DECISION

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

60166

FILE: B-183616 DATE: October 31,1975

97589

MATTER OF: Environmental Tectonics Corporation

DIGEST:

1. Where review of initially unfavorable preaward survey concluded that concurrent production under protester's existing contract and proposed contract was unavoidable and therefore protester could not meet delivery schedule, reasonable basis existed for review team recommendation of no award to protester upon which contracting officer determined protester nonresponsible. Also SBA's denial of COC provides credence for contracting officer's finding.

2. Where bidder indicates bid acceptance period shorter than that contemplated by agency, there is no duty to seek bid extension and upon expiration of bid, award to that bidder would do serious harm to integrity of competitive system by unfairly prejudicing other bidders. Price difference between expired bid and next low bid is not relevant since mere monetary savings is insufficient to allow integrity of competitive system to be compromised.

3. Where bid received in competitive environment compares favorably to price paid on previous competitive procurement adjusted for increase in production cost and taking into account longer production lead time, no disagreement is stated against contracting officer's determination that price was fair and reasonable.

4. Agency's requests for extensions of 60-day bid acceptance period provided in IFB prior to expiration of bid acceptance period and subsequent extensions was appropriate and in accordance with ASPR.

5. Where requisitioning activity indicated that technical data was most current obtainable, there were no known changes and package was adequate and recommended procurement by technical data, it cannot be concluded that data was deficient notwithstanding question by preaward survey team, and in any event, protester as current contractor was in position to know and protest before bidding if

discrepancy in data on current contract existed in proposed contract and it was inappropriate for protester to protest only after learning it would not receive award.

Invitation for bids (IFB) No. DSA 700-75-B-1131 was issued on December 12, 1974, by the Defense Construction Supply Center, Columbus, Ohio. The IFB, a 100-percent small business set-aside, sought bids on a total quantity of 45 water purification units (3000 gallons per hour capacity).

Upon bid opening on January 31, 1975, the following bids were received:

Environmental Tectonics Corporation (ETC)	$1,577,655
A. C. Ball Company (Ball)	1,844,000
Met-Pro Systems, Inc.	2,330,925
Kellett Corp.	7,845,432

By telegram of February 1, 1975, Met-Pro protested to the agency against the award of a contract to either ETC or Ball for the reason that their respective bids were nonresponsive and they were not responsible bidders. Subsequent to receipt of the protest, a preaward survey was conducted by the Defense Contract Administration Services Region, Philadelphia (DCASR). It was recommended that no award be made to ETC. The contracting officer thereafter determined ETC to be nonresponsible and on March 4, 1975, pursuant to Armed Services Procurement Regulation (ASPR) § 1-705.4(c) (1974 ed.), the matter was referred to the Small Business Administration (SBA) for its determination as to whether a Certificate of Competency (COC) should be issued.

On April 7, 1975, the SBA denied ETC's application for a COC and on April 9, 1975, ETC filed a protest with this Office stating that the contracting officer's finding of nonresponsibility was made on the basis of an erroneous preaward survey report. That protest was withdrawn without prejudice by a telegram received on April 18, 1975, which indicated that the negative preaward survey would be reviewed. The review of the negative preaward survey confirmed the original DCASR finding. Thereafter, on May 22, 1975, the contracting officer affirmed his original determination that ETC was a nonresponsible bidder.

Subsequently, the contracting officer rejected the second low bid submitted by Ball. According to the initial agency report, the basis for the rejection was as follows:

> "The pre-award survey of the second lowest bidder, A. C. Ball Company, was also negative, and in addition, A. C. Ball specified a 30-day acceptance period which expired on 2 March 1975."

However, the agency's supplemental report to this Office states:

> "The * * * bid * * * submitted by A. C. Ball * * * was rejected after a negative pre-award survey because the 30-day bid acceptance period specified by A. C. Ball expired before any extension was granted and could not thereafter be extended." (Emphasis supplied.)

The agency determined that, the third low bidder, Met-Pro was responsible and that its bid price was fair and reasonable. Accordingly, award was made to Met-Pro on June 6, 1975. ETC was advised of that action orally on the same day.

