

DECISION

104-124
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

27016

FILE: B-212254**DATE:** December 13, 1983**MATTER OF:** F&H Manufacturing Corporation**DIGEST:**

1. Agency's decision to terminate a contract is proper where erroneous award to other than the low bidder was discovered shortly after award and there is no evidence that termination, and the proposed award to the actual low bidder, is not in the government's interest.
2. Fourth low bidder is not an interested party under GAO's Bid Protest Procedures to protest that the low bid is nonresponsive.

F&H Manufacturing Corporation protests the termination for convenience of its contract to supply vehicle parts to the Department of the Army, and the proposed award of a contract for that requirement to Carsonville Metal Products Company under invitation for bids (IFB) No. DAAE07-83-B-H325. We deny the protest in part and dismiss it in part.

The IFB solicited bids on an f.o.b. origin basis. The IFB contained a clause entitled "GUARANTEED MAXIMUM SHIPPING WEIGHTS AND DIMENSIONS" which requested each bidder to insert in the spaces provided guaranteed shipping data, including the maximum shipping weight per container, number of units per container, and the type, size and shipping character of each container. The clause provided that if a bidder failed to enter the guaranteed shipping data as requested, the government would use estimated weights and dimensions to evaluate applicable transportation costs for each bid; if delivered supplies exceeded the estimated weights or dimensions, a contract price reduction would be made by the government to offset excess shipping costs for the item. In this instance, the government estimated the shipping weight of the item to be 6 pounds and approximately .5 cubic feet when two items were packed per container.

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Eleven bids were received and opened on March 28, 1983. The four low unit prices bid, exclusive of transportation costs, were as follows:

Carsonville	\$3.45
Howell Industries, Inc.	\$3.62
Longwood Manufacturing Corporation	\$3.65
F&H	\$3.67

F&H was the only bidder that supplied guaranteed shipping data.

In computing the cost of transportation to be added to the bids, the Army evaluated the three low bids on the basis of the government estimate stated in the solicitation. F&H's bid was evaluated on the basis of its own guaranteed shipping data, which reflected two items per container. The evaluation of the three low bids, however, was based on packing a single item per container having the weight and dimensions set forth in the solicitation. On the basis of this evaluation, the contracting officer determined F&H to be the low bidder and awarded the contract to that firm on May 24.

Carsonville filed a protest with the Army on June 1. In reevaluating bids, the contracting officer determined that all bids should have been evaluated on the basis of shipping two items per container and that under the original evaluation the transportation costs for all bidders but F&H had been doubled. Under a proper evaluation based on a correct transportation cost evaluation, the four low bidders were Carsonville, Howell, Longwood, and F&H, respectively. Accordingly, the contracting officer terminated F&H's contract for the convenience of the government and now proposes to award the requirement to Carsonville.

F&H insists that it is the low bidder and maintains that the contracting officer's opposite conclusion is based on an erroneous interpretation of the IFB provisions. First, F&H argues that the packaging data requirement which permitted evaluation based on two items per container (Packaging Data Sheet No. 10937879) was not properly referenced in the solicitation on the page where the guaranteed estimated weights and dimensions clause appeared. Second, in addition to various contentions concerning the responsiveness of Carsonville's bid, F&H argues that unless a bidder, like Carsonville, inserts actual guaranteed transportation data in its bid, there can be no valid comparison

of transportation costs since any evaluation would be based on F&H's actual weights and dimensions versus a mere estimate for other bidders. F&H argues that if the government underestimated the actual weights and dimensions of the containers, and awarded a contract to a bidder based on those erroneous estimates, the ultimate cost to the government might well exceed F&H's fixed price per item.

Contrary to F&H's contention, the packaging data requirements were in fact referenced and identified by number in several places in the solicitation, such as in the bidding schedule and in the list of attachments and exhibits to the invitation. Also, the fact that evaluation of transportation costs for bidders who did not supply their own transportation data would be based on a government estimate was clear from the invitation. Thus, all bidders, including the protester, knew before they entered the competition precisely how their bids would be evaluated, and the Army is constrained, in selecting an awardee, to follow the IFB evaluation scheme.

As to F&H's argument that its own bid might actually reflect a savings to the government compared to a lower evaluated bid based on government-estimated transportation data, by the terms of the IFB the awardee would be liable to the government for any increased transportation costs that may result from exceeding the weights and dimensions stated in the IFB. Thus, the estimated weights and dimensions were, upon acceptance of a bid to which they were applied in evaluation, contractually specified maximums to the same extent as if the figures had been provided by the bidder. We therefore are unable to see any competitive advantage accruing to any bidder that did not provide actual transportation data.

Accordingly, we find the Army acted properly in determining that the correct basis for evaluating transportation costs was two items per container and that Carsonville, not F&H, was the actual low bidder under this invitation.

F&H also questions the wisdom of contract termination since all parties acted in good faith in awarding the contract to that firm. In our view, however, when the improper award of a contract to other than the low bidder is discovered shortly after award, the government's strong interest in the preservation of the integrity of the competitive procurement system virtually requires that the contract be terminated and re-awarded unless there are

convincing reasons why it is not in the best interest of the government to do so. An example of such a reason would be where termination costs are substantial or far exceed the possible cost savings to the government which the re-award of the contract might produce, see, e.g., Shockley Construction Co., B-200125, November 10, 1980, 80-2 CPD 352, or where termination would have a significant adverse impact on the mission of the agency. See, e.g., Vega Precision Laboratories, Inc., B-191432, June 30, 1978, 78-1 CPD 467.


On the record before us, there is nothing to indicate that it is not in the Army's best interest to correct its error in awarding the contract initially by terminating F&H's contract and letting a new one. Accordingly, this portion of F&H's protest is denied.

As stated previously, F&H advances numerous arguments concerning the responsiveness of Carsonville's bid, such as Carsonville's failure to bid on an f.o.b. origin basis and to supply certain transportation information along with its bid. However, we do not believe that F&H is eligible to protest these issues. A party must be "interested" under our Bid Protest Procedures, 4 C.F.R. § 21.1(a) (1983), in order to have its protest considered by our Office. Determining whether a party is sufficiently interested involves consideration of the party's status in relation to the procurement and the nature of the issues involved. Therm-Air Mfg. Co., Inc., 59 Comp. Gen. 255 (1980), 80-1 CPD 119. Since F&H, when all bids are correctly evaluated as to transportation charges, is the fourth low bidder, there are three lower bidders to which award could be made under the invitation.

Thus, F&H would not be in line for the award if its protest is upheld with respect to these issues, so that the protester does not have the requisite direct interest to raise them in a bid protest. See International Business Investments, B-202164.2, June 8, 1981, 81-1 CPD 459. We therefore dismiss this portion of the protest. In any event, we point out that a low f.o.b. destination bid submitted in response to an invitation which requires prices on an origin basis is responsive, 38 Comp. Gen. 708 (1959), and that information concerning transportation modes may be acquired from a bidder after bid opening. Beta Systems, Inc.; Brown-Minneapolis MTM Tank & Fabricating Co., B-184413, February 18, 1976, 76-1 CPD 109.

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The protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States