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DECISION

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

FILE: B-212395.2, B-212395.3, B-212395.4, B-212395.5 **DATE:** April 24, 1984

MATTER OF: Swintec Corporation, Canon U.S.A., Inc., Olympia USA, Inc., Guernsey Office Products

DIGEST:

1. Letter stating grounds of protest and intent to file protest with the General Accounting Office if agency fails to take corrective agency action constitutes protest to agency, and protest filed with GAO within 10 working days of initial adverse agency action is timely.

2. Where protesters undisputedly offered product conforming to solicitation item description, but agency decides to evaluate offers on the basis of features not stated in the item description, the agency must inform offerors of the change and permit them an opportunity to revise their proposals.

3. Protest against alleged improprieties in solicitation is dismissed where protester would not be eligible for award because its product is nonresponsive to the solicitation even if the issues raised were resolved in its favor.

4. Protest against solicitation impropriety which was not filed prior to bid opening either with the agency or GAO is untimely filed under GAO Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983).

5. Bidder's complaint that it only received an amendment 3 days before bid opening and therefore did not have adequate time to consider it in preparing the bid does not affect the validity of the award. The agency issued the amendment in sufficient time to permit bidders to consider it in bid preparation, and the propriety of the procurement therefore depends on whether the government obtained adequate competition and reasonable prices, not on whether some prospective bidders in fact failed to receive the amendment in time to consider it.

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6. Where protester seeks correction of defects in testing methodology and application which protester alleges materially affected bid price evaluation under solicitation and requests termination of contract and resolicitation of requirement, protester is a sufficiently interested party to assert protest under our Bid Protest Procedures.

7. Contention that life-cycle cost (LCC) testing methodology and application incorporated into solicitation is defective is denied where protester has not shown that agency methodology and application were unreasonable or prejudiced protester.

Canon U.S.A. (Canon), Swintec Corporation (Swintec), Olympia USA, Inc. (Olympia), and Guernsey Office Products (Guernsey) protest a number of different aspects of invitation for bids (IFB) FGE-C4-75249-A issued by the General Services Administration (GSA). The IFB solicits a single award, government-wide requirements contract for single element, electric/electronic and typebar typewriters for the period from the date of award through September 30, 1984. An award was made under the IFB to International Business Machines (IBM). Swintec and Olympia also protest the rejection of their offered typewriters under GSA's multiple-award schedule (MAS) solicitation YGE-B8-75246, for electronic typewriters capable of automatic typing and temporary storage.

Each protester's allegations will be discussed separately below, except where the same issues are raised by different protesters, in which case we will consider them together.

We sustain Swintec's and Olympia's protest of the MAS contract. We deny in part and dismiss in part the various protests under the single award IFB.

Swintec Corporation

Swintec protests GSA's allegedly arbitrary rejection of Swintec's offer of its model 1146CM electronic memory typewriter under the MAS solicitation. Swintec also protests GSA's failure to properly synopsize its intention to include electronic typewriters in life-cycle cost (LCC) tests to develop a list of typewriters eligible for competitive contracts, specifically, a single award under solicitation, FGE-C4-75249-A. Finally, Swintec argues that the procedures and criteria developed by GSA for LCC testing are faulty and exceed the government's minimum needs.

We note that in a prior decision, Swintec Corporation, B-212395, August 8, 1983, 83-2 CPD 184, we concluded that Swintec's protest against the MAS procurement was untimely and not for consideration on the merits. However, we did request a report from GSA concerning the possible disqualification of Swintec from competing on a future Federal Supply Schedule (FSS) procurement, subsequently identified as the single award IFB, because its product would not be included on a qualified products list for that procurement.

Swintec timely requested reconsideration of our ruling that its protest of the MAS contract was untimely.

Concerning the timeliness of Swintec's MAS protest, we now agree with Swintec that the protest is timely. In our decision, we held that a Swintec letter of June 10, 1983, to GSA resubmitting its offer under the MAS was not a protest. This letter advised GSA that Swintec intended to file a protest with the GAO if its resubmitted offer was not accepted or it was not given the opportunity to compete under the single award solicitation. We concluded that Swintec's protest to GAO on July 15, 1983, filed more than a month after it learned the basis of protest, was untimely.

However, Swintec points out that in a decision, Office Products International, Inc., B-209610, April 5, 1983, 83-1 CPD 363, we interpreted a letter of intent to protest filed with the agency as a protest where it contained language similar to that used in Swintec's letter, showing awareness of the basis of protest and seeking corrective action from the agency. See Office Products International, supra. At the time Swintec filed its protest with GAO on July 15, 1983, GSA had not returned the resubmitted offer or responded to Swintec's letter. Swintec only learned that GSA would not change its position that Swintec's product was not eligible for consideration under the MAS at a meeting on July 11, 1983. Under these circumstances, Swintec's protest of the rejection of its offer for the MAS is timely.

