

**Matter of:** North American Resource Recovery Corporation

**File:** B-254485

**Date:** December 17, 1993

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Richard J. Conway, Esq., J. Andrew Jackson, Esq., and Merle M. DeLancey, Esq., Dickstein, Shapiro & Morin, for the protester.

William D. Blakely, Esq., James A. Gede, Jr., Esq., and Gretchen L. Lowe, Esq., Piper & Marbury, for United CoGenerators, an interested party.

Colonel Riggs L. Wilks, Jr., and Major Wendy A. Polk, Department of the Army, for the agency.

Susan K. McAuliffe, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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**DIGEST**

General legend in front of bid package stating that pages of "proposal or quotation" marked with restrictive legend are proprietary and are not releasable outside of the government does not render bid nonresponsive where none of the pages of the bid are marked with the referenced restrictive legend or are otherwise identified as proprietary or restrictive material.

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**DECISION**

North American Resource Recovery Corporation protests the proposed award of a contract by the Department of the Army to United CoGenerators under invitation for bids (IFB) No. DAKF29-93-B-0015, for the operation and maintenance of the Fort Dix Resource Recovery Facility. North American contends that United's bid should be rejected as nonresponsive for inclusion of a restrictive legend limiting public disclosure of the bid.

We deny the protest.

The IFB, issued on March 30, 1993, sought bids for 1 base year and 2 option years. North American and United submitted the two bids received by bid opening on July 9. The bids offered the following monthly prices:

	<u>Base Yr.</u>	<u>1st Opt. Yr.</u>	<u>2nd Opt. Yr.</u>
United	\$ 89,465	\$ 86,643	\$ 86,938
North American	108,599	109,416	111,658

The outside cover sheet and an identical inside first page cover sheet of United's bid contained the following legend:

"PROPRIETARY DATA

"This proposal or quotation includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part, for any purpose other than to evaluate this proposal or quotation; if, however, a contract is awarded to this offeror or quoter as a result of or in connection with the submission of this data, the Government shall have the right to duplicate, use or disclose the data to the extent provided in the contract. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in all sheets of this proposal marked with the legend. Information contained in this volume is considered by the offeror to be exempt from disclosure under the Freedom of Information Act (FOIA), Exemption (b)(4). Offeror is to be notified of any request for information related to this proposal made under the Freedom of Information Act." [Emphasis added.]

No other page of United's bid contained the referenced legend or identified specific bid information as proprietary or restricted information not for public disclosure.

North American initially filed an agency-level protest against any award to United. The agency denied the protest, stating that the general legend in the front of United's bid was not interpreted by the Army to limit public disclosure of the bid since no portion or portions of the bid were identified, as described by the challenged general legend, as restricted material. This protest followed.

North American contends that this general legend on the bid's cover sheets restricted release of information in United's bid since the title phrase of the legend, "PROPRIETARY DATA," allegedly identifies the entire bid

document as proprietary, and the general legend further states that some unidentified data included in the submission is not to be released outside the government; North American also argues that United also limited public disclosure of its bid by requesting notification of FOIA requests for "proposal" information.

United explains that an administrative clerk inadvertently included in its bid the restrictive legend normally included in proposals submitted by the firm for negotiated procurements. United and the Army contend that the bid is responsive since, despite the inadvertent inclusion of the general legend in the front of the bid, the bid does not limit the government's release of the essential portions of the bid or condition the bid upon the government's not releasing such information.

Generally, where a bidder imposes a restriction that prevents the public disclosure of its bid, the restriction renders the bid nonresponsive if it prohibits the disclosure of sufficient information to permit competing bidders to know the essential nature and type of the products offered or those elements of the bid that relate to quantity, price, and delivery terms. See generally Orbit Advanced Techs. Ltd., B-224603.2, Mar. 11, 1987, 87-1 CPD ¶ 273; VACAR Battery Mfg. Co., Inc., B-223244.2, June 30, 1986, 86-2 CPD ¶ 21 (stating that the purpose of public opening of bids is to protect both the public interest and the bidders against any form of fraud, favoritism or partiality and to leave no room for suspicion).

We do not agree with North American that United's inclusion of the challenged provision in its bid conditioned the bid on nondisclosure of essential bid information or otherwise violated requirements for public bid opening. We do not agree with the protester that the title phrase "PROPRIETARY DATA," as it appears on the front two cover pages of the bid above the general legend in question, has the effect of labeling the entire bid document as proprietary. Read as a whole, the challenged provision clearly states that: "the data subject to this restriction are contained in all sheets of this proposal marked with the legend." The clear reading of the bidder's representation here is that if the pages of the bid are not marked with the legend or otherwise identified as proprietary, such portions of the bid are not proprietary and are freely releasable by the government.

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<sup>1</sup>Federal Acquisition Regulation § 52.215-12 sets forth a similar provision for use in negotiated procurements.

No other page of United's bid (except the mentioned cover pages which contain no material bid information since these pages list information available elsewhere in the bid or from public sources regarding the type of procurement, the IFB number, and the bidder's name, address, and telephone number), contains the referenced restrictive legend or is otherwise identified as containing restricted proprietary information. Simply stated, the general legend challenged by the protester has no meaningful force or effect here since nothing in the bid, including all essential elements of the bid (i.e., the nature and type of services offered, price, quantity, and delivery terms), by the terms of the bid and the challenged provision itself, is restricted from public disclosure.<sup>2</sup>

The protest is denied.

James F. Hinchman  
General Counsel

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<sup>2</sup>Concerning the alleged FOIA restriction, we note that by voluntarily submitting its bid without restriction for a proper public bid opening, United's bid became public information not subject to the referenced FOIA exemption for confidential information. See generally CNA Financial Corp. v. Donovan, 830 F. 2d 1132 (D.C. Cir. 1987).