By telegram of June 6, 1975, ETC again filed a protest. This protest was against the award to Met-Pro and the contracting officer's finding that ETC was not responsible. Subsequently, ETC filed Civil Action No. 75-1130 in the United States District Court for the District of Columbia against Lt. General Wallace H. Robinson, Jr., Director, Defense Supply Agency, and James Schlesinger, Secretary of Defense. ETC's complaint sought a declaratory judgment and injunctive relief on the basis that ETC was improperly declared nonresponsible and, even if ETC was not qualified, the next low bidder, Ball, was improperly rejected and the award to Met-Pro at a price $486,925 more than the Ball bid was not advantageous to the Government and was thus illegal. ETC also complained that the specifications were defective. Each of these points were covered either in the agency's initial or supplemental report to this Office. The protester has furnished this Office written comments on the reports.

Pursuant to its request for injunctive relief, ETC filed a motion for preliminary injunction. In opposition to the motion, the defendants filed a cross motion to dismiss the action for lack of jurisdiction and in the alternative for a stay of all proceedings pending a decision by this Office on the merits of ETC's protest. By order of September 23, 1975, ETC's request for a preliminary injunction was denied, but the court indicated its interest in a

decision from this Office on the points in issue. It is by virtue of this expression of interest that we are proceeding. See § 20.10 of the Bid Protest Procedures, 40 Fed. Reg. § 17979 (1975).

ETC's Responsibility

The agency states that ETC was found nonresponsible after a negative preaward survey, the refusal of SBA to issue a COC and a review of the initial preaward survey confirmed the original recommendation that no award be made to ETC. This recommendation was based on ETC's "unsatisfactory production capability, performance record and ability to meet the required delivery schedule."

The minimum general standards for prospective contractors set out in ASPR § 1-903.1 (1974 ed.), require the contractor to:

(i) have adequate financial resources or the ability to obtain them;

(ii) be able to comply with the required delivery schedule taking into account all other business commitments;

(iii) have a satisfactory record of performance; and

(iv) have a satisfactory record of integrity.

If a bid of a small business concern such as ETC is to be rejected solely on the basis of the contracting officer's determination that the firm lacks capacity or credit, then the matter must be sent to SBA for its determination whether to issue a COC. ASPR § 1-705.4(c) (1974 ed.). As stated in ASPR § 1-705.4(a) (1974 ed.), SBA has statutory authority to certify the competency of any small business concern as to capacity and credit. ASPR § 1-705.4(a) (1974 ed.) defines capacity as:

> "* * * the overall ability of a prospective small business contractor to meet quality, quantity and time requirements of a proposed contract and includes ability to perform, organization, experience, technical knowledge, skills, 'know-how,' technical equipment and facilities or the ability to obtain them."

Where a COC is issued it is conclusive of the firm's capacity and credit. 15 U.S.C. § 637(b)(7) (1970).

However, a determination by the contracting officer that a small business is not responsible pursuant to ASPR § 1-903.1(iii) and (iv), supra, is not covered by the COC procedures. ASPR § 1-705.4(c)(vi) (1974 ed.). Where a small business bidder is determined to be nonresponsible based on an unsatisfactory record of performance due to failure to apply necessary tenacity or preseverance to do an acceptable job or lack of integrity, a copy of the documentation supporting the determination is required to be sent to SBA which may appeal the determination to the head of the procuring activity. The decision of the head of the procuring activity is final.

In the instant case, the contracting officer's initial determination of nonresponsibility was based on three factors--(1) ETC's unsatisfactory production capability, i.e., an overlapping of an existing contract for a similar system and the proposed contract would exist at a time when each contract would be at a critical and demanding stage; moreover, while ETC proposed to use its Southampton and Newtown plants to overcome this overlap, the lack of welding fixtures, which the contractor had no plans to acquire, along with the delays inherent in a transfer of operations, would cause a loss in effective production operations; (2) ETC's past and present performance record; and (3) ETC's inability to meet the required delivery schedule, due again to the overlapping of the existing and the proposed contracts, a lack of fixtures, and the delays inherent in transferring operations between two plants as well as a history of rapid personnel turnover and past insufficient personnel staffing.