GSA states that the MAS solicited electronic typewriters with text or page format memory capabilities. GSA states that text memory is an electronic memory built into the typewriter which can be loaded with any text. That text can later be printed by the typewriter under a simple command procedure. Page format memory describes the ability of the typewriter memory to store prerecorded forms for later use. It allows for the storage of combined tab and index movements. According to GSA, Swintec's typewriter does not have either of these features, and as a result, its

offer was rejected under the MAS. Because it was GSA's view that the model Swintec offered had limited memory capabilities, it was determined that the model offered belonged under the single award solicitation for electric and electronic original document typewriters which have either no memory or limited memory capabilities and which required LCC testing. However, in this regard GSA points out that the Swintec typewriter to be offered under the single award solicitation offers less than the required paper capacity and, thus, Swintec would not have been eligible for award under the single award procurement had its typewriter been submitted for LCC testing.

With regard to the rejection of Swintec's bid under the MAS, we sustain Swintec's protest. GSA reports that it rejected Swintec's bid because it did not have either of two features, text memory or page format memory. However, we do not find either of these requirements were explicitly required under the MAS item description which provides as follows: "Typewriter, electronic - machines capable of automatic typing with temporary storage ability without the use of storage media."

Swintec states that its model 1146CM meets this description in that it can automatically retype the previous 46 characters typed without use of storage media when required to make corrections. GSA has not refuted this statement, but rather relies on the failure of the model to feature text or page format memory, which are not stated specification requirements. Thus, in our view, the rejection of Swintec's bid on the basis of an unstated specification requirement was unreasonable and we sustain Swintec's protest. With regard to a remedy, we recommend that GSA determine whether or not the existing item description reflects its minimum needs. If GSA concludes that the above item description is appropriate, it should award Swintec a contract under this MAS. If GSA concludes user needs include the text or page format memory, which appears to be GSA's position, GSA should determine whether all listed contractors meet this requirement. In any event, future MAS procurements should reflect GSA's needs.

We note in this connection that Olympia protests that its model ES100S/SC was rejected under the MAS for lack of phrase memory capability which is not a stated requirement. We sustain this protest and include Olympia's offer under the recommendation above, if its model is otherwise acceptable.

With regard to Swintec's protest against the single award solicitation, and the LCC testing procedures and criteria used, we agree with GSA that Swintec is not an interested party under our Bid Protest Procedures. Under our Bid Protest Procedures, a party must be "interested" before we will consider its protest allegations. 4 C.F.R. § 21.1(a) (1983). Whether a party is sufficiently interested depends upon the degree to which its interest in the outcome is both established and direct. In general, we will not consider a party's interest to be sufficient where that party would not be eligible for award, even if the issues raised were resolved in its favor. Anderson Hickey Company, B-210252, March 8, 1983, 83-1 CPD 235.

Swintec challenges the allegedly improper notice given for the LCC testing and also protests the LCC testing methodology incorporated into this solicitation. However, the IFB required typewriters with a maximum paper width of between 15 and 18 inches, and Swintec's offered model 1146CM has a 14-inch carriage. Thus, Swintec's model does not meet the minimum carriage requirements and is ineligible for award regardless of LCC considerations. Accordingly, we will not consider Swintec's protest regarding the LCC testing procedures because the firm is not an interested party. Anderson Hickey Company, supra.

Furthermore, Swintec's protest of the 15-inch carriage capacity requirement is untimely. Swintec did not protest this requirement here until December 14, 1983. Bids were opened October 14, 1983. Our Bid Protest Procedures require that a protest based upon alleged improprieties in the IFB which improprieties are apparent prior to bid opening, must be filed prior to bid opening. 4 C.F.R. § 21.2(b)(1) (1983), M&M Services, Inc., B-210818.2, March 25, 1983, 83-1 CPD 308.

Guernsey Office Products

Guernsey Office Products (Guernsey), a dealer for Royal Adler Typewriters (Adler), protests that it was permitted insufficient time to consider the two amendments to the single award IFB, and this effectively precluded it from competing under the IFB. Guernsey asserts that having participated in the LCC testing, it earned the right to have its bid considered under this IFB. Amendment No. 1, dated October 6, 1983, made a number of revisions, including extending the bid opening date to October 14. It also requested one price for delivery within the continental United States, rather than a separate price for each of the 13 geographical zones listed in the original IFB. Amendment

No. 2 dated October 11, 1983, further revised the scope of contract clause to make the contract mandatory for most departments and independent establishments, but did not further extend the bid opening date.

