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

FILE: B-219411.2 **DATE:** August 9, 1985

MATTER OF: Government Contractors, Inc.--
Request for Reconsideration

DIGEST:

1. Bidder's failure to supply information necessary for the operation of an Economic Price Adjustment (EPA) clause by bid opening renders a bid nonresponsive.

2. Reconsideration request by a bidder, which was properly found nonresponsive, against the standard of review of the responsibility of a higher bidder is dismissed because the protesting bidder is not an interested party under GAO's Bid Protest Regulations.

3. Despite allegations that rate to be quoted by bid opening for use in an EPA clause is not properly verifiable, no cogent and compelling reason exists to cancel solicitation after bids are opened and to resolicit, if the EPA rate submitted by the low responsive bidder is proper, because neither the interests of the government nor other bidders have been prejudiced.

Government Contractors, Inc. (GCI), requests reconsideration of our decision in Galaxy Custodial Services, Inc., et al., B-215738, et al., June 10, 1985, 64 Comp. Gen. _____, 85-1 C.P.D. ¶ ___. In that decision, we denied GCI's protest of the rejection of its bid as nonresponsive by the Air Force for GCI's failure to furnish certain information with its bid required by the Economic Price Adjustment (EPA) clause in the invitation for bids (IFB). We held that since the IFB unequivocably advised that certain information necessary to the operation and implementation of the EPA clause was required with a bid

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in order for the bid to be considered responsive, GCI's bid must be rejected as nonresponsive.

We affirm our prior decision.

GCI contends that our decision is wrong as a matter of law. GCI argues that its bid did not limit its liability to the government under the EPA clause, as we found, so that its bid must be considered responsive. GCI also argues that from a practical standpoint, its bid would result in the lowest price and that the effect on GCI's bid of its failure to furnish the EPA information was not material. GCI further argues that the cases cited in the prior decision, particularly Patriot Oil, Inc., B-191607, Sept. 7, 1978, 78-2 C.P.D. ¶ 177, involve materially different facts and are not applicable to the present situation. GCI distinguishes Patriot as a "special situation" involving the "extremely volatile" petroleum market where an economic price adjustment was vital to remove the parties' price risks and where the requested EPA data was based upon readily available petroleum reference prices. GCI alleges that no such unusual circumstances exist in the present situation and bidders can insert any figure in the EPA clause in question here, no matter how unrealistic.

GCI's attempted distinction of the Patriot case is unpersuasive and not supported by that decision. The Patriot decision reports no "special situation" or "unusual circumstances" that would distinguish it from any other case requiring bidders to submit information necessary for the proper operation of an EPA clause by bid opening in order to be considered responsive. Further, we do not believe, nor does Patriot imply, that the relative general availability and verifiability of the EPA base rate information is a factor in determining bid responsiveness.

GCI cites Roarda, Inc., B-192443, Nov. 22, 1978, 78-2 C.P.D. ¶ 359, as being a situation much more analogous to the present situation. In that case, bidders could, but were not required to, submit "detention rates" for ancillary transportation services with their bids for the supply of petroleum products. Bidders were cautioned in the solicitation that if quoted "detention rates" were inconsistent with

applicable regulated tariffs, that "may render a bid nonresponsive." We found that a bid, which quoted "detention rates" clearly not comparable to the tariffs, was nevertheless responsive where the agency was able to determine that this deviation from the solicitation instructions had a de minimus effect on the bid price (approximately one-tenth of 1 percent of the bid price and 4 percent of the difference between the two lowest bid prices for the same bid items). Roarda must be contrasted with the present case where the basic purpose of the EPA clause is to allow contract price adjustments for as yet unknown upward and downward shifts in salaries paid the service employees based upon the specified economic factors. In Roarda, the amount of the possible dollar impact of the inflated detention rates could be determined based upon actual agency experience.

GCI's failure to propose the required information cannot be said to be de minimus since the EPA clause cannot operate as advertised and the legal obligations of GCI to the government under that clause are adversely affected. In this regard, we have held that the remoteness of the possibility of a downward price adjustment under an EPA clause does not negate its materiality. Aqua-Trol Corporation, B-191648, July 14, 1978, 78-2 C.P.D. ¶ 41. Further, a nonresponsive bid cannot be accepted merely because it represents substantial cost savings. See Survivair, division of U.S.D. Corp., B-215214, Dec. 3, 1984, 84-2 C.P.D. ¶ 600. Under the circumstances, we believe GCI's failure to supply this EPA information by bid opening was material and rendered its bid nonresponsive.

GCI also disagrees with the caveat in our prior decision's provision for award to American Maintenance Company (American). We stated that American should be found nonresponsible if the EPA figures that it inserted in its bid are found to be so unarguably false as to amount to fraud. GCI states that the rigorous "fraud" standard in the caveat has no rational basis nor is it supported by any precedent, and that the American bid should be rejected if its EPA clause information could cause the possibility that the award will not result in the lowest cost to the government. However, GCI is not an interested party eligible to protest or request reconsideration of this matter under our Bid Protest Regulations. Public Entity Underwriters, Ltd., B-213745, Sept. 20, 1984, 84-2 C.P.D. ¶ 326. Because GCI's bid was properly found nonresponsive and because there are other responsive bidders, e.g., Trinity Services, Inc.,

about whose EPA information no questions have been raised, GCI would not receive the award, even if its request for reconsideration on this point were ultimately upheld. Consequently, this basis for reconsideration is dismissed.

Finally, GCI asserts that, at the least, this procurement should be canceled and resolicited because the EPA clause permits submission of unverifiable reference rates. An IFB can only be canceled and the requirement resolicited after bids have been opened if there is a cogent and compelling reason. Federal Acquisition Regulation, 48 C.F.R. § 14.404-1 (1984). The fact that an IFB is deficient in some way does not necessarily justify cancellation and resolicitation after bid prices are exposed. Edward B. Friel, 55 Comp. Gen. 231, 237 (1975), 75-2 C.P.D. ¶ 164. In determining whether a cogent and compelling reason exists to justify cancellation and resolicitation, two factors must be examined: (1) whether the best interests of the government would be served by making an award under the subject solicitation and (2) whether any bidder would be treated in an unfair and unequal manner if an award were made under the IFB. North American Laboratories of Ohio Inc., 58 Comp. Gen. 724 (1979), 79-2 C.P.D. ¶ 106.

In our prior decision, we noted that the government's interests may not be protected if a bidder did not quote a proper Base Rate for the EPA clause (i.e., a Base Rate not based on its bid price). However, the nature of the information that was required to be submitted in this case is in no way ambiguous. If a responsive bidder follows the bid instructions and quotes a proper Base Rate, the government's interests under the EPA clause are fully protected in making an award to that bidder. No other bidder is prejudiced under such circumstances. As noted above, our prior decision requires verification of American's EPA information prior to award. Under the circumstances, where no showing has been made that the award would not be in the government's best interest, we perceive no cogent and compelling reason to justify cancellation and resolicitation.

Based on the foregoing, our prior decision is affirmed.

for Milton J. Socolar
Comptroller General
of the United States