The first and third reasons outlined above fall within the stated definition of capacity and thus were clearly for consideration by SBA via ETC's application for a COC. In this regard, SBA concluded, after reviewing all information and data, that ETC had "overloaded its capacity" and "to add the effort required on the proposed award to [ETC's] * * * present overloaded capacity would not be in [ETC's] * * * best interest or the best interest of the Government." Moreover, SBA questioned ETC's financial position wherein it stated that "we have no reasonable assurance [ETC] * * * will have adequate finances to function this contract and other work in-house when all the foregoing factors are taken into consideration," i.e., ETC's problematic quick working capital ratio, unacceptable projected cash flow (both original 15-month and subsequent 26-month projections), unrealistic projected 26-month volume based on past production problems, and the manner in which ETC used contract billings to meet other obligations. Thus, while the original determination was in large measure made on the basis of ETC's lack of capacity, the SBA declined to issue a COC due to its findings not only as to capacity but also as to credit. After conducting the review, DCASR stated that

based on information gathered during an April 29, 1975, visit to ETC's plant by its technical representatives, it was the considered opinion of the review team that ETC could not meet the delivery schedule set forth in the IFB. This conclusion was reached even though ETC had proposed a new production plan. The review indicated that ETC's constant changes in methods, procedures and controls had a serious effect on overall production and the required delivery schedule. Therefore, it was decided to reaffirm the "no award" recommendation due to problems of compliance with the delivery schedule. Upon consideration of this supplemental data, the contracting officer affirmed his earlier determination that ETC was nonresponsible.

The protester contends that neither the contracting officer's initial nor supplemental report to this Office provides a reasonable basis for the determination of nonresponsibility. In this regard, as we indicated in Leasco Information Products, Inc., 53 Comp. Gen. 932 (1974), 74-1 CPD 314, it is not the function of this Office to determine whether a prospective contractor has demonstrated a capability to perform the contract, but rather our function is to review the record to determine whether the contracting officer's exercise of judgment and discretion in finding the prospective contractor nonresponsible was reasonable under the circumstances. In these matters, this Office will not substitute its judgment for that of the contracting officer unless the contracting officer's determination of nonresponsibility was without a reasonable basis. American Safety Flight Systems, Inc., B-183679, August 5, 1975, 75-2 CPD 83; Raycomm Industries, Inc., B-182170, February 3, 1975, 75-1 CPD 72; see Development Associates, Inc., B-181826, January 27, 1975, 75-1 CPD 51.

The protester contends that DCASR failed to give consideration to the changed production methods and better utilization of technical personnel proposed by ETC during the second preaward survey. This is said to be in contravention of ASPR § 1-905.2 (1974 ed.) which requires data regarding a prospective contractor's performance capability to "be obtained on as current a basis as is feasible with relation to the date of contract award." Similarly, we have held that information going to the prime basis upon which the determination of nonresponsibility was founded should not be ignored. Harper Enterprises, 53 Comp. Gen. 496 (1974), 74-1 CPD 31. Where the prime basis of the nonresponsibility determination is, as here, the bidder's alleged inability to meet the required delivery schedule, a failure to consider proposed alternate methods of meeting these requirements would be a serious omission.

ETC implies that the review failed to take into account (1) ETC's proposed use of a second shift to accelerate the output on its present contract from four units per month to five units per month so as to reduce any overlap with the proposed contract (i.e., complete present contract production before production began on the proposed contract), (2) its proposed use of additional space at the Newtown Industrial Park, and (3) the proposed shift of ETC's "most qualified technical expert" from the present contract to the proposed contract.

With regard to the second shift question, the report of the review by the four Government representatives who visited the ETC plants indicates that ETC proposed to overcome the problem of contract overlap in accelerating production under its present contract to five units per month with total assembly at the Newtown plant. However, while the report recognized that ETC's proposed production plan differed from the one proposed during the initial preaward survey,

> "* * * [there was] still a question of doubt whether or not this contractor can accelerate on his present program to at least five [units] per month to overcome the production overlap. This area is strictly judgmental and contractor indicated that 'second shift' work would cure all problems."

The report's reference to ETC's proposed use of the second shift and the change of personnel in the manufacturing operation clearly indicates that the review team did not ignore ETC's proposed production modifications.

The review team noted that due to space limitations at the Newtown plant it was impossible to establish the 10 work stations ETC proposed to use and still maintain efficient production. ETC indicated, therefore, that additional space could be rented in the Newtown Industrial Complex. While the report of the review did not specifically comment either favorably or unfavorably upon the latter point, it seems clear that the matter was before the review team and it remained of the view that concurrent production was unavoidable, since ETC's present contract had to be amended to compensate for time delays caused by change orders.

