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DECISION

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

FILE: B-189578

DATE: November 8, 1977

MATTER OF: Cubic Western Data, Inc. (Reconsideration)

DIGEST:

1. Bidder's failure to provide complete test data, which is required to enable agency to determine bidder's ability to perform, does not render bid nonresponsive and, thus, is distinguished from situation where information submitted with bid in response to IFB responsibility provision affirmatively indicates bidder will not perform in accordance with basic specification requirement.
2. Where GAO, in considering procurement conducted pursuant to Federal grant must determine legal effect of invitation requirement in accordance with Federal competitive bidding principles, rationality of grantee agency's decision is not determinative.

By letter dated October 21, 1977, Cubic Western Data, Inc. (Cubic) has requested that we reconsider our decision Cubic Western Data, Inc., B-189578, October 7, 1977, 57 Comp. Gen. (1977), 77-2 CPD. Our decision was issued in response to a request for an opinion from the United States District Court for the Northern District of Georgia in connection with its consideration of Qonnar Corporation v. The Metropolitan Atlanta Rapid Transit Authority, Civil Action 77-1218A.

Our decision concerned the responsiveness of the bid submitted by Duncan Industries (Duncan), a division of Qonnar Corporation, under an invitation for bids (IFB) issued by the Metropolitan Atlanta Rapid Transit Authority (MARTA) for the design, furnishing and installation of the fare collection system for MARTA's Rapid Rail Transit System. The procurement is to be funded in substantial part (80 percent) by a grant from the Urban Mass Transportation Administration.

We concluded that Duncan's low bid should not be rejected as nonresponsive because of its alleged failure to furnish complete test data with its bid. We held that the IFB requirement for the data which was solicited to enable MARTA to determine a bidder's competency to furnish the "ticket handler"

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component of the fare collection system, involved bidder responsibility; therefore, additional information which MARTA obtained after bid opening indicating that Duncan "could in fact meet the performance and reliability standards * * * of the specifications * * *" could properly be considered.

Cubic now alleges that our decision is "patently inconsistent, and irreconcilable" with Test Drilling Service Co., B-189682, September 15, 1977, 77-2 CPD 193. We disagree.

In Test Drilling, the IFB required bidders to respond to a "method of operations" provision, which the agency indicated was included to enable it to determine bidder responsibility. In responding to that provision, the low bidder stated that it would use .375 inch spiral or seamless steel pipes with outside diameters of 18 and 20 inches as temporary well casings for the construction of relief wells. However, the IFB specifications explicitly required casings with an outside diameter of 18 inches and a minimum wall thickness of .50 inch, and prohibited the use of spiral-weld casings. We agreed with the agency that the response represented an exception to the specifications and rendered the bid nonresponsive. We stated:

"The purpose of the provision in this IFB was to determine how the bidder proposed to perform the work. It was not intended to permit the bidder to change the specifications."

In Cubic, the test data submitted with Duncan's bid did not represent an attempt to change the specifications. The case involved only an insufficient response to the IFB requirement. As pointed out by Cubic in its submissions to this Office, Duncan's response was allegedly deficient for (1) the failure to indicate the ability to furnish a product with both paper and plastic capability; (2) the failure to specify barrier unlatch time and (3) the failure to furnish all the solicited test data.


There is, we believe, a significant difference between an omission and a specific indication that there will not be compliance with the specifications if the bid is accepted. As we said in Test Drilling, had the protester not made any "method of operation"

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response, its bid "would have been responsive and any information required could have been submitted after bid opening." However, once the protester inserted information indicating it would not comply with the basic specifications, the bid could only be viewed as nonresponsive. Unlike the Test Drilling situation, Duncan's alleged deficiency is in the nature of an omission, rather than an attempt to alter the specification requirements. Thus, while acceptance of the low bid in Test Drilling would have resulted in an obligation to perform in a manner contrary to the specifications, in Cubic the challenged test data did not represent a statement of intended noncompliance with specifications, but only (assuming the truth of the allegations) an insufficient body of information to enable MARTA to determine Duncan's ability to perform. It follows that Duncan's submission did not affect its legal commitment to adhere to the specifications, and since the legal obligation of Duncan to perform the contract under the terms solicited was not impaired, the bid was responsive.

Cubic also expressed disappointment "that we did not give any weight to the MARTA decision [that Duncan's bid was nonresponsive] or to the overwhelming facts of record which supported the rationality of MARTA's actions." In considering complaints regarding procurements conducted pursuant to Federal grants, this Office considers whether there has been compliance with applicable statutory, regulatory and grant provisions and advises the Federal grantor agency accordingly. Therefore, ultimately it is the propriety of the grantor agency's action in concurring or not concurring with the grantee's decision which is the subject of our review. In this case, the essential question involved the legal effect of the invitation requirement to submit test data. There was no question involving agency discretion. Thus, we were not concerned with determining the rationality of MARTA's decision but with a legal issue which, under the circumstances of the case, was to be determined on the basis of Federal competitive bidding principles and the related decisional law.

Our prior decision is affirmed.


Deputy Comptroller General
of the United States



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

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NOV 1977

The Honorable Charles A. Moya, Jr.
United States District Court for the
Northern District of Georgia

RE: Qonnar Corporation v.
The Metropolitan Atlanta Rapid
Transit Authority, Civil Action
77-1218A

Dear Judge Moya:

We refer to the letter dated October 21, 1977, from Jacob B. Pompan, Esquire, requesting that we advise you of the applicability of our decision Test Drilling Service Co., B-189682, September 15, 1977, 77-2 CPD 193, to the Qonnar v. MARTA matter which you are considering. We have treated Mr. Pompan's letter as a request for reconsideration of our decision Cubic Western Data, Inc., B-189578, October 7, 1977, 57 Comp. Gen. ___ (1977), 77-2 CPD ___.

Enclosed is a copy of the Comptroller General's decision of today affirming our prior decision.

Sincerely yours.

Paul G. Dembling

Paul G. Dembling
General Counsel

Enclosure

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