DECISION

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

FILE: B-209089; B-209089.3; B-209089.4, B-209089.5 **DATE:** March 28, 1983

MATTER OF: Central Certificate Registry, Inc.; DDD Company; Contract Business Services Incorporated

DIGEST:

1. An agency has the discretion of determining its minimum needs and the methods of accommodating them. There is no obligation for an agency to continue the same method of program operation established pursuant to a prior contract.

2. Low bid for the operation of a carrier security (insurance) and process agent compliance program was properly rejected for failure to include a bid price for a contract line item concerning the furnishing of a carrier's insurance history in conjunction with the issuance of a revocation order, even though bidder contends that the price of the item was included in the total bid price. Since the work covered by that item was regarded as material, the omission of a bid price cannot be waived as a minor informality. Where there is a question as to whether a bidder could be required to perform all work called for if he chose not to, integrity of bid system requires rejection of bid.

3. Where an agency made a determination that an award must be made promptly, notwithstanding a protest, and the determination was approved at a higher level than the contracting officer, in accordance with applicable regulations, the determination is not subject to question by GAO.

4. Later-raised bases of protest, not included in initial protest, must independently satisfy timeliness criteria of Bid Protest Procedures.

The Interstate Commerce Commission (ICC) issued an invitation for bids (IFB) No. ICC-82-B-0003 that solicited for the operation of a carrier security (insurance) and process agent compliance program. Bid opening was scheduled for 3 p.m. on September 16, 1982. Award was made to Equipment Interchange Association (EIA) on October 4, 1982. Central Certificate Registry, Inc. (CCR), DDD Company (DDD) and Contract Business Services Incorporated (CBSI) have filed protests.

We have denied CCR's protest and DDD's protest and dismissed in part and denied in part CBSI's protest.

CCR Protest

CCR, the incumbent contractor, filed a protest with our Office on September 16, 1982, at 2:22 p.m. Bid opening was scheduled for 3 p.m. the same day and, therefore, the protest is timely. CCR submits that the IFB contained numerous misrepresentations, misinformation and other improprieties. As a matter of fact, CCR notified the ICC of that at a meeting with ICC officials on August 24 and again by letter dated August 27, 1982. However, CCR states that the ICC ignored the allegations and conducted a bidder's conference on September 1, 1982. Also, the issuance of an amendment to the IFB on September 3, 1982, did not satisfy CCR. Specifically, CCR contends that (1) even though the IFB states that the awardee will take possession and maintain a physical file for each active motor carrier (30,000 in number), there are no such files; (2) since no suspense file is maintained due to CCR's computerization of correspondence, there is no pending correspondence to be physically transferred to an awardee which is contrary to what the IFB requires; and (3) although the IFB describes a chaindex system for maintenance of current insurance information and states that the ICC will initially provide a code in the chaindex file indicating actual insurance coverage, CCR submits the ICC cannot do this. Accordingly, it is CCR's position that no contractor, including CCR, would be able to perform under a contract awarded pursuant to the present IFB.

We deny the protest.

The ICC advises that it reviewed CCR's allegations and issued amendment No. 1. This amendment provided that the ICC, not the incumbent, would provide the physical records to be maintained by the contractor. In addition, the ICC submits that it created the filing system during the conversion period. ICC argues that, even though CCR was not required under its contract to maintain a separate physical file for each carrier, it was required to keep all documents relating to insurance filings, cancellations and process agents. It is the ICC's position that physical files for each carrier are necessary to insure the accuracy of the system and permit the audit of contract performance. In regard to the suspense file, the ICC points to the IFB, paragraph 3 on page 39, which requires the file for all pending matters requiring further action. The ICC advises that it also created a suspense file during the conversion period. Finally, the ICC disagrees with CCR's contention that it cannot provide a chaindex system. The ICC explains that this system consists of two insurance codes--one indicating the required coverage for a carrier and the other indicating actual coverage. The actual coverage for those carriers whose insurance was processed during the previous contract can be obtained from the incumbent contractor's records. For those carriers whose coverage is not currently listed, the ICC argues that it can be obtained by researching the older files during the conversion process. During this period, 30 days, the ICC would be running the system.