We believe that it is significant to note that the narrative portion of the initial preaward survey, in reviewing the production schedule of ETC's present contract for similar items along with that of the proposed schedule, also indicated that there would be an overlapping of the two contracts in the months when the first article

test model and the maintenance capability model would be due on the proposed contract and during the initial production period. This, it was stated, "could create an overlapping at the Newtown plant." While the report went on to discuss the fact that ETC then proposed to overcome this overlapping by (1) accelerating production on its present program, and (2) using its Southampton plant, the survey team specifically pointed out the problems of an interplant transfer of operations.

ETC references its letter to the contracting officer of April 18, 1975, to support the position that the production schedules of the present contract for 1,500 GPH units and that of the proposed contract for 3,000 GPH units are so staggered that the major demand for technical assistance on the 1,500 GPH water purifier will have abated by the time the development phase of the proposed contract is underway. Moreover, ETC, in that letter, argued that while the survey was not incorrect in concluding that delays were occurring in the present ETC contract for the 1,500 GPH units (which could, as the team found, create or accelerate production overlapping if the proposed contract were awarded to ETC), the survey failed to note that these delays were caused by the late receipt of Government-furnished property and deficient Government-furnished drawings for which an extension was sought to April 30, 1975, for delivery of a first article.

It is true that in a review of the contractor's past and present performance record the question of which party, the Government or the contractor, was the cause of delay is critical. However, where the question is whether or not there will be a production overlap, even if this was caused by some fault of the Government, the fact still remains that the overlap exists. If that overlap is determined to seriously impair the prospective contractor's ability to meet the required delivery schedule, that is in no way lessened by the fact that the Government may have been the causative factor. The inquiry is into the productive capability of the prospective contractor at the relevant time and who caused the diminution of the capacity is irrelevant to the matter of determining the ability to meet the production schedule.

ETC's comparative delivery schedules for the present and proposed contracts, as of April 18, 1975, indicated the following:

	"1975								1976												1977					
	M	1 J	2 J	3 A	4 S	5 O	6 N	7 D	8 J	9 F	10 M	11 A	12 M	13 J	14 J	15 A	16 S	17 O	18 N	19 D	20 J	21 F	22 M	23 A	24 M	25 J
Proposed Contract IFB #-1131 45 each 3,000 GPH WPU	Awd 5/31/75								2							4	4	4	4	4	4	4	4	5	5	2
Present Contract Contract #-9495 * 50 each 1,500 GPH WPU	2				4	4	4	4	4	4	4	4	4	4	4	4										

*NOTE: This schedule will probably be pushed back an estimated one month because of additional drawing discrepancies."

Based on this comparison, ETC stated:

> "* * * DCASD finds that an overlapping of the two contracts in the months when, under the proposed contract, the First Article and MCM [maintenance capability model] are due while under the present contract production is in progress, an overload situation would develop. In fact, the additional workload amounts to producing two additional units beyond the four (4) being produced under the present contract. Any overlapping of this nature would occur for only a short period. * * *" (Emphasis supplied.)

ETC also stated:

> "* * * It can be easily seen that the present contract will be well into production when the First Article and Maintenance Capability Model are due on the proposed contract, approximately in January 1976. Typically, technical assistance needs are sharply reduced during the production phase of a contract of this type. Therefore, ETC's project engineer will be available approximately 90 percent of his time for the proposed contract, and still available if needed for the present contract." (Emphasis supplied.)

The April 29, 1975, review team report specifically addressed this question:

> "* * * It must be recognized that an overlap will occur, because the present contract must be modified to compensate for the delays caused by the change order being generated. In fact each change order (ECP) presented by the contractor defines the effect on production delivery schedule as 'Delays performance 30 days,' and/or 'Delay FA [(First Article)], MCM and Production 30 days.' Therefore since present contract must be amended to compensate for the time delays caused by the change orders. Concurrent production is unavoidable.
>
> "In other words, the more time it takes to purify the technical package through Engineering Change Proposals the longer it takes to obtain a First Article approval, the more impact the present contract will have on the proposed award." (Emphasis supplied.)

Incidentally, ETC has indicated that the date set for delivery of first article has been extended to August 31, 1975.

From the foregoing, we believe that a reasonable basis existed for the review team's recommendation upon which the contracting officer determined that ETC was nonresponsible in the area of capacity. However, ETC states that since the author of the report of the review "concluded that no contractor could perform the contract, it is not surprising that he also concluded that ETC could not do so."