We agree with GSA's position that Guernsey's participation in the LCC testing did not guarantee Guernsey any right to bid on future contracts. By letter dated September 21, 1982, announcing the LCC testing program, GSA informed potential suppliers that the purpose of the program was to establish LCC data for specific machines which the government would procure in the future. Thus, bidders were advised the testing established eligibility to bid future solicitations, and nothing more.

Guernsey also argues that the amendment limiting suppliers to bid one price for national coverage rather than permitting bids for geographical zones, issued so close to bid opening, did not permit sufficient time to seek alternative arrangements with its supplier. Guernsey argues it received amendment No. 1 by mail and also picked up from GSA a copy of amendment No. 2, on October 11, 1983, 3 days before bid opening. Guernsey argues that because of inadequate time to respond to the change to a national bid under amendment No. 1, it could not submit a bid.

Federal Procurement Regulations § 1-2.207(c) requires that prospective bidders be given sufficient time to consider amendments. Here, GSA reports that it forwarded amendment No. 1 to bidders on Octber 6, 1983, 7 days prior to bid opening and notified parties of amendment No. 2 on October 11. It further states that since nine bids were received, eight of which included acknowledgment of both amendments, and contract prices were 10 percent better than the previous year's contract prices, and 41 percent better than commercial prices for this item, both adequate competition and reasonable prices were obtained. We have consistently held that the contracting activity has discharged its responsibility when it issues and dispatches an amendment in sufficient time to permit all the prospective bidders to consider the information in preparing their bids. The propriety of a particular procurement generally does not depend on whether some prospective bidders, in fact, fail to receive an amendment in sufficient time to consider it in preparing their bids, but on whether the government obtained adequate competition and reasonable prices. Space Services International Corporation, B-207888.4, .5, .6, .7, December 13, 1982, 82-2 CPD 525.

Here, the record shows that nine bidders responded to the subject solicitation, eight of which acknowledged both amendments Nos. 1 and 2 indicating that the amendments were available in sufficient time to permit bidders to consider the amendment and act on it. Since Guernsey does not allege that GSA deliberately attempted to preclude it from bidding, and does not dispute that GSA obtained adequate competition and reasonable prices, the inability of Guernsey to respond to the amendment does not provide a basis for our objecting to an award. Space Services International Corporation, supra; E.&I., Inc., B-195445, October 29, 1979, 79-2 CPD 205.

Finally, we note that Guernsey reports that it learned from Adler that Adler would not have permitted Guernsey to sell its product nationwide; thus, Guernsey could not have been prejudiced by the timing of the amendment.

Canon U.S.A., Inc.

With regard to Canon's protest of the LCC testing used in this IFB, GSA asserts several reasons why Canon is not an interested party under the GAO Bid Protest Procedures, 4 C.F.R. § 21.1(a) (1983). First, GSA points out that Canon failed to acknowledge the two amendments to the IFB, and its bid was thus nonresponsive. GSA argues these amendments were material because they affected the scope of contract clause, the estimated annual volume of the contract, the geographical zones to be serviced and the contract period. Second, GSA advises that Canon submitted the highest net bid of the nine submitted. Under Canon's evaluated bid with the LCC factored in Canon remains the highest bidder. GSA reasons that even if the protest were resolved in Canon's favor and the LCC test data were excluded from the evaluation process, Canon would not be eligible for award because its bid would remain the highest priced.

Furthermore, GSA advises Canon is not an interested party in the single award contract on another basis. GSA asserts that in its letter dated September 21, 1982, announcing LCC testing, bidders were informed of the coverage of the MAS and the single award IFB which would incorporate the LCC test results. They were advised that a typewriter could be included in only one schedule. GSA reserved the right to determine on which schedule the typewriter would be placed. By letter dated February 24, 1984, GSA states it reexamined the Canon typewriter which was LCC tested and concluded that the typewriter belonged on the MAS because of its advanced features. Canon was awarded

a contract under the MAS, and GSA argues that Canon is ineligible to receive an award under the IFB.

As a general rule, in determining whether a party is sufficiently "interested" under our Bid Protest Procedures to have its protest considered by our Office, we will review the party's status in relation to the procurement and the nature of the issues involved. See generally, American Satellite Corporation (Reconsideration), B-189551, April 17, 1978, 78-1 CPD 289; Cobarc Services Inc., B-200360, March 2, 1981, 81-1 CPD 155. In this case, Canon challenges the method by which bids were evaluated using the LCC test results, arguing that the LCC testing was unfairly and improperly structured and prejudiced Canon. The requested remedy is not award under the solicitation, but rather cancellation and resolicitation.