Our review of the record indicates that the ICC made the determination to change how the carrier security and process agent compliance program was to operate. The specifications in the IFB reflected this change. Why CCR viewed this solicitation as a continuation of the services it was performing is unclear. Nonetheless, there was no obligation on the ICC to continue operating the program as it did in the past. An agency has the discretion of determining its minimum needs and how to accommodate them. See Angeline v. Culfogienis, Inc., B-205536, February 9, 1982, 82-1 CPD 120; Tyco, B-194763, B-195072, August 16, 1979, 79-2 CPD 126. There is nothing in the record that demonstrates that the ICC was unreasonable in changing the method of accommodating its minimum needs. We therefore find no legal merit to CCR's protest.

DDD Protest

DDD objects to the rejection of its bid for failing to insert a price in the Workload Statement and Unit Cost Sheet for contract line item (CLIN) No. 13. That item concerns the furnishing of a carrier's insurance history in conjunction with the issuance of a revocation order. It is DDD's position that it is clear from the bid that CLIN No. 13, like CLIN No. 12 (involving the handling of telephone and in person inquiries), did not have a separate unit cost. Consequently, the fact that DDD's bid did not indicate this should be treated as a minor clerical mistake. DDD, in further support of its position, points out that the Workload Statement and Unit Cost Sheet was revised by amendment and did not provide a place for the CLIN No. 13 unit price. Instead, the word "Total" and a blank line were printed in what would have been the area for CLIN No. 13's unit price. Moreover, DDD contends that since CLIN's Nos. 12 and 13 were similar in nature, both a part of the public records service which the IFB advised was not billable on a unit price basis, they should not be independently priced. DDD also states that the IFB did not require that all CLIN's must be individually priced.

ICC disagrees. ICC argues that DDD's bid did not contain a price for CLIN No. 13 but rather included its total price of $178,470 less a 5 percent discount. ICC contends that there was no indication in DDD's bid that CLIN No. 13 was included in the price of other line items or that it would be provided to the ICC at no cost. Since that line item was an essential element of the ICC's requirements and because the exact nature of the error and the amount involved cannot be determined from DDD's bid, it is the ICC's position that it was proper to reject DDD's bid as nonresponsive.

A bid is generally regarded as nonresponsive on its face for failure to include a price on every item and may not be corrected. See Farrell Construction Company, 57 Comp. Gen. 597 (1978), 78-2 CPD 45. The rationale for this rule is that when a bidder fails to submit a price for an item that is considered a material requirement, he generally cannot be obligated to perform that service as part of other services for which prices were submitted. See Regis Milk Company, B-180302, April 18, 1974, 74-1 CPD 203.

While DDD argues that the work called for under CLIN No. 13 was included in the prices of other line items, the same as was done for CLIN No. 12, there is nothing in DDD's bid to indicate this fact. DDD placed the figure $178,470, the sum of the unit prices for CLIN's Nos. 1-11, in the space opposite CLIN No. 13. Certainly DDD did not intend to bid that amount for CLIN No. 13. But, it is not clear from DDD's bid that DDD intended to provide CLIN No. 13 at no cost to the ICC. Accordingly, the right of the Government to require the performance of the tasks specified in that item is in doubt. The fact that the word "Total" and a blank line were placed in the space which should have been designated for the CLIN No. 13 unit price does not support DDD's position that CLIN No. 13 did not have to be independently priced. We note that, during the prebidding conference, DDD, in response to an unrelated question, was advised that the blank line should be under CLIN No. 13. This should have put DDD on notice that the ICC expected that CLIN No. 13 should have a unit price or, at the very minimum, an indication that the work specified under CLIN No. 13 was included in the total bid price.

Moreover, the IFB, on page 57, described in detail what was required under CLIN No. 13. The IFB did not state, as it did concerning CLIN No. 12, that CLIN No. 13 was not billable on a unit price basis. Therefore, we cannot view DDD's failure to include a price or notation that it was included in another line item as a minor clerical error since CLIN No. 13 is a material requirement as seen by its description in the IFB. See 51 Comp. Gen. 543 (1972).

