



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Enco Dredging

File: B-284107

Date: February 22, 2000

Christopher T. McRae, Esq., McRae & Metcalf, for the protester.
Stephen R. Miller, Esq., Miller Law Firm, for L.W. Matteson, Inc., an interested party.
Sherry K. Kaswell, Esq., Department of the Interior, for the agency.
Wm. David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Bid was responsive notwithstanding bidder's failure to limit its mobilization/demobilization price to 5 percent of total bid price where limit was not mandatory, and solicitation provided for payment of amount above 5-percent limit only after the contract work had been substantially completed.
2. Bid was not unbalanced where agency reasonably concluded that, even if prices were unbalanced, there was no unacceptable risk to government, since total price for work that was ordered was low and would remain low for any additional quantities ordered.

DECISION

Enco Dredging protests the award to L.W. Matteson, Inc. of an indefinite-delivery, indefinite-quantity contract under invitation for bids (IFB) No. 99-SI-34-0412, issued by the Yuma (Arizona) Area Office of the Bureau of Reclamation (BOR), Department of the Interior, to obtain maintenance dredging of the Colorado River above the Imperial Dam. Enco basically contends that Matteson's bid should have been rejected as nonresponsive.

We deny the protest.

The IFB requested the submission of a lump-sum price for line item No. 1, mobilization/demobilization, and unit and extended prices for the two sub-items of line item No. 2. Prices were to include the furnishing of all labor, material,

equipment, and incidentals required for the dredging and for the delivery of the dredged material to a designated disposal site. The first sub-item (2a) covered 400,000 cubic yards of dredging and the second sub-item (2b) covered up to 850,000 additional cubic yards of dredging. Bidders were guaranteed a minimum of the 400,000 cubic yards of dredging, with the possibility of delivery orders for up to the additional 850,000 cubic yards of dredging if funding became available. IFB, Foreword, at 1. Bids were to be evaluated based upon the total bid, and award was to be made to the responsible bidder submitting the lowest responsive total bid. IFB, § L.12(a), at L-9, and § M.2(a), (b), at M-1.

The IFB also contained the clause at Federal Acquisition Regulation (FAR) § 52.214-19, which is applicable to construction solicitations. Paragraph (d) of that clause provides as follows:

The Government may reject a bid as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.

IFB § L.12, at L-9.

The IFB also provided that the line item No. 1 price “should not exceed 5% of the total contract price” and that payment of these costs would be governed by the section H-- “Payment for Mobilization and Preparatory Work”--clause. *Id.*, § B.1(h), at B-1. Subsection H.3, which provides for the manner in which these costs would be paid--both in instances where the price bid for line item No. 1 constituted no more than 5 percent of the total price bid and where the price bid exceeded the 5-percent limit, states in pertinent part as follows:

(a) General. The contract line item for mobilization and preparatory work should not exceed 5 percent of the total contract amount (see (d)(3), (4), and (5) below concerning payments exceeding 5 percent) and shall be used by the Government to make payment to the Contractor in accordance with this clause

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(d) Payment. Payment for mobilization and preparatory work under paragraph (a) of this clause shall be made at the contractor lump-sum price bid for this item as contained in the Schedule. Progress payments for mobilization and preparatory work shall be made as follows--

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(3) When progress payments totaling 5 percent of the total original contract amount have been made by the Government for all other work accomplished under the contract, the Government shall pay the Contractor 50 percent of the mobilization and preparatory work contract line item amount or 2.5 percent of the total original contract amount (whichever is lower) exclusive of any payment already made to the Contractor for performance and payment bond premiums and specified insurance under subparagraph (d)(1) of this clause.

(4) When progress payments totaling 10 percent of the total original contract amount have been made by the Government for all other work accomplished under the contract, the balance of the amount for the mobilization and preparatory work contract line item or 2.5 percent of the total original contract amount (whichever is lower) shall be paid to the Contractor.

(5) If the amount bid for mobilization and preparatory work exceeds the total of the payments allowed under (3) and (4) above, the balance shall be paid when the contract is substantially complete as determined by the Contracting Officer.

Id., § H.3 (a) and (d)(3), (4), (5), at H-3 to H-4. This provision basically provides that a contractor that has priced the line item for mobilization/demobilization in excess of 5 percent of the total contract amount will recover no more than the 5 percent until the contracting officer has determined that the contract has been substantially completed.

Six bids were received by bid opening on September 21, 1999. Matteson submitted the low total price of \$3,541,500; Enco submitted the second low total price of \$4,724,000. The mobilization/demobilization prices submitted by Matteson and Enco were \$748,000 and \$225,000, respectively. Agency Report, Tab 8, Abstract of Offers--Construction, at 1. Since Matteson's total bid price was approximately 45 percent lower than the government estimate and 26 percent lower than the next low bid, the contracting officer requested Matteson to verify its price or, if a mistake had occurred, to submit a request either to correct, along with appropriate evidence to establish the mistake and the intended bid price, or to withdraw the bid. Agency Report, Tab 9a, Letter from Contracting Officer to Matteson (Sept. 24, 1999). Matteson confirmed its bid price. Agency Report, Tab 9b, Letter from Matteson to Contracting Officer (Sept. 24, 1999).