Therefore, whether Canon was nonresponsive and the high bidder, as GSA alleges, is irrelevant in determining Canon's interested party status. With regard to GSA's final argument as to Canon's eligibility for award, there is nothing in the protested IFB which prohibits Canon from bidding on the IFB. As Canon points out, it was GSA's decision to have the Canon model accepted under both solicitations. GSA tested and qualified the model in the LCC program and included it on the list of qualified machines which could be bid under the IFB. Canon accepted an award under the MAS only after its bid was rejected under the IFB, and several months after it filed its protest. Under these circumstances, we do not believe the 1982 letter would render Canon ineligible for award if its protest was sustained and a resolicitation occurred. Thus, in view of the nature of the issue raised and the relief requested, we believe that Canon is a sufficiently interested party under our Bid Protest Procedures. Yardney Electric Division, B-201846, June 2, 1981, 81-1 CPD 440.

Canon alleges that GSA's choice of the single strike correctable ribbon for use in the LCC test was prejudicial to Canon since it was not the most cost efficient ribbon for Canon's typewriter. GSA responds that it used the same type of basic ribbon, the most commonly used by the government, for all typewriters tested. In this connection, under a current ribbon procurement, the government's projected purchases of the ribbon used for testing far exceed the quantity of the type of ribbon Canon argues should have been used. Depending on the manufacturers' design, it could be, but in most cases was not, the highest cost per character ribbon available. Canon has not shown that use of this ribbon was based only on "personal preferences or subjective judgment" or that its use was intended to prejudice Canon.

Canon asserts that the LCC formula is defective because it includes a standard value representing hourly operator wages which was uniformly applied to all firms in the evaluation of bids. Canon argues the use of a standard value under this and other criteria fails to take into account the relative efficiencies and productivity rates of individual machines. Canon states that its machine offers numerous operator efficient features designed to increase productivity and it received no credit for these features. For example, the mean corrective time, by applying a factor uniformly to all machines, fails to differentiate between the fully automated Canon machine with more rapid correction action than the semiautomated IBM model.

GSA states that its objective under the test is to determine the quality of the product. GSA further contends that since it is testing a variety of brands and model of typewriters, it is impossible in a practical amount of time to adapt the test to each and every unique feature available on each typewriter, and GSA limited its testing to features required under the commercial item description contained in the IFB. Thus, no vendor received any credit for special features on their tested machine, despite the fact that many of the models tested apparently had features increasing productivity. Under the circumstances, we find this test methodology to be reasonable.

Canon also protests the use by GSA of outdated corrective tape instead of the tape recommended by Canon. Under the IFB, bidders could choose the tape to be used. As a result of GSA using the wrong tape, according to Canon, more maintenance problems resulted, and Canon's score for mean degradation response time, mean keystrokes between maintenance actions, catastrophic degradation, nuisance failures, and repair time are allegedly erroneous.

GSA reports that due to supply problems, a different brand of dry lift-off tape was used on the Canon typewriter for a period of time. During this time, a series of defects, assessable as penalties under the LCC test, occurred which required servicing by a Canon repair technician. The repairman made an adjustment to the machine based on a "production line modification." The repairman also pointed out the apparent incompatibility of the tape with the Canon typewriter. Since GSA was unsure whether the machine malfunctions were caused by the machine or the correction tape, it used the same type of tape after service before replacing the tape with the manufacturer's recommended product. The machine malfunction did not recur

and, thus, GSA concluded the defects were caused by the need to adjust the typewriter, not the tape.

We think the approach taken by GSA to determine the cause of the machine failures was reasonable, and it supports GSA's conclusion that the failures were due to the need for machine adjustment. While Canon argues that the conclusion is unreasonable, it does not refute GSA's statement that the malfunctions did not occur once the machine was adjusted even with the allegedly improper tape. Under these circumstances, we are not prepared to say the assessment of these defects against the bidder was improper.

Canon objects to being charged for the cost of battery replacement in its machine during testing as a repair cost. Canon argues batteries are not required to operate the machine and should not be a cost of operation. According to Canon, the batteries power a feature which enhances the operation of the Canon machine by providing the ability to store multiple format settings. Canon asserts that if battery costs are to be included as a factor, the benefits of the storage feature should be considered.

