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

82-2 cpd 177

FILE: B-206015.2, B-206015.3 DATE: August 25, 1982

MATTER OF: Enterprise Chemical Coatings Company and General Services Administration--Reconsideration

DIGEST:

Prior decision--in which GAO held a bid to be ambiguous and nonresponsive where bidder designated responsive qualified products list product by manufacturer's designation but a nonresponsive product by superseded qualified products list test number--is affirmed. Recommendation is made to terminate contract for convenience of Government particularly where this is second recent procurement where protester has been deprived of contracts improperly awarded to another firm.

Enterprise Chemical Coatings Company (Enterprise) and the General Services Administration (GSA) request reconsideration of our decision in Chemray Coatings Corporation, B-206015, May 3, 1982, 82-1 CPD 412 (Chemray II).

We affirm our decision.

In the decision, we held that the low Enterprise bid for the forest green camouflage paint portion of a requirements contract under GSA invitation for bids (IFB) No. 10PR-XMS-5083 was ambiguous and nonresponsive. Therefore, we sustained the protest of Chemray Coatings Corporation (Chemray), the second low bidder, against the GSA award to Enterprise, and we recommended that GSA consider the feasibility of terminating the contract for the convenience of the Government and awarding the contract to Chemray.

Our decision was based on the following. The IFB specified that the procurement was for paint manufactured in accordance with a military specification. The products of all bidders were required to have been tested and approved for inclusion on Qualified Products List (QPL) No. QPL-52798-5, which superseded QPL-52798-4. In the schedule of items, the Enterprise bid listed the paint

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by the correct QPL-52798-5 manufacturer's product designation, 900-G-002, but incorrectly listed QPL test number, TB-12, which refers to the paint formerly listed on the superseded QPL, a product which differed materially from the paint required by the IFB.

Enterprise argues that the product intended to be supplied was determinable from the correct product designation, together with the identification of the manufacturer and the applicable QPL specified in the solicitation; therefore, the designation of the wrong and meaningless QPL test number is a minor informality which may be waived, citing D. Moody & Company, Inc., Astronautics Corporation of America, 55 Comp. Gen. 1 (1975), 75-2 CPD 1. Enterprise distinguishes Chemray Coatings Corporation, B-201873, August 17, 1981, 81-2 CPD 146 (Chemray I), involving a prior solicitation for the same paint, in which we found an Enterprise bid was nonresponsive because the firm had inserted incorrect QPL product designation and test numbers.

Enterprise contends that termination of the contract with Enterprise and reaward to Chemray would interrupt contract coverage and maintenance of the necessary supply of this "never-out-of-stock critical item," seriously endangering our military supply commitment capabilities for this product. Enterprise finally alleges that termination will result in substantial costs and delays to the Government: Chemray's price is approximately $165,000 higher, and Enterprise has begun performance, is committed to the purchase of $2,000,000 worth of raw materials, and has already met 300 hours of first batch testing, which would need to be repeated if the contract is reawarded.

GSA also contends that the QPL test number listed by Enterprise is without meaning because the QPL on which that product was listed, QPL-52798-4, was superseded by QPL-52798-5. Therefore, GSA argues, that the listing of a "meaningless" QPL test number is equivalent to omitting the number, and the D. Moody decision governs. GSA advises that termination does not appear to be in the Government's interest because of the costs involved and potential delivery delays.

Contrary to the contentions of GSA and Enterprise, the listing of the QPL test number of a product previously listed on a superseded QPL is not meaningless or equivalent to no listing. Rather, it is a specific

reference to a sample of a paint. Although QPL-52798-4 has been superseded, there is no allegation that the product becomes nonexistent. Therefore, the Enterprise designation of two materially different products, one responsive to the IFB and the other nonresponsive to the IFB, properly resulted in our conclusion of nonresponsiveness.

The D. Moody, supra, decision is clearly distinguishable. There, the bidder failed to enter either the manufacturer's name or the QPL test number. We held that the QPL item intended to be offered could be determined by reference to other information in the bid. The bidder did list the manufacturer's designation number and, by reference to the applicable QPL, the manufacturer and the test number could be determined.

As we pointed out in Chemray I, supra, decision in D. Moody, supra, and similar cases excuse the failure of a bidder to insert relevant QPL information, such as a test number, so long as other information in a bid, or elsewhere, enables the agency to determine the intended product. Inherent in those decisions is the specific identification of the intended product incompletely identified in the bid. Here, however, the bid expressly designated two materially different products, one responsive and the other nonresponsive, and nothing else in the bid indicates the actual intended product. The bid of Enterprise, therefore, is ambiguous and nonresponsive and should not have been accepted.

The determination of whether an improperly awarded contract should be terminated and either recompeted or reawarded involves the consideration of several factors, including the seriousness of the procurement deficiency, the degree of prejudice to other bidders or the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, and impact of a termination on the procuring agency's mission. See United States Testing Company, Inc., B-205450, June 18, 1982, 82-1 CPD 604.

This protested procurement is the second recent paint procurement on which Chemray has been the low responsive bidder. In both cases, Enterprise has been nonresponsive as a result of similar bid defects, Enterprise has received improper contract awards and Chemray has been deprived of contracts. This prejudice to Chemray and the integrity of the competitive bidding

system significantly impacts on our consideration of whether to recommend termination of the contract with Enterprise and reaward to Chemray.

Enterprise has alleged that termination of the contract and reaward will cause serious interruption in the supply of this critical paint. The agency, however, has not alleged that termination would seriously disrupt supply of the paint, and Chemray has alleged that GSA can make exigency purchases under the contract during the relatively short reaward process.

Enterprise also alleges that it is now committed to substantial raw material costs. In connection with the investigation of the feasibility of terminating the contract as recommended in our prior decision, GSA estimated the value of the contract to be $2,800,000. We agree with Chemray that, while Enterprise may have commitments for costs representing a significant portion of the contract, these costs may not be recoverable due to the requirements nature of the contract. Also, the contract runs through January 31, 1983, and, as of June 29, 1982, Enterprise advises that only 17 percent of the annual estimated requirements have been ordered.

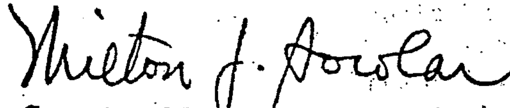
Further, GSA advises that the quantifiable cost of termination is well under 10 percent of the contract value. Finally, the agency has not indicated that Chemray's price is unreasonable and, for this reason, we find that the protester's higher price should not impact on termination since Chemray should have received the award, and the effect of the higher price has been diminished by Enterprise's ongoing performance. Even including the price differential would result in termination costs of only slightly above 10 percent of the contract value.

In view of these termination consequences and our opinion that the integrity of the competitive bidding system outweighs the expected cost to the Government to terminate the contract (see Datapoint Corporation, B-186979, May 18, 1977, 77-1 CPD 348), we recommend that the contract with Enterprise be terminated for convenience. This should be accomplished on the ending date of any purchase order current on the date of this decision and the contract be awarded to Chemray, if otherwise eligible for award.

As neither Enterprise nor GSA has established that our prior decision was based on an erroneous interpretation

of either law or fact, we affirm our decision. Little Harbor Boatyard Corporation--Reconsideration, B-205027.2, January 4, 1982, 82-1 CPD 7.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.



Acting Comptroller General
of the United States