a contract may be deemed to be an affirmative determination by the contracting officer that the prospective contractor is responsible with respect to the contract.

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Also, for reasons explained in our earlier decision, our Office no longer reviews affirmative determinations of responsibility except in circumstances not present in this case.

Hendricks also complains that our decision did not sufficiently explain our reasoning in rejecting the legal arguments which it advanced. Hendricks in its protest cited several cases, including 51 Comp. Gen. 498 (1972) (for the proposition that an obviously erroneous bid cannot be accepted), and Pace Co., Division of AMBAC Industries, Incorporated v. Department of the Army, 344 F. Supp. 787 (W.D. Tenn., 1972) (there must be a rational basis for an award where a portion of a bid was deliberately understated). Also, Hendricks has cited language from Frank Stamato & Co. v. City of New Brunswick, 90 A. 2d 34, 36 (1952), quoted in 49 Comp. Gen. 335, 343 (1969) to the effect that proof of other irregularity of such substantial nature as would operate to affect fair and competitive bidding could render an unbalanced bid nonresponsive.

As a matter of information, we believe that Hendricks did not show in its protest how these general principles are applicable to the present case and require rejection of the low-priced, mathematically unbalanced bid. 51 Comp. Gen. 498 involved a situation where the unit prices for several items appeared to be ridiculously low, where it was probable that those prices were submitted as additives to other item prices, and where the bidder's price verification was not therefore convincing evidence that the bid as submitted was as originally intended. The Pace decision involved a situation where the court found that the apparently successful bidder had deliberately understated the size and weight of certain wooden pallets which, in turn, affected the calculation of transportation costs and resulted in a more favorable bid price. We have difficulty seeing how either of these cases involves an unbalanced bidding situation--which normally occurs where a solicitation contains estimated quantities of various items and a bidder offers nominal prices for some work and/or enhanced prices for other work--or how they are otherwise factually similar to the present case. Hendricks itself states that all other issues in its case are ancillary to that of unbalanced bidding.

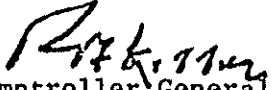
As for the Stamato case, we believe it is consistent with the general approach taken in our unbalanced bidding decisions. Stamato was cited in Mobilease Corp., 54 Comp. Gen. 242 (1974), 74-2 CPD 185, which in turn was followed and applied in the more

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recent decision in the matter of Edward B. Friel, Inc., 55 Comp. Gen. 231 (1975), 75-2 CPD 164. As stated in Friel, the general rule is that a mathematically unbalanced bid may be accepted if the agency, upon examination, believes that the solicitation's quantity estimates are a reasonably accurate representation of actual anticipated needs. If, on the other hand, it is found that the estimates are not reasonably accurate, the proper course of action is to cancel the solicitation, and resolicit using revised estimates. We do not think that Hendricks' protest demonstrated what other "irregularity" existed in this case which would properly mandate an exception to be made to the general rule on unbalanced bidding.

Hendricks also cited 49 Comp. Gen. 330, 335 (1969), where we stated that it is in the best interests of the Government to discourage, through appropriate invitation safeguards, the submission of unbalanced bids. However, Hendricks did not indicate what safeguards it believes were lacking in the present IFB. We note that the IFB at page 25 reserved the Government's right to reject bids containing inconsistent or unrealistic pricing. Also, providing an accurate estimate of requirements in the IFB can be regarded as the principal safeguard against material unbalancing, which is the existence of reasonable doubt that acceptance of a mathematically unbalanced bid will result in the lowest ultimate cost to the Government.

In view of the foregoing, we do not believe that Hendricks has demonstrated errors of fact or law in our earlier decision, and that decision is accordingly affirmed.


Deputy Comptroller General
of the United States