The portion of the review which allegedly reached this conclusion stated:

> "* * * during the * * * interview, the team reviewed some of the material requirements of the proposed bid; namely required Steel (Cor-ten) used in the formed shapes of the van body. Contractor advised that this was not a requirement in the bid package since the parts for the van body dwg. 13208E9605 did not specify this material for the structual shapes. Contractor contended that this implied selection was at the discretion of the contractor. Upon review, the piece parts drawing did specify 606 (Cor-ten) type steel. Contractor was advised that if he planned to use A366 type steel, authorized on the present contract, a deviation would be required. Further discussion, inferred that the technical package could be deficient as developed on the 1500 GPH units, but possibly not in the same magnitude. This in itself could prevent any prospective bidder from meeting the desired schedule."

As can be seen, the question of whether any bidder could meet the delivery schedule was mentioned only in the context of the deficiency of the technical package and was not stated with regard to the capacity of any firm. The question of the deficiency of the technical package will be addressed below. The fact remains, however, irrespective of any such defect, the report of the review concluded that ETC would have a production overlap which would seriously impact on its ability to meet the delivery schedule and this provided the necessary basis for the nonresponsibility determination.

We note also that the SBA denial of a COC has been held to be an affirmation of a contracting officer's determination of nonresponsibility. Unitron Engineering Co., B-181350, August 20, 1974, 74-2 CPD 112; Marine Resources, Inc., B-179738, February 20, 1974,

74-1 CPD 82. See also Building Maintenance Specialities, Inc., B-181986, February 28, 1975, 75-1 CPD 122. Further, in this instance, SBA also raised a question with regard to ETC's financial situation. In the Marine Resources decision, supra, it was stated that although SBA considered a bidder nonresponsible on a different basis than found by the contracting officer initially, in view of the SBA finding, this Office was unable to conclude that the contracting officer's subsequent determination was without a basis in fact. The SBA action therefore provides credence for the contracting officer's finding although his determination of responsibility even if based on ETC's capacity alone was not without a reasonable basis.

Rejection of the Ball Bid

The supplemental report of the contracting officer states:

> "The second lowest bid on DSA 700-75-B-1131 was submitted by A. C. Ball but this bid was rejected after a negative pre-award survey because the 30-day bid acceptance period specified by A. C. Ball expired before any extension was granted and could not thereafter be extended. After the expiration of the 30-day bid acceptance period, A. C. Ball's bid could no longer be considered for award and was therefore properly rejected (42 CG 604)."

However, ETC (1) challenges the fact that a preaward survey was conducted; (2) indicates that Ball was not contacted prior to the expiration of its bid and requested to extend its bid acceptance period although a request was made of Met-Pro, on three occasions; and (3) states that after the expiration of its bid acceptance period Ball was willing to accept award at its bid price and thus should have received award.

The Ball bid on Standard Form 33 (November 1969 ed.) contained the following provision with regard to the bid acceptance period:

> "In compliance with the above, the undersigned offers and agrees, if this offer is accepted within ___ calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered at the price set opposite each item, delivered at the designated point(s)."

By inserting "30" in the blank space provided for the indication of an acceptance period, Ball provided 30 days for acceptance of the bid.

The matter is on all fours with the decision in 42 Comp. Gen. 604 (1963). There the IFB also contemplated a 60-day bid acceptance period, but allowed bidders to indicate a shorter period which the low bidder did, i.e., 20 days. The procurement regulations (Federal Procurement Regulations § 1-2.404-1) were similar to the regulations (ASPR § 2-404.1(c) (1974 ed.) pertaining to military agencies in that they provided that, where there may be a delay in award beyond the bidders' acceptance periods, "The several lowest bidders should be requested, before expiration of their bids, to extend the bid acceptance period." Nevertheless, the low bid was allowed to expire. After being informed that its bid could no longer be considered for award due to the expiration of the acceptance period, the bidder (E and M) extended the bid. However, the agency refused to award the contract to E and M and proposed an award to the second low bidder. The rationale for the action was as follows:

> "In explanation of the refusal to consider the E and M bid for an award it is stated that the low bidder deliberately selected a period of 20 days for acceptance rather than granting the Department the usually contemplated bid acceptance period of 60 days; that due to the unusual conditions existing at that time the Department did not act within the 20-day acceptance period; that it is the Department's view that the low bidder assumed the risk of its bid acceptance period expiring before an award could be made; that after its bid expired, E and M had the legal right to refuse to accept any award the Department might make to it; and that to now allow the E and M bid to be considered would have the effect of giving that bidder an option after bid opening to accept or reject an award as it thought best. In the circumstances, it is stated that it is proposed to award the contract to Armstrong, the second low bidder, whose bid of $18,000 is $302.76 more than the low bid." 42 Comp. Gen., supra, at page 605.