The contracting officer subsequently requested Matteson again to review, and confirm if correct, its price--this time after it had reviewed its line item No. 1 price compared to the government estimate and the bids submitted by the other bidders

and reviewed the pertinent IFB provisions, including subsection H.3 provision concerning the payment for mobilization. Agency Report, Tab 9c, Letter from Contracting Officer to Matteson (Sept. 28, 1999). Matteson again confirmed its bid price. It stated that “[o]ur understanding of ‘substantially completed’ is when the original 400,000 cubic yards has been dredged.” Agency Report, Tab 9d, Letter from Matteson to Contracting Officer (Sept. 29, 1999). Contract award was made on September 30 and, on the same date, a delivery order was issued to Matteson for 746,200 cubic yards of dredging. Agency Report, Tab 9f, Contract No. 99-C-34-0412, and Tab 9e, Order for Supplies or Services.

Enco filed an agency-level protest on October 12. Agency Report, Tab 9h, Letter from Protester to Contracting Officer (Oct. 12, 1999). On October 25, pursuant to FAR § 33.103(f)(3), BOR issued a Determination and Findings authorizing continued contract performance notwithstanding Enco’s protest. Agency Report, Tab 9j, Determination and Findings to Support Continued Performance Notwithstanding a Protest (Oct. 25, 1999). The agency subsequently denied Enco’s protest. Agency Report, Tab 9i, Letter from Contracting Officer to Protester (Oct. 29, 1999). Enco then protested to our Office.

Enco contends that, because Matteson’s mobilization/demobilization price exceeded 5 percent of its total price, its bid was nonresponsive and the award was improper. Protest at 1.¹ Enco asserts that the agency’s intent to strictly apply the 5-percent limit is shown by the agency’s response in an amendment in which the agency refused a request by Matteson to delete the 5-percent limit. Protester’s Comments at 2-3.

Enco’s contention that Matteson’s bid was nonresponsive is premised on its view that the IFB language prohibited bidders from pricing mobilization/demobilization above the 5-percent level. The precise language, however, provides merely that “mobilization costs should not exceed 5 percent of the total contract price.” As the agency correctly points out, the language is not stated in the imperative--“shall not” or “cannot.” See, e.g., FAR § 2.201 (“shall” denotes the imperative). The IFB contains no language that the failure to adhere to the limit would result in rejection

¹ Enco also suggests that Matteson received some type of assurance as a result of its concurrent contract performance on another BOR project that it could ignore the 5-percent limit. Protester’s Comments at 3; Protester’s Supplemental Comments, Feb. 3, 2000, at 1. Enco has provided no support for this allegation. Environmental Affairs Management, Inc., B-277270, Sept. 23, 1997, 97-2 CPD ¶ 93 at 4. Further, to the extent that Enco may be objecting to Matteson having obtained an advantage on this procurement through the other contract, the mere existence of a prior or current contractual relationship between a contracting agency and a bidder does not create an unfair competitive advantage. Optimum Tech., Inc., B-266339.2, Apr. 16, 1996, 96-1 CPD ¶ 188 at 7.

of the bid. Accordingly, we agree with the agency that the “should not” language constituted guidance, but not a firm requirement, that mobilization be priced within the 5-percent limit. The reasonableness of this position is confirmed by the IFB’s inclusion of subsection H.3, which addressed payments where the price for line item No. 1 was more than 5 percent of the total contract price. This provision obviously contemplates that bids could properly exceed this limitation. Under these circumstances, we conclude that there was no basis to reject Matteson’s bid for exceeding the 5-percent limit.²

Enco also argues that Matteson’s bid should be rejected as unbalanced because its mobilization/demobilization price is twice the government estimate for that line item, more than three times Enco’s line item No. 1 price, and more than four times the 5-percent limit. Protester’s Comments at 4; Protester’s Supplemental Comments, Jan. 5, 2000, at 2. Enco asserts that the Matteson bid is materially unbalanced because reasonable doubt exists that Matteson’s bid will result in the lowest cost to the government and because the bid is front-loaded and will result in an impermissible advance payment. Enco notes that its price is lower than Matteson’s until 618,000 cubic yards of the awarded 746,200 cubic yards have been dredged, and that a bid is considered unbalanced where the bidder’s price will not become low until late in the contract term. Protester’s Comments at 5; Protester’s Supplemental Comments, Jan. 5, 2000, at 3-4.