GSA's position is that when the Canon model is operated without batteries it cannot function as well as a normal typewriter unless the electric power switch is left on continuously and, thus, the batteries represent a real cost. GSA once again states that it tested for agency minimum needs and did not make allowances for typewriters with enhanced features. Other typewriters tested also offered enhanced features, none of which were considered under the LCC testing.

Canon has not rebutted GSA's position that, in addition to powering enhancements, the batteries are essential to the normal operation of the Canon model tested. Thus, at best, we have a technical disagreement between agency and protester, which does not satisfy Canon's burden of proof to show that the inclusion of the batteries as a cost was unreasonable. See Rack Engineering Company, B-208615, March 10, 1983, 83-1 CPD 242.

Canon also objects to the calculation of the ribbon removal and replacement time. Canon claims the quality of packaging of its ribbons is greater than other qualifiers and provides for maximum shelf life. However, in Canon's view, GSA improperly included the time used in removing a ribbon from its packaging and, thus, allegedly was penalized for its quality packaging which ultimately saves the government money.

We do not find unreasonable the measuring of the time it takes to replace the ribbon in a typewriter. As GSA points out, when changing the ribbon in a typewriter, the new ribbon must be removed from its packaging by someone, presumably the typist. The time involved is definite and measurable, and GSA included this unwrapping time in the LCC for all machines as part of the ribbon changing procedure.

In our view the type and quality of the packaging is entirely in the discretion of the manufacturer. The record indicates that GSA's decision to measure the ribbon changing process from the unpackaging point, while arguably of greater cost to Canon, was based on a determination that the ribbon changing process was a measurable legitimate cost to the government under the LCC testing. There is no evidence this method of calculation was a deliberate attempt to prejudice Canon.

Canon alleges that the residual value element used in the LCC formula was unreasonable, and the awarding of a high residual value to IBM was improper and does not accurately reflect the value of the IBM machine 10 years from award. The residual value in the LCC formula is a prediction of the value to GSA of each qualified machine at the end of its useful life, here defined as 10 years from purchase. Canon argues that the electronic typewriter market currently is undergoing rapid technological changes and as a result, in its view, the class of typewriters being procured here will be obsolete within 10 years and the residual value negligible. Here the residual value assigned to IBM, which is weighted as a credit in its evaluated price, was approximately double the amounts assigned to almost all qualified electronic machines (adjusted residual value for IBM was $131.63 or $127.38, versus $59.83 for Canon).

We note that of all the bidders, Canon's bid price was the highest (approximately $200 higher than the next low bid). Similarly, Canon's evaluated bid price including the residual value credit, remains the highest--over $300 higher than the next low bid, and $720 higher than IBM's evaluated price. Under these circumstances, even assuming Canon is correct and a negligible or no residual value was used in the solicitation, Canon's bid price and/or evaluated price still remains the highest of all bidders and Canon would not be in line for award. Under these circumstances, we find that the residual value assigned the machines did not prejudice Canon in the bidding.

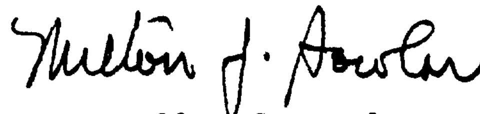
Canon also objects to GSA's award to IBM despite the pendency of the protest and without prior notice to GAO. In

accordance with the Federal Procurement Regulations (FPR) § 1-2.407-8(b)(4) (1964 ed.), GSA made the requisite determination and finding that an award pending the protests would be advantageous to the government and made award.

However, contrary to the FPR, GSA apparently failed to advise GAO of this decision until after the award had been made. We have consistently held that the failure to follow the regulatory requirements in the making of the award notwithstanding the pendency of the protest is merely a procedural defect which does not affect the validity of an otherwise valid award. Creative Electric Incorporated, B-206684, July 15, 1983, 83-2 CPD 95.

Olympia USA Inc.

Finally, to the extent Olympia protests the continuation of the LCC testing for future solicitations, we dismiss this allegation as premature. Under GSA letters advising potential bidders of the LCC testing program, GSA states the testing program does not concern any specific procurement. In Remington Rand Corporation; SCM Corporation; Olivetti Corporation, B-204084, B-204085, B-204085.3, B-204085.6, May 3, 1982, 82-1 CPD 408, we found timely a protest filed prior to bid opening against a solicitation although the protester knew prior to issuance of the solicitation how GSA intended to conduct the tests and what information GSA had obtained from the test. In effect, we concluded that until the solicitation was issued, there was nothing to protest and our Bid Protest Procedures apply to specific procurements as compared to hypothetical questions. Applying that rationale to this case, we only will consider Olympia's protest of the use of LCC test results in the context of a specific procurement.



Acting Comptroller General
of the United States