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**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** MCI Constructors, Inc.

**File:** B-274347; B-274347.2

**Date:** December 3, 1996

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Steven J. Weber, Esq., Watt, Tieder & Hoffar, for the protester.  
Christopher M. Bellomy, Esq., George N. Brezna, Esq., and Robert M. Roylance, Esq., Department of the Navy, for the agency.  
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

Where solicitation states that option prices will be evaluated in determining which bid offers the lowest overall price for a construction contract, a bid, which is only low if the option is considered, is not materially unbalanced where the agency reasonably expects to exercise the option.

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## **DECISION**

MCI Constructors, Inc. protests an award to Danis Heavy Construction Company under invitation for bids (IFB) No. N62470-94-B-4124, issued by the Department of the Navy, Naval Facilities Engineering Command, for the wastewater treatment plant upgrade of the French Creek Wastewater Treatment Facilities, Marine Corps Base, Camp Lejeune, North Carolina. MCI contends that Danis's bid should be rejected as unbalanced.

We deny the protest in part and dismiss it in part.

The existing wastewater treatment facilities at Camp Lejeune do not comply with National Pollution Discharge Elimination System (NPDES) Permit No. NC0063029. Camp Lejeune is currently permitted to operate these facilities under a Special Order of Consent agreement entered into between Camp Lejeune and the North Carolina Environmental Management Commission. Under this agreement, compliance with the NPDES Permit is required by December 31, 1998.

The IFB, issued on May 1, 1996, contemplated award of a firm, fixed-price construction contract for phases II and III of the three-phase wastewater treatment plant upgrade project.<sup>1</sup> Phase II of the project covers the construction of a Sludge Treatment System. Phase III of the project covers the construction of a Biological Nutrient Removal (BNR) System. Completion of all three phases of this project is necessary in order to bring Camp Lejeune’s wastewater treatment facilities into compliance with the NPDES Permit.

The IFB bid schedule contained the following four bid items:

<u>“BID ITEM</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
“0001A	Price for entire work ( <b>including</b> the total construction cost for the selected Sludge Treatment System), complete and in accordance with the drawings & specifications, but <b>EXCLUDING</b> BID ITEMS 0001B, 0001C AND 0002.	\$ _____
“0001B	Price for the present worth of guaranteed total electrical power consumption for the selected BNR System.	\$ _____
“0001C	Price for the present worth of guaranteed total electrical power consumption for the selected Sludge Treatment System.	\$ _____
“0002	<b>OPTION ITEM 0001</b>  Price for all work associated with the selected BNR System (except for associated power consumption covered in Bid Item 0001B), complete and in accordance with the drawings and specifications.	\$ _____”

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<sup>1</sup>A contract for phase I, which included demolition of old wastewater treatment plants and construction of a sanitary sewer distribution system, was previously awarded to Danis.

Bid item No. 0002 (phase III of the project) was an option item because, when the IFB was issued, funds for the military construction budget had not yet been appropriated. Funds were previously appropriated for phase I in fiscal year 1994, and for phase II in fiscal year 1996. Phase III funding was in the fiscal year 1997 military construction budget submitted to Congress.

The IFB required bids on an all-or-none basis for all four bid items. The base contract would cover only bid item No. 0001A, and the government reserved the right to exercise the option for bid item No. 0002 within 300 calendar days after contract award.<sup>2</sup> The IFB incorporated by reference the clause at Federal Acquisition Regulation § 52.217-5, Evaluation of Options (July 1990), which states that the government will include the price of options in its evaluation of total price for award purposes. The IFB also provided that the low bid for purposes of award shall be the bid with the lowest total price for all four bid items.

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<sup>2</sup>Bid items 0001B and 0001C represent guaranteed energy consumption rates of a bidder's systems. As such, the bid prices for these bid items do not represent a contract price to be paid to the contractor, but rather the energy cost which the government will incur to operate the systems. If the installed systems exceed the guaranteed energy consumption rates represented by these bid items, the IFB/contract provides for cash penalties to be paid by the contractor to the government to compensate the government for such additional energy expense.

