



Comptroller General
of the United States

1148169

Washington, D.C. 20548

Decision

Matter of: B & P Refuse Disposal, Inc.

File: B-253661

Date: September 16, 1993

John R. Poague for the protester.
Lester Edelman, Esq., Department of the Army, for the agency.
David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency properly may decline to include an economic price adjustment (EPA) clause in a solicitation where the agency has a reasonable basis for omitting the clause, since use of the EPA clause is a matter within the agency's discretion.

DECISION

B & P Refuse Disposal, Inc. protests the Department of the Army's failure to include a provision in invitation for bids (IFB) No. DACA31-93-B-0042, issued for refuse collection and removal services, which would allow contract prices to be adjusted for escalating dumping fees.

We deny the protest.

The IFB requested firm, fixed prices for a base year and 2 option years for refuse collection and removal at Fort Myer, Arlington Hall Station, and Henderson Hall, Arlington, Virginia. The contractor would be responsible for providing the refuse containers and for maintaining them. The IFB provided that bids were to be evaluated for award purposes on the basis of the prices submitted for both the base and the option years. The IFB stated that the contract price would not at any time be adjusted for increases in dumping fees and that bidders should, therefore, include fees in their prices for the base and option years. The IFB contained a history of the dumping fees charged during the current contract for these services. For a 3-1/2 year

period (January 1989-July 1992), the fees had increased in increments a total of 67 percent from \$26.52 to \$44.34. The bid opening has been delayed indefinitely, pending resolution of the protest.

B & P argues that an economic price adjustment (EPA) clause should have been included in the IFB because the history of recent dumping fees shows an erratic and undiscernible variation in the fee increases. It notes that the IFB information shows dumping fee increases of 1.4, 9.1, 4.1, 22.4, 6.1, and 11.7 percent and that the timing of the increases is similarly without pattern: two in the first half of 1989, two in 1990, one in 1991, and one in 1992. B & P argues that the information is insufficient to prepare a bid because a bidder cannot determine the amount dumping fees will increase during the term of the contract and therefore a bidder cannot properly price its dumping costs.

B & P notes that refuse collection contracts of this type are so competitively priced that a small percentage difference in price can mean the difference between winning and losing the contract. Because that portion of a bidder's price that is determined by future fee increases will be based simply on guesswork, B & P asserts that bidders have no means of fairly competing against each other. Further, B & P states that if a bidder guesses wrong concerning the cost of dump fee increases during the contract, submits a low bid and receives the award, that bidder will not be able to absorb the increased dumping fee costs and will be unable to successfully perform the contract. B & P also argues that other agencies frequently incorporate EPA clauses in similar refuse collection contracts and that the Army should also be required to use one here.

The agency states that the decision as to whether to use an EPA clause in a particular solicitation is discretionary. The Army states that here the contracting officer reasonably determined that the risk of dumping fee increases would be addressed adequately by notifying bidders in the IFB of the history of fee increases during the current contract and that bidders should provide for future fee increases in their bid. The contracting officer also points out that the IFB contains 2 option years which permits a bidder to submit prices which anticipate the potentially higher dumping fees in those years.


With respect to the inclusion of an EPA clause, the clause's basic purpose is to protect the government in case of a decrease in contract costs and the contractor in the case of an increase. See Master Sec., Inc., B-232263, Nov. 7, 1988, 88-2 CPD ¶ 449. However, it is within a contracting officer's discretion whether or not to include an EPA clause, and we will only question the decision regarding its

inclusion where it is unreasonable. Master Sec., Inc., supra; Kings Point Mfg. Co., Inc., B-220224, Dec. 17, 1985, 85-2 CPD ¶ 680; Argus Servs., Inc., B-234016.2; B-234017.2, Sept. 12, 1989, 89-2 CPD ¶ 227. In addition, it is within the ambit of administrative discretion to offer to competition a proposed contract imposing risks upon the selected contractor and minimum administrative burdens upon the agency. Second Growth Forest Mgmt., Inc., B-218273; B-238273.2, Apr. 10, 1985, 85-1 CPD ¶ 410.

Here, the agency's decision not to include an EPA clause in the IFB was reasonable. Bidders were advised that the dumping fees were subject to increases during the duration of the contract and that provisions for these increases should be made in the prices bid because contract prices would not be adjusted for any increases. Bidders, therefore, knew that some risk was involved regarding future fee increases. The mere presence of risk due to the probability of dumping fee increases does not make the decision not to include an EPA clause in the IFB improper. Argus Servs., Inc., supra.

Further, it is the bidder's responsibility to project costs and include in its prices a factor covering any otherwise uncompensated cost increases. The agency provided bidders with the 3-1/2 year history of prior fee increases which permitted them a basis for incorporating likely fee increases into their prices. The lack of an EPA clause affects all potential bidders equally and in our view, does not preclude a fair competition. Id. Additionally, the IFB provided a mechanism in the form of separate pricing for the option years which allowed bidders to reduce the risk occasioned by potential fee increases while at the same time offering competitive prices. Id. Finally, we note the fact that other agencies have used EPA clauses in their solicitations has no bearing here where we have concluded that the agency's decision in this case not to include such a clause in the IFB was reasonable; each procurement stands on its own. See Southwest Marine, Inc., B-247639, May 12, 1992, 92-1 CPD ¶ 442.

The protest is denied.


 James F. Hinchman
 General Counsel