This Office agreed with the agency's position and indicated that, while there may have been a duty imposed on the contracting officer by the regulations to request an extension of the acceptance period prior to expiration of the bid, there was also an obligation on the part of the bidder to check with the contracting officer before the bid expired if it had a continuing interest in the award. Further, ASPR § 2-404.1(c) (1974 ed.) cited by ETC as creating a duty on the part of the contracting officer to seek extensions of expiring bid acceptance periods has been held to be inapplicable

where, as here, only the bid of a bidder who chose to limit its acceptance period would expire. B-162000, September 1, 1967.

In 42 Comp. Gen., supra, it was concluded that the integrity of the competitive bidding system would best be served by an award to the second low bidder. This view was amplified in 46 Comp. Gen. 371, 373, (1966) which distinguished 42 Comp. Gen., supra, on the basis that in the later decision the bidder whose bid had expired had not sought and gained an advantage in the nature of an option not sought by the other bidders, i.e., it did not gain the ability due to any initially short acceptance period (the expired bid had agreed to the contemplated 60-day acceptance period) to renew the bid in short increments or allow it to lapse as dictated by market conditions. Accord: Mission Van & Storage Co. Inc., B-180112, April 15, 1974, 74-1 CPD 195.

As summarized in 46 Comp. Gen., supra, at page 373:

> "* * * The issue presented [in 42 Comp. Gen. 604] was whether award should be made to the low bidder [who was willing to accept] not whether a valid award could be made since we recognized that if an award were made to the low bidder, it was probable the courts would hold that the resulting contract would be enforceable. However, we concluded that such an award would compromise the integrity of the competitive bidding system. * * *"

ETC contends that award should have been made to Ball since it was willing to accept award and, unlike the situation in 42 Comp. Gen., supra, where the difference in bids was "a mere $300," the difference in price between the Ball and the Met-Pro bids was approximately $500,000. We do not agree. The discussion in 42 Comp. Gen., supra, of preserving the integrity of the competitive bidding system was not concerned with balancing the advantage gained by E and M against the additional cost to be incurred by the Government if award were to be made to the next low bidder. In implying that this was the case, ETC confuses two concepts: (1) the harm to the integrity of the competitive system which is either substantial or not and (2) the reasonableness of the next low bid price (a matter which is discussed below). With respect to the first point, this Office has said on many occasions that a mere monetary savings is insufficient to allow the integrity of the competitive bidding system to be compromised.

Reasonableness of Met-Pro Bid

If, as ETC contends, the Met-Pro bid ($2,330,925) was unreasonably high, an award to it would not have been in the Government's best interest. See ASPR § 2-404.1(b)(vi) (1974 ed.) and ASPR § 2-404.2(e) (1974 ed.) which provide for rejection of unreasonably high bids.

The report of the contracting officer states that Met-Pro's prices were determined to be fair and reasonable "because of the competition obtained on a previous contract and the competitive atmosphere of this procurement." The Price Analysis Report indicated that on a 1968 procurement upon which adequate price competition was obtained Met-Pro had bid $27,594.20 for the same basic item. Accordingly, Met-Pro's $50,283 price in the instant procurement indicated a price increase of 82.2 percent since 1968 while the Bureau of Labor Statistics Wholesale Price Index showed an approximate increase of 76.3 percent from May 1968 to March 1975 for this type of item. Although the price analysis recognized that the Index was not conclusive and only an indication of trends, it also noted that the 1968 procurement called for delivery in 260 days rather than the average of 487 days in the instant contract. Furthermore, Met-Pro's price ($55,900) for First Article Testing (Contract Line Item 13) was determined to be in line, in view of the cost of (1) producing the article in a separate production run, (2) reconditioning the test model prior to shipping as the last unit on the contract, and (3) the testing cost itself. The analysis concluded that Met-Pro's prices were fair and reasonable, having been obtained in a competitive atmosphere; comparing favorably to prices paid on the previous competitive procurement in 1968 adjusted for increase production costs on the procurement and taking into consideration the longer production lead times on this procurement.