Bid opening was held on June 11. The Navy received the following bids:

Bid Item No.	MCI	Danis	Gov't Est.
0001A	\$42,559,498	\$41,261,000 <sup>3</sup>	\$38,350,000 <sup>4</sup>
0001B	3,981,140	3,921,140	5,100,000
0001C	686,362	2,403,532	3,600,000
0002	8,500,000	1,300,000	3,150,000
<b>Total</b>	<b>\$55,727,000</b>	<b>\$48,945,672</b>	<b>\$50,200,000</b>

On June 18, MCI filed an agency-level protest. On August 16, the Navy denied this protest and awarded the contract to Danis. This protest followed on August 26. The Navy suspended contract performance pending resolution of this protest.

MCI contends that Danis's bid prices are unbalanced because its price for bid item No. 0001A allegedly includes work associated with construction of the BNR System that would only be performed if the Navy exercises the option for bid item No. 0002. MCI also alleges that, since the funds for phase III of the project had not been appropriated at the time of award, the exercise of the option is uncertain and thus should not be considered in determining the lowest bid price.<sup>5</sup>

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<sup>3</sup>Danis's bid for this item, as submitted, was \$39,300,000. After bid opening, Danis requested, and the Navy approved, correction of a mistake in the price for this bid item. The mistake was attributed to Danis double-counting a pre-bid price reduction by its supplier for Sludge Treatment System equipment. The double-counting of the reduction resulted in this bid item being understated by \$1,961,000, which the Navy determined was clearly and convincingly evidenced on the worksheets used by Danis to prepare its bid. MCI does not specifically protest the propriety of this correction.

<sup>4</sup>The government estimate was originally \$34,400,000 and \$7,100,000 for bid items No. 0001A and No. 0002, respectively. After bid opening, the Navy determined that it had included in bid item No. 0002 the price of work which was to be performed under bid item No. 0001A. The agency corrected the government estimate to the prices shown in the table by shifting the price of this work, \$3,950,000, from bid item No. 0002 to bid item No. 0001A. The total of the government estimate did not change as a result of this correction.

<sup>5</sup>To the extent MCI alleges that it was improper for the Navy to include in the  
(continued...)

To be rejected as unbalanced, a bid must be both mathematically and materially unbalanced. DGS Contract Servs., Inc.; Inventory Accounting Servs., Inc., B-258429; B-258429.2, Jan. 19, 1995, 95-1 CPD ¶ 27; Star Brite Constr. Co., Inc., B-244122, Aug. 20, 1991, 91-2 CPD ¶ 173. A bid is mathematically unbalanced where it contains both understated prices for some items and overstated prices for other items. Star Brite Constr. Co., Inc., *supra*. A mathematically unbalanced bid is considered materially unbalanced, and cannot be accepted, where there is a reasonable doubt that acceptance of the bid will result in the lowest overall cost to the government. *Id.*; K.P. Food Servs., Inc., 60 Comp. Gen. 1 (1980), 82-1 CPD ¶ 289. Except in cases of extreme price front-loading not applicable here,<sup>6</sup> a bid which is mathematically unbalanced due to the pricing of base and option items is not materially unbalanced where the record shows that the option requirement is certain to exist and that there is a reasonable expectation that funds will be available to permit exercise of the option. International Shelter Sys., Inc., 64 Comp. Gen. 519 (1985), 85-1 CPD ¶ 549; K.P. Food Servs., Inc., *supra*; see F&E Erection Co., B-234927, June 19, 1989, 89-1 CPD ¶ 573.

