

DECISION



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

FILE: B-220364

DATE: December 23, 1985

MATTER OF: Newport News Industrial Corporation;
Simulation Associates, Inc.

DIGEST:

1. Tennessee Valley Authority (TVA) is subject to GAO bid protest jurisdiction under the Competition in Contracting Act of 1984 (CICA) since TVA comes within the statutory definition of a federal agency subject to CICA and TVA procurements are funded with appropriated funds.
2. Agency's failure to make the required CICA determination for continued contract performance during pendency of protest does not provide a basis to upset an otherwise proper award.
3. Protest filed after bid opening is untimely to the extent that it challenges contracting agency's choice of procurement method.
4. Bid is properly found nonresponsive where bidder concedes that its equipment deviates from numerous technical specifications in IFB. Fact that bidder did not explicitly take exception to the specifications and now contends that it will modify its equipment to fully comply, does not cure deviations from the specifications evident from technical information included in the bid.

Newport News Industrial Corporation (NNI) and Simulation Associates, Inc. (SAI),^{1/} protest the rejection of NNI's bid under invitation for bids (IFB) No. 60-972166,

^{1/} SAI would be a major subcontractor if NNI were to receive the award. The protest was filed on behalf of both firms.

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issued by the Tennessee Valley Authority (TVA) for a full-scale replica of the control room at the Watts Bar Nuclear Power Plant, Spring City, Tennessee. The protesters contend that the procurement should not have been conducted using sealed bidding procedures, and that TVA improperly found that NNI's bid was nonresponsive. We dismiss the protest in part and deny it in part.

As a preliminary matter, TVA challenges our jurisdiction to decide the protest under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. §§ 3551 et seq. (West Supp. 1985), and our Bid Protest Regulations, 4 C.F.R. part 21 (1985). TVA's arguments have already been considered and rejected by our Office in Monarch Water Systems, Inc., B-218441, Aug. 8, 1985, 64 Comp. Gen. _____, 85-2 CPD ¶ 146. Specifically, we concluded in the Monarch case that TVA meets the applicable definition in the Federal Property and Administrative Services Act of 1949 (Property Act) of a federal agency subject to our bid protest jurisdiction. ^{2/} We also found that the power program funds used for TVA procurements constitute a continuing appropriation, not nonappropriated funds as TVA argues. Since TVA has presented no new arguments in this case, we see no basis on which to modify our conclusion in Monarch that TVA is subject to our bid protest authority under CICA.

Under CICA, 31 U.S.C.A. § 3553(c), if a protest concerning a procurement is filed before award, a contract may not be awarded while the protest is pending, unless the contracting agency determines that urgent and compelling circumstances significantly affecting the interests of the United States do not permit withholding award until a decision on the protest is issued. In this case, TVA, acting on its position that it is not subject to CICA, awarded a contract under the IFB on October 16, after the protest was filed. TVA's action, taken without the required finding of urgent and compelling circumstances, contravenes the requirement in CICA that award be withheld while the protest is pending. Nevertheless, an agency's failure to delay award does not itself constitute

^{2/} Our interpretation of CICA has subsequently been confirmed by Congress. Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, § 1304(d) (Nov. 8, 1985) eliminates the reference to "executive agency" and makes it clear that our CICA bid protest authority applies to all federal agencies as defined in the Property Act.

a basis for upsetting an otherwise proper award. Inter-Trade Industries Ltd., B-219353, Sept. 27, 1985, 64 Comp. Gen. ____, 85-2 CPD ¶ 346.

TVA also argues that its procurements are not subject to the Federal Acquisition Regulation (FAR). As support for this argument, TVA contends that the FAR is issued under the Office of Procurement Policy Act (OFPPA), 41 U.S.C. §§ 401 et seq.; since TVA does not fall with the OFPPA's coverage as defined in 41 U.S.C. § 403, TVA argues that it is not subject to the regulations issued under the OFPPA. TVA's argument is without merit. The OFPPA states that it applies to "a wholly owned Government corporation fully subject to the provisions of chapter 91 of title 31." Since 31 U.S.C. § 9101(3)(M) provides that TVA is subject to the provisions of chapter 91, we think that TVA falls within the definition section of the OFPPA. In any event that is irrelevant to whether TVA's procurements are subject to the FAR. Rather, as we explained in Monarch, while TVA has broad statutory authority regarding its contracts and expenditures, absent a determination to the contrary by the TVA Board, TVA is subject to the procurement procedures in the Property Act and the FAR. See 39 Comp. Gen. 426 (1959). Since TVA does not contend that the Board has determined not to follow the FAR, its provisions apply to this case.

The IFB calls for bids for a replica of a nuclear power plant control room to be used to train plant operators by simulating different plant operations and malfunctions and monitoring trainees' responses. The IFB required submission of a lump-sum bid for the entire system, as well as separate bids for several optional features. The IFB advised bidders their bids had to demonstrate full compliance with the technical specifications included as an appendix to the IFB.