In General Fire Extinguisher Corp., 54 Comp. Gen. 416 (1974 ed.) 74-2 CPD 278, it was stated that where an award is made only after the contracting officer ascertains that the bidder's price is fair and reasonable on the basis of price analysis, this Office cannot say that the award was illegal. In the cited case, as here, the price analysis stated that the proposed contract price was obtained in a competitive atmosphere and compared favorably to prior procurements. Under these circumstances we cannot disagree with the contracting officer's determination to award to Met-Pro.

Extension of Met-Pro Bid

ETC implies that the agency acted improperly in requesting Met-Pro on three separate occasions to extend its bid acceptance period while "[f]or some reason, the Contracting Officer was not nearly so solicitous of any of the other lower bidders * * *." In this regard, we believe that it is important to review the chronology leading up to the award. Bids were opened on January 31, 1975. As noted above, the agency had no duty to seek an extension of Ball's bid which offered less than the contemplated 60-day acceptance period. Therefore, Ball's bid expired on March 2, 1975.

During the month of March, ETC was engaged in discussions surrounding the agency's initial determination of nonresponsibility and was fully aware that question had been sent to SBA for its determination regarding the issuance of a COC. Indeed, the agency by telegram of March 20, 1975, advised ETC that the SBA decision was expected by the close of business on April 2, 1975, which was the day after ETC's 60-day bid acceptance period was to have expired. It is true that the agency did not seek an extension of ETC's bid, but ETC's course of dealings with the agency indicated a continued interest in an award. Moreover, even if ETC's bid expired, since it had not limited the acceptance period to less than that contemplated by the agency, upon being found responsible award could have been made to it provided it was willing to accept award. 46 Comp. Gen., supra. There was, however, no such course of dealings between the agency and Met-Pro upon which to conclude that Met-Pro still intended to keep its bid open and the fact that Met-Pro filed a protest with the agency was not necessarily determinative. See 52 Comp. Gen. 863 (1973), affirmed, B-177165, August 23, 1973. Therefore, the agency's request, made prior to March 24, 1975, that Met-Pro extend its bid until April 20, 1975, was appropriate and in accordance with ASPR § 2-404.1(c). A similar request of ETC would not have been improper. The subsequent requests made of Met-Pro seeking additional extensions of its bid were likewise proper and in accordance with ASPR.

The Specifications

The sole basis relied upon by ETC to support its contention that the IFB was defective is a quotation from the letter released to ETC under the Freedom of Information Act from the commander of DCASR, Philadelphia, to the contracting officer concerning the review teams reexamination of ETC's responsibility.

The letter stated:

> "The data package discrepancies detected on the 1500 GPH and 600 GPH at ETC and similar findings on the 420 GPH units currently at Met Pro led us to question whether any contractor can meet the IFB requirements. As a result, it is recommended that consideration be given to withdrawing this solicitation until the data package can be stabilized. Such a decision could prevent future contract delays and potential claims against the government."

Upon receipt of this letter, the contracting officer checked with the requisitioning activity, the United States Army Troop Support Command, which indicated that (1) the technical data package (TDP) was the most current obtainable, (2) there were no known changes and (3) the package was adequate for fiscal 1975 procurements. The Command stated: "strongly recommend procurement by utilization of the TDP that has been provided."

In view of the above, we are unable to conclude that the specifications were defective. In any event, ETC as a current contractor for water purfication equipment was in a position to know prior to bid opening whether any discrepancy found in the data package on the current contract items existed in the data package on the proposed contract. Therefore, it was inappropriate for ETC to protest the adequacy of the specifications only after it learned that it was no longer in line for award. It was incumbent upon ETC to bring any discrepancy to the agency's attention before bid opening. In that regard, the Bid Protest Procedures provide:

> "Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening * * *." § 20.2(b)(1), 40 Fed. Reg. 17979 (1975).

Under the circumstances, no further comment on this point is necessary.

In view of the foregoing the ETC protest is denied.

In reaching this decision, no consideration was given to a second supplemental agency report which was unsolicited and was sent more than a month after the date of the ETC letter it was commenting upon. In that regard, § 20.3(d) of the Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), provides:

> "* * * Unsolicited agency rebuttals shall be considered if filed within 5 [working] days after receipt by the Agency of the comments to which rebuttal is directed."

Further, an agency report of October 24, 1975, received October 28, 1975, furnishing additional information as to the reasonableness of the Met-Pro bid price, was not considered necessary to the disposition of the protest and therefore was not evaluated in arriving at a decision on the protest.

R. F. Keller

Deputy Comptroller General
of the United States