Here, even if we assumed that Danis's bid is mathematically unbalanced, it is not materially unbalanced because there was no reasonable doubt at the time of award that the Navy would exercise the option for bid item No. 0002, and thus there was no doubt that the award to Danis will result in the lowest overall cost to the government. Camp Lejeune's wastewater treatment facilities must be brought into compliance with the requirements of the NPDES Permit. Such compliance cannot occur without completion of the work under this option item. The requirement thus presently exists and will continue to exist until such work is completed. The funds for this option item were in the military construction budget for the 1997 fiscal year budget which had been submitted to Congress for appropriation, and the agency had no reason to suspect that the funds would not be appropriated. Indeed, during the course of this protest, the funds for phase III of the project were appropriated and the Navy states that, at the conclusion of this protest when contract

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<sup>5</sup>(...continued)

IFB provisions for the evaluation of option prices, the protest is untimely as alleged solicitation defects apparent on the face of an IFB must be raised prior to bid opening. Bid Protest Regulations, section 21.2(a)(1), 61 Fed. Reg. 39039, 39043 (July 26, 1996) (to be codified at 4 C.F.R. § 21.2(a)(1); see Crowley Co., Inc., B-258967, Feb. 21, 1995, 95-1 CPD ¶ 105.

<sup>6</sup>MCI does not protest that Danis's bid is extremely front-loaded. In any case, Danis's price for item No. 0001A is less than MCI's price for this item.

performance resumes, it will exercise the option. Accordingly, Danis's bid will result in the lowest cost to the government and is not materially unbalanced. See K.P. Food Servs., Inc., supra.

MCI also essentially alleges that the IFB instructions were latently ambiguous regarding the distribution of work to be priced under bid items No. 0001A and No. 0002. MCI alleges that it priced more work under the optional bid item No. 0002 than the agency did in the government estimate, thus causing a higher overall bid price than MCI would have been able to offer if it had priced the work in question under bid item 0001A. However, even if we assume that the IFB is ambiguous, we would not sustain MCI protest because it has failed to demonstrate that it suffered competitive prejudice.

Competitive prejudice is an essential element of a viable protest. Colonial Storage Co.--Recon., B-253501.8, May 31, 1994, 94-1 CPD ¶ 335. Our Office will not assume the existence of prejudice where such prejudice can be relatively easily established by the protester and it fails to do so, relying instead on general allegations of prejudice. Id.; Labrador Airways Ltd., B-241608, Feb. 13, 1991, 91-1 CPD ¶ 167. In this case, MCI alone has the information showing whether it could reduce its price by the nearly \$7 million dollar margin existing between its bid and Danis's bid by shifting work from item 0002 to item 0001A. Such a large reduction appears improbable and MCI has not shown that such a restructuring could in fact produce a price reduction of this magnitude. Therefore, we will not assume that prejudice exists. See Colonial Storage Co.--Recon., supra; Labrador Airways Ltd., supra.

In MCI's initial protest, it alleged that Danis's bid took exception to the terms of the energy efficiency guarantees under bid items No. 0001B and No. 0001C. The Navy's report submitted in response to the protest provided a copy of Danis's bid and demonstrated that Danis's bid did not take exception to the terms of the IFB. In its comments on the agency report, MCI requested that we decide this issue on the record but did not refute the agency's position. We have reviewed the record and find no merit to this protest allegation.

On November 8, MCI filed a supplemental protest, based on documents provided by the agency to MCI on October 17 (delivered on October 18), alleging that Danis is not responsible and that the agency should not have evaluated bid items 0001B and 0001C. We will not consider this protest, inasmuch as it was untimely filed. Under our Bid Protest Regulations, protests not based on alleged improprieties apparent in a solicitation must be filed no later than 10 calendar days after the protester knew,

or should have known, of the basis for protest, whichever is earlier.<sup>7</sup>  
Section 21.2(a)(2), 61 Fed. Reg. 39039, 39043 (to be codified at 4 C.F.R. § 21.2(a)(2)).  
The November 8 protest does not meet this requirement.

The protest is denied.

Comptroller General  
of the United States

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<sup>7</sup>In this letter, MCI also complains that it has not received an appropriate response to the document request made in its protest. While the agency report did not respond to MCI's request, the agency did provide various documents after MCI submitted its response to the agency report in the above mentioned October 17 response. Since MCI did not complain of its failure to receive all relevant requested documents prior to its November 8 submission it will not be considered.