Of the three bids received, NNI's was the lowest at \$9,239,967, followed by The Singer Company's bid at \$10,936,130, and Westinghouse's bid at \$13,204,900. As discussed in detail below, TVA rejected NNI's bid as nonresponsive, after determining that NNI's bid failed to comply with numerous IFB specifications. TVA then made award to Singer, the second low bidder.

NNI and SAI contend that the procurement should not have been conducted using sealed bidding procedures. In addition, the protesters maintain that the NNI bid was responsive in all respects, and, therefore, NNI, as the low bidder, should have received the award.

NNI and SAI first argue that since the IFB required submission of technical proposals, TVA should have used the two-step sealed bidding procedures, under which technical acceptability is determined first, with an opportunity for proposal modification, followed by a price competition. See FAR, 48 C.F.R. subpart 14.5. We find this argument untimely. As the protesters recognize, TVA's intention to conduct the procurement using sealed bids was evident from the IFB. Our Bid Protest Regulations require that protests based on alleged improprieties apparent on the face of the IFB be filed before bid opening. 4 C.F.R. § 21.2(a)(1). Here, the protest was not filed until October 15, well after bid opening on August 2. As a result, the protesters' challenge to TVA's choice of procurement method is untimely and will not be considered on the merits. Behavioral Systems Southwest, B-213065, Oct. 11, 1983, 83-2 CPD ¶ 441.

The protesters' next contention is that TVA improperly rejected NNI's bid as nonresponsive. We find this argument to be without merit. TVA states that NNI's bid was found not to comply with 26 of the IFB's technical specifications. NNI and SAI recognize that NNI's bid does not comply with a number of the specifications, conceding in their protest comments that its equipment as described in the technical literature submitted with the bid does not meet all the specifications. For example, sections 5.2.6 and 5.3.12 of the IFB require that the simulator's communications controllers, which perform data transmission from the simulator computer to devices such as terminals, printers and plotters, be capable of transmitting to, and receiving data from, up to eight devices at a specified rate (19.2 Kbaud) without loss of data. In the protest, NNI concedes that its proposed controllers cannot operate at the specified rate.

As another example, section 5.4.7 of the IFB requires that the simulator include a hand-held remote control unit which the instructor can use to control the simulator. The specification at section 8.7 also requires that the remote control unit have a feedback feature to indicate that the instructor's command has been received and processed by the simulator computer. The protesters concede that the product description in NNI's bid of the remote

control unit it proposed to use did not indicate that it had a feedback capability. In fact, NNI states in the protest that it would have had to purchase a separate product to add the feedback feature to the remote control unit.

With regard to these and similar deviations from the specifications, the protesters argue that, if NNI received the award, it would modify its equipment to fully comply with the specifications. Further, the protesters maintain that since NNI's bid did not explicitly take exception to the specifications, it should be regarded as responsive despite the fact that the descriptive literature and other technical information in the NNI bid showed that its system deviated from the specifications. We disagree. A bid's compliance with specifications must be determined from the face of the bid itself without resort to explanations furnished after bid opening. Frontier Mfg. Co., B-215288, Nov. 11, 1984, 84-2 CPD ¶ 529. Moreover, even regarding NNI's failure to take exception as evidence of its intention to comply with the specifications, such a blanket statement in a bid does not cure the bid's deviation from the specifications. Modutech Marine, Inc., B-207601, Feb. 9, 1983, 83-1 CPD ¶ 144.

Here, the IFB clearly required that the bids demonstrate compliance with the technical specifications. Since the technical information submitted with NNI's bid did not show that its system would comply with all the specifications, its bid was properly found nonresponsive. See Zero Mfg. Co., B-210123.2, Apr. 15, 1983, 83-1 CPD ¶ 416. Moreover, since TVA properly found NNI nonresponsive on the various grounds conceded by NNI, we need not consider whether NNI also was nonresponsive in the remaining areas identified by TVA. Wayne Kerr, Inc., B-217528, Apr. 18, 1985, 85-1 CPD ¶ 445.

In addition to recognizing in its protest the various deficiencies in the NNI bid, the bid itself stated that NNI took exception to four specifications. ^{3/} Specifically, NNI proposed a lower power frequency for the simulator computer system than required; printer paper of a narrower width than required; and limited, instead of full, on-site acceptance testing of malfunctions. The protesters argue, however, that neither of the other two bidders could have complied with the specifications regarding power frequency

^{3/} The bid form provided a space in which bidders were to indicate any specifications to which they took exception.

and paper width, based on their assumption that the other bidders' systems used the same equipment as NNI proposed using. NNI and SSI have offered no support, however, for their argument that the other bidders failed to comply with these specifications. The protesters do not argue that no equipment on the market could comply with the specifications, and do not explain why we should assume that the other bidders proposed using the same equipment. NNI and SAI request that we obtain a copy of the awardee's bid to confirm that TVA used a "standardless and subjective method of procurement." The protesters' allegations regarding TVA's evaluation of the other bids are unsubstantiated. We do not conduct investigations in connection with our bid protest function for the purpose of establishing the validity of a protester's assertions. Raytheon Support Services Co., B-216898, Sept. 25, 1985, 85-2 CPD ¶ 334.

The protest is dismissed in part and denied in part.

Harry R. Van Cleve

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General Counsel