

14037 PL-3

DECISION



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

FILE: B-198757

DATE: June 16, 1980

MATTER OF: Isometrics, Inc.

DLG 4798

DIGEST:

1. Bid which takes no exception to requirement that Federal Excise Tax be included in bid price is responsive since bid binds bidder to perform in accordance with invitation tax requirement.
2. No legal basis exists to preclude contract award merely because low bidder submitted below-cost prices.
3. Review of affirmative determinations of responsibility are not made except in cases of fraud or misapplication of definitive responsibility criteria set forth in solicitation, neither of which is alleged.

Isometrics, Inc., ^{Against} protests any award of ~~a~~ contract for various trucks to the apparent low bidder, the Elliott Machine Works, under United States Army Tank-Automotive Materiel Readiness Command invitation for bids No. DAAE07-80-B-5221 on the basis that the low bid is nonresponsive to the terms of the invitation. DLG04
DLG02

The alleged nonresponsiveness results, it is contended, from the failure of the low bidder to include the Federal Excise Tax (F.E.T.) in certain of its prices as was required by the Defense Acquisition Regulation (§ 7-103.10(a)) (1976 ed.) provision in the invitation. The contention that the tax was not included in the items which were not tax-exempt is based upon the following comparison of the prices submitted by Elliott and Isometrics on two invitation items:

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Item	Tax status	Isometrics	Elliott
LAE	taxable	\$30,969	\$29,025
LAF	tax-exempt	28,464	27,525
	difference	\$2,505	\$1,500

As both of these items are the same type of truck and both are priced on an F.O.B. origin basis, the sole differences between the item prices, it is noted, arise from the applicability of the F.E.T.

The total F.E.T. applicable to item LAE is \$2,404, Isometrics advises, of which \$1,008 is attributable to the General Motors chassis for the unit and \$1,396 is attributable to the body and equipment. Since both Isometrics and Elliott are purchasing the chassis from General Motors and must pay to General Motors, as part of the purchase price, the \$1,008 in F.E.T. for the chassis, it is allegedly apparent that the Elliott price on the taxable item includes a maximum \$492 in F.E.T. for the body and equipment. Because the total applicable F.E.T. for the body and equipment is \$1,396, it is consequently believed that Elliott failed to include the entire applicable F.E.T. in its price for item LAE and the Elliott bid should have been considered nonresponsive.

We do not agree. There is nothing in the Elliott bid to indicate that it does not intend to pay the F.E.T. No exception was taken in that bid to the requirement that the F.E.T. be included in the appropriate bid prices. Since the bidder has submitted an offer to perform, without exception, pursuant to the terms of the invitation F.E.T. requirement and will be bound to so perform, we cannot say that the Elliott bid is nonresponsive for the reason advanced by Isometrics. 37 Comp. Gen. 864 (1958); The Entwistle Company, B-192990, February 15, 1979, 79-1 CPD 112. The cases cited by Isometrics in support of its contention are inapposite since they involved bids wherein notice was given in the bids that prices did not include the applicable taxes.

If the protest is interpreted as one against the submission by Elliott of a below-cost bid, if a bidder has been found to be otherwise responsible the fact that it may have submitted a below-cost bid does not constitute a legal basis for precluding or disturbing a contract award.

Ira Gelber Food Services, Inc., B-196868, February 27, 1980, 80-1 CPD 161. As regards the issue of responsibility, our Office does not review protests of affirmative determinations of responsibility unless fraud on the part of the procuring officials is alleged or the invitation contains definitive responsibility criteria which allegedly have not been applied, neither of which is alleged here. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Bowman Enterprises, Inc., B-194015, February 16, 1979, 79-1 CPD 121.

Accordingly, the protest is summarily denied in part and dismissed in part.



Acting Comptroller General
of the United States