

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20540

M. Caton
Proc 11

7596

FILE: B-191786

DATE: September 8, 1978

MATTER OF: M&B Contracting Company-Reconsideration

DIGEST:

1. Bid is not materially unbalanced unless it is reasonably clear that acceptance will not result in lowest overall cost to Government. Allegations that interest may have to be paid or that excessive termination costs will be incurred are speculative, and GAO will not consider them.
2. Construction contractor being paid upon completion of various classes of work may be paid reasonable cost of preparatory work done and materials furnished, less estimated value of items of equipment at conclusion of contract, without violating statute prohibiting advance payments.

M&B Contracting Company (M&B), the third-low bidder for construction of a divide cut on the Tennessee-Tombigbee Waterway and an interested party in the protest of Farrell Construction Company (Farrell), 57 Comp. Gen. (1978), 78-2 CPD 45, seeks reconsideration of part of our decision in that case.

Harbert Construction Corporation (Harbert), which has since been awarded the contract, was alleged by Farrell and M&B to have submitted an unbalanced bid because it included the cost of new equipment, to be used in performing the three-year contract, in its \$6 million price for the bid item covering mobilization and preparatory work.

Farrell and M&B contended that because this amount would be paid at the "front end" of the contract, Harbert would be financing its performance with Government money, rather than its own. Farrell argued that the Government might have to divert funds from other sources to maintain liquidity of the project and might incur additional costs if, due to exhaustion of funds, interest had to be paid on amounts due; moreover, according to Farrell, if the contract were terminated before completion, the Government would have purchased a huge fleet of equipment for the contractor. M&B also argued that such payment would violate the statute prohibiting advance payments, 31 U.S.C. 529 (1976).

We held that the Corps of Engineers had discretion to determine the amount and kind of equipment which might be paid for under the mobilization and preparatory work clause prescribed by Armed Services Procurement Regulation (ASPR) 7-603.37 (1976 ed.) and included in the contract. We stated that Farrell's arguments regarding diversion of funds and payment of interest were based on events which might or might not occur, and that the possibility of such events did not affect the legality of the proposed award.

In addition, we found that payments under the mobilization and preparatory work clause were in the nature of progress payments, rather than advance payments, and that the Government's interest appeared to be protected by the standard termination clause for construction contracts, which requires the contractor to transfer title and deliver to the Government supplies and other material acquired in connection with performance of the work which is terminated.

In its request for reconsideration, M&B states that our decision is correct with regard to Farrell's unit prices (we found Farrell, the lower bidder, nonresponsive for having omitted a price for a mandatory

bid item, because its intended price could not be determined from the pattern of pricing), but that our analysis is in error with regard to unbalanced bidding.

M&B argues that Harbert's bid of \$6 million, when compared to the Government estimate of \$1,060,000 for mobilization and preparatory work, is "a classic case of unbalanced bidding;" this conclusion is "reinforced by Harbert's strikingly distorted bid \$11,262,000 for common excavation, compared to the Government estimate of \$16,044,500." M&B argues that our decision misconstrues the meaning of unbalancing by tacitly accepting the Corps of Engineers' reasoning--that because the total of mobilization and preparatory costs, clearing and grubbing, and common excavation is virtually the same for all parties, there is no unbalancing. The similarity in these totals is actually "the essence of unbalanced bidding," M&B states; "it simply proves that costs have been improperly shifted among pay items."

In our original decision, we stated that in analyzing unbalanced bids, the question generally is whether each bid item carries its share of the contractor's costs and profit, or whether it is based on nominal prices for some work and enhanced prices for other work. A bid is not materially unbalanced unless it is reasonably clear that acceptance will not result in the lowest overall cost to the Government. Chrysler Corporation, B-182754, February 18, 1975, 75-1 CPD 100.