Also, in this regard, our Office has held that, where there is any substantial question as to whether the bidder upon award could be required to perform all of the work called for if he chose not to, the integrity of the competitive bid system requires that the bid be rejected as, at the least, ambiguous unless the bid otherwise affirmatively indicates that the bidder contemplated performance of the work or the item was not to be awarded, which was not present in this situation. To hold otherwise would give a bidder an option after all bids had been exposed to argue, when bids were close in price, that the price for an item had already been included in another item. On the other hand, if the difference between bid prices was substantial, the bidder could urge that the item had been omitted and the

price should be increased to include that item. See General Engineers and Machine Works, Inc., B-190379, January 5, 1978, 78-1 CPD 9.

Based on the foregoing, DDD's bid was properly rejected as being nonresponsive. Therefore, DDD's protest is denied.

CBSI Protest

CBSI has protested the award to EIA based on its belief, with no further explanation, that an apparent conflict of interest exists on the part of EIA's officers and/or members due to their involvement with the trucking industry. CBSI posits that, in light of the involvement with the industry, EIA should not operate ICC's compliance program. CBSI also objects to the award to EIA, notwithstanding the protests filed with our Office. Furthermore, CBSI questions the ICC's failure to record in the abstract of bids and evaluate the one-time startup costs which were listed under the caption "Other Costs (Annual)" on the page following the Workload Statement and Unit Cost Sheet.

As regards the apparent conflict of interest, the ICC responds that, since it was aware that EIA was an association comprised of motor carriers regulated by the ICC, it considered this issue prior to making an award to EIA. The ICC explains that, since the contract is essentially "a record keeping function involving virtually no discretion and no sensitive proprietary information, a conflict of interest [is] unlikely to result." The ICC also argues that it has strict oversight through its audit process.

We have reviewed the IFB and find that the work to be performed under the contract is essentially clerical in nature. Motor carriers file various documents to show that each has acceptable security (insurance) for the protection of the public and who each is designating as an agent prior to receiving a certificate, license or permit which grants the carrier operating authority. The contractor is to review this documentation to assure that the ICC's requirements are satisfied and must maintain the records of each transaction and any changes in the motor carrier's position concerning security. In this circumstance, there appears to be little room for EIA to exercise any discretion from which

a conflict of interest would arise. In addition, there are no provisions in the IFB regarding conflict of interest or prohibiting an organization like EIA from bidding. Furthermore, we note that the ICC considered this issue prior to award and can, through its contract administration function, monitor EIA's performance of the contract.

Based on the foregoing, we do not believe that a conflict of interest exists. See Exotech Systems, Inc., 54 Comp. Gen. 421 (1974), 74-2 CPD 281. We deny this portion of CBSI's protest.

CBSI's objection to the award of a contract notwithstanding a protest is also denied. Since the ICC determined that an award must be made promptly and the determination was approved at a higher level than the contracting officer, in accordance with applicable regulations, it is not subject to question by our Office. See Vi Mil Inc., B-208012, September 20, 1982, 82-2 CPD 244.

We find CBSI's final argument, failure to record in the abstract of bids and evaluate startup costs, to be untimely and will not consider it. The abstract of bids, dated September 16, 1982, listed all the bidders and their respective unit prices for CLIN's Nos. 1-13. There was nothing listed concerning one-time startup costs. Accordingly, CBSI should have been aware of this basis of protest on September 16, 1982, the day the abstract of bids was completed and available for inspection by each bidder. Nonetheless, this issue was raised for the first time in CBSI's comments to the ICC's report, which was received by our Office on November 4, 1982. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(2) (1982), require that a protest be filed within 10 working days after the basis is known or should have been known, whichever is earlier. Since this issue was filed approximately 6 weeks after CBSI should have known this basis of protest, it is untimely. The fact that CBSI initially filed a timely protest does not change this result. New and independent protest grounds raised in supplemental comments to a timely protest must independently

satisfy our timeliness procedures. See Bekins Moving and Storage Co. of Hawaii, Inc., B-205904, July 28, 1982, 82-2 CPD 88.

for Shelton J. Doolan
Comptroller General
of the United States