FAR § 15.404-1(g) provides that unbalanced pricing exists where, notwithstanding an overall low price, the price of one or more contract line items is significantly overstated as indicated by the application of cost or price analysis techniques. FAR § 15.404-1(g)(2) requires that offers with separately priced line items or sub-line items be analyzed, using cost or price analysis techniques, to determine if the prices are unbalanced and, if an offer is found to be unbalanced, the contracting officer shall consider the risk that award of the contract will result in paying unreasonably high prices for contract performance. An offer may be rejected if the contracting officer determines that the lack of balance poses an unacceptable risk to the government. FAR §15.404-1(g)(3).

Here, the contracting officer considered the potential risk in Matteson’s pricing and concluded that it did not pose an unacceptable risk to the government, both because of the firm’s verification of its bid and because the government was ordering the additional quantities under line sub-item 2b. Agency Report, Tab 6, Award and Price Reasonableness Determination, at 5.

² Enco’s further argument concerning the agency’s decision to refuse Matteson’s request to delete the 5-percent limit that was memorialized in an amendment does not alter our conclusion. The agency’s decision merely meant that the terms originally set out in the IFB continued to apply; the amendment did not revise the IFB provisions in any way.

We review the contracting officer's determination regarding the risk of unbalancing for reasonableness, and we conclude that the determination here was reasonable. As the protester recognizes, the agency ordered considerably more than the minimum amount, and Matteson's bid was low for the amount of the actual delivery order (and remains low for any additional quantities ordered under the contract). Thus, there could be no reasonable doubt that Matteson's bid would result in the lowest overall cost to the government. With respect to the allegation that Matteson's bid would result in an improper advance payment, we find that, given the provisions of the subsection H.3 payment clause, there is simply no possibility of any advance payment: the amount by which Matteson's line item No. 1 price exceeds 5 percent of the total price will be paid only at the time the contract has been substantially completed.²

Finally, Enco objects to the contracting officer's multiple requests that Matteson verify its prices. Protest at 2; Protester's Comments at 5. According to Enco, in responding to the second request, Matteson was given an opportunity not given to other bidders to define substantial completion as constituting the dredging of 400,000 cubic yards no matter what amount of dredging was awarded, and therefore was able to avoid a risk to which other bidders were subjected. Protester's Comments at 5. Enco argues that by being paid its entire mobilization price upon the completion of the guaranteed 400,000 cubic yards, Matteson will be able to recover the inflated portion of that price up front and thereby negate the payment provisions of subsection H.3. Protester's Supplemental Comments, Jan. 5, 2000, at 2. Matteson explains that when it submitted its verification letter, it assumed that the order would be for the guaranteed minimum of 400,000 cubic yards, not for the larger amount that actually was subsequently ordered. Supplemental Agency Report, Feb. 9, 2000, Letter from Contracting Officer to Matteson (Feb. 8, 2000). Enco also objects to this postaward clarification of Matteson's intent. Protester's Supplemental Comments, Feb. 14, 2000, at 1-3.

In cases where a contracting officer has reason to believe that a mistake may have been made, the bidder must be requested, after the suspected mistake is brought to the bidder's attention, to verify the correctness of its prices. FAR § 14.407-1. This is exactly what the contracting officer did. Matteson's bid was significantly lower than the government's estimate and the other bidders' prices. Therefore, the agency reasonably requested verification of Matteson's bid. After receiving Matteson's first verification, the agency apparently still remained concerned that Matteson did not understand the effect of the payment provisions in the IFB and the agency decided to again request verification and point out the payment provision concerning the

² We note that, under the recently revised unbalanced pricing provision in FAR § 15.404-1(g), neither the term "advance payment" nor the concept is any longer used in discussing unbalanced pricing. It is not clear why the term has been retained in FAR §§ 52.214-10 and 52.214-19.

5-percent limit to ensure that Matteson understood it would receive its line item No. 1 costs in accordance with the payment provisions that prevented front-loading. While in its second verification Matteson indicated that the “substantially complete” language related to the guaranteed minimum of 400,000 cubic yards, since at the time of verification this was the amount that it reasonably believed would be awarded, we do not view this statement as an attempt to condition its bid or change the contract.³

The protest is denied.

Comptroller General
of the United States

³ During the pendency of the protest, the agency confirmed that the determination of whether performance was “substantially complete” would be based on the total quantity of work ordered (not the 400,000 cubic year minimum). Since the IFB reserves that determination to the contracting officer’s discretion, we view the agency’s statement in this regard as binding. Therefore, even if we assume that Enco is correct in arguing that Matteson was trying to change the contract terms, the agency could still properly make award to Matteson with confidence that the contracting officer’s determination regarding substantial completion would govern. In any event, since the agency ordered far more than the minimum, the protester’s concern on this issue, like its concern about unbalanced pricing, is academic.