We do not believe the protesters, who have the burden of proof, have shown that Harbert's bid would not result in the lowest overall cost to the Government. M&B states that our decision never addressed the extra cost to the Government in interest expenses caused by this unbalanced bid or the more serious potential loss to the Government if this project is terminated. Despite M&B's argument that our Office "cannot abrogate its responsibilities to protect the financial interests of the Government by demanding a showing of certainty of Government loss," we continue to believe it would be speculative for us to consider such costs, which may never be incurred by the Government.

In deciding the protest, we found it more precise to identify the issue as whether the cost of equipment to be used in performing the contract might properly be included in and paid for as mobilization and preparatory work, rather than as a question of unbalanced bidding. We quoted and discussed the mobilization and preparatory work clause, and held that the Corps of Engineers might reasonably find the equipment which Harbert proposed to buy was covered by the clause, since it was "in excess of the type, kind, and quantity presumed to be the normal equipment of a contractor qualified to undertake the work."

M&B, in its request for reconsideration, again argues that the immediate payment of capital expenses is a prohibited advance payment, "indefensible unless the Government is totally protected from loss." In M&B's opinion, termination for the convenience of the Government would result in protracted litigation over the disposition of equipment purchased by Harbert.

We distinguished the payments in this case from those in General Telephone Company of California, 57 Comp. Gen. 89 (1977), 77-1 CPD 376, cited by M&B, in which our Office had objected to payment upon installation of a basic charge for special equipment which was being leased for 10 years. In that case, the basic charge had not been "actually earned" and did represent an illegal advance payment.

The instant case, we believe, is closer to one decided by our Office in 1931, involving a \$49 million contract for construction of the Hoover Dam. Like Harbert's, the contract was on a unit price basis, with the contractor to receive certain amounts for various classes of work. Since there was no separate item for preparatory work, we were asked by the Secretary of the Interior whether some \$3 million in preparatory costs could be paid as a partial payment if charged to a \$13 million item for excavation of four diversion tunnels, the principal item of work for first performance. The

Secretary stated that while this preliminary work would be of considerable value to the Government in the event it became necessary to take over the work, he had understood that preparatory work could not be paid for unless it became the property of the Government. Except for a highway and a railroad constructed by the contractor, which the Government could not be denied use of, none of the items listed would become the property of the Government.

We found no legal objection to the proposed method of payment. We stated:

* * * In making payments for preparatory work done, the contractor should not be paid all of its expenditures for supplies and equipment delivered at the site in connection with preparatory work and which will not be incorporated in the dam or consumed in the course of performance of the contract work. That is to say, the contractor may be paid the reasonable cost of the preparatory work done and materials furnished, less the estimated value of the items of equipment at the conclusion of the work * * *. If it should become necessary to * * * take possession of the preparatory work and equipment, such as railway equipment, compressor plant, etc., there will not be invested therein public money, and as a part of the contract payments, any sums in excess of the approximate cost of the equipment, etc. which will be consumed during the contract period of work." A-38974, October 15, 1931. 1/

1/ This decision recently has been modified to the extent that cos. of a performance bond may now be included in the amount paid for preparatory work. See 57 Comp. Gen. 25 (1977), 77-2 CPD 319. The quoted portion, however, has neither been modified nor overruled.

We note, incidentally, that a statute prohibiting advance payments, the Act of January 31, 1823, 3 Stat. 723, which has since been amended and codified at 31 U.S.C. 529, supra, was in effect at the time of this decision.

In the instant case, the salvage value of Harbert's equipment, as estimated by the contracting officer, will be deducted from the amount paid to Harbert for mobilization and preparatory work, and thus the equipment paid for will be "consumed" in the course of performance. As stated in our original decision, we believe the termination clause is broad enough to cover such equipment should it be necessary for the Government to take over the work. Moreover, since this is a progress or partial payment, the statutory requirement that if advance payments are authorized, adequate security must be given and an agency must determine that payment would be in the public interest, 10 U.S.C. 2307 (c) (1976), is not directly applicable.

Since M&B has not advanced additional facts or offered any other arguments of law to demonstrate that our decision of July 18, 1978, is in error, it is hereby affirmed.

R.J. Kaffen
Deputy Comptroller General
of the United States