



Comptroller General
of the United States
Washington, D.C. 20548

1159197

Decision

Matter of: Eastern Trans-Waste of Maryland, Inc.
File: B-250991.2
Date: July 19, 1993

Kendall O. Baldwin for the protester.
Carolyn D. Talley, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Bidder that is reasonably found not able to perform at its bid price and that in fact expects an increase in bid price is not eligible for award and thus is not an interested party to protest the cancellation of the invitation for bids.

DECISION

Eastern Trans-Waste of Maryland, Inc. (ETW) requests reconsideration of our dismissal of its protest challenging the post-bid opening cancellation of invitation for bids (IFB) No. F49642-92-B-0006, issued by the Department of the Air Force for refuse collection, disposal and recycling at Bolling Air Force Base, Washington, D.C. We dismissed ETW's protest in Eastern Trans-Waste of Md., Inc., B-250091, Mar. 2, 1993, 93-1 CPD ¶ 192, finding that ETW was not an interested party.

We affirm the dismissal.

The Air Force received nine bids in response to the IFB by the April 27, 1992, bid opening date. ETW submitted the low bid. During the 4-month period after bid opening during which ETW's responsibility was being assessed, the landfill/dumping fees for the area, which were a large portion of the bid prices, increased significantly. The Small Business Administration (SBA) advised the Air Force that this significant increase was beyond the fees which were anticipated and reflected in the bids, including ETW's, and that none of the small business bidders had the financial capacity to complete the contract requirements at the prices bid. After confirming this advice, the Air Force canceled the IFB, determining that no bidder could perform the work at the

prices bid. The services are being obtained through the section 8(a) program.

In its protest, ETW claimed that the agency lacked a cogent and compelling reason to cancel the IFB since an amendment to the IFB issued prior to bid opening provided the means to allow for an equitable adjustment for the increase in landfill/dumping fees. That amendment contained an answer to a prospective bidder's question stating that the contractor would be reimbursed any certified increases in landfill/dumping fees during the contract.

We dismissed ETW's protest because it was not an interested party under our Bid Protest Regulations, which define an interested party as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 4 C.F.R. § 21.0(a) (1993). We found that ETW lacked the requisite direct financial interest to protest the cancellation because ETW could not perform at its bid price and because ETW apparently expected its bid price to be adjusted upwards to reflect the significantly higher fees, an increase which could not be legally accomplished.

On reconsideration, ETW argues that the SBA never found that it could not perform at its bid price and that our decision is therefore in error, inasmuch as ETW can in fact perform at its bid price. However, the record provided adequate documentation, in the form of several memoranda by Air Force officials memorializing their conversations with the SBA representative, of the fact that although the SBA never ruled on the certificate of competency for ETW, the SBA representative advised the Air Force that ETW and all other bidders could not perform at their bid prices because of the dramatic increase in landfill/dumping fees that occurred after bids were submitted and before award could be made.

In any case, ETW confirms in its reconsideration request that it would expect its bid price to be adjusted to reflect the increased fees. While ETW does not specifically condition accepting the award on receiving such an adjustment, it is clear that it would claim it. As explained in our prior decision, it is fundamental that a bidder is required to perform at the price bid in its original submission, and that its price may not be adjusted upwards to account for factors not included in the calculation of the bid or contingencies that may occur subsequent to bid opening but prior to award. See General Elevator Co., Inc., 57 Comp. Gen. 257 (1978), 78-1 CPD ¶ 81. Since a bidder must keep its original bid price available for acceptance by the government without adjustment, any increase in the bid price would in fact change the terms of the bargain for the

government. GTA Container, Inc., B-234395.3, July 12, 1989, 89-2 CPD ¶ 37. Such an adjustment would result in unfairness to other bidders who, if they had been able to compete on the same basis of expecting their bid prices to be adjusted to reflect any increases in fees during the period from bid opening to award, might have submitted more competitive bids, thereby resulting in a better price to the government. Thus, any request by a bidder for upward adjustment in its bid price to account for factors not included in the bid constitutes, in effect, a refusal to keep the bid available for acceptance by the government without adjustment, thereby disqualifying that bid for award. Id.; Steenmeyer Corp., 61 Comp. Gen. 384 (1982), 82-1 CPD ¶ 445.

Since ETW could not receive award under the IFB, it is not an interested party eligible to protest the cancellation of the IFB. The dismissal is therefore affirmed.

Ronald Berger

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Associate General Counsel