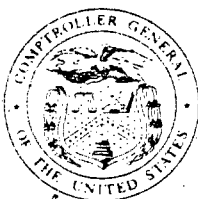


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Feldman
PETI

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548*[Protest of Navy Contract Award]*

FILE:

B-198427.2

DATE: October 3, 1980

MATTER OF:

K.P. Food Services, Inc.

DIGEST:

1. To extent protester objects after bid opening to inclusion and evaluation of option periods as set forth in IFB, protest is untimely under GAO Bid Protest Procedures 4 C.F.R. § 20.2(b) (1) which require protests based on alleged solicitation improprieties apparent prior to bid opening to be filed before such time.
2. Question whether revised Defense Acquisition Regulation (DAR) 1-1502 permits inclusion of option provisions in solicitation for mess attendant services is significant issue within meaning of GAO Bid Protest Procedures. Issue is of widespread interest to procurement community because of prior GAO decision in Palmetto Enterprises, Inc., et al., which held prior DAR provision prohibited inclusion of option provision in food service contracts and thus any evaluation of option period.
3. Current DAR provision 1-1502 permits inclusion of options in solicitations for food services. On this basis, GAO decision in Palmetto Enterprises, Inc., et al. is modified.
4. Bid for base period approximately \$180,000 greater than bids for two one-year options is not mathematically unbalanced where there is no evidence that bid is based on nominal prices for some work and enhanced prices for other work and bid for base period represents 36.7 percent of total bid price with each option year representing 31.6 percent of total price.

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5. Mathematically unbalanced bid is not materially unbalanced and may be accepted where there is no reasonable doubt that award would result in lowest ultimate cost under solicitation's evaluation criteria.
6. Question regarding affiliation of individual on debarred bidders list for violation of Service Contract Act is not for review by GAO, because Service Contract Act provides that Federal agency head and Secretary of Labor are to enforce Act.

K.P. Food Services, Inc. (K.P.) protests the proposed award of a contract to Military Services, Inc. of Georgia (Military) under invitation for bids (IFB) N00600-80-B-4988 issued by the Navy. The IFB is for mess attendant services at the U.S. Naval Academy, Annapolis, Maryland. K.P. argues that Military's bid for the basic one year term and two option years is mathematically and materially unbalanced and must be rejected by the Navy as nonresponsive. In this connection, the protester maintains that the Navy cannot properly evaluate or exercise the options and that it should receive an award based on its low bid price for the basic one year period. Finally, the protester questions the affiliation of Military with an individual on the debarred bidders list.

We deny the protest.

Preliminary Considerations

K.P.'s allegation regarding the propriety of evaluating the option periods, filed after bid opening, is untimely. The IFB provided that bids would be evaluated for purposes of award by adding the prices bid for the option years to the price bid for the base year. Our Bid Protest Procedures require that protests based upon alleged improprieties which are apparent prior to bid opening must be filed before bid opening. 4 C.F.R. § 20.2(b)(1) (1980). Thus, to the extent K.P. objects to the inclusion of the option provisions, its protest is untimely.

However, we think that the related question concerning the applicability and interpretation of DAR § 1-1502(c) falls within the significant issue exception to our timeliness rules. 4 C.F.R. § 20.2(c). We have previously held that under DAR § 1-1502 (b)(i) an agency could not properly include option provisions in an IFB for food services and that any exercise of those option provisions would be improper. Palmetto Enterprises, Inc., et al., B-193843, B-193843.2, B-193843.3, August 2, 1979, 79-2 CPD 74. The Navy now argues that DAR § 1-1502(c) subsequently was promulgated largely in response to our decision in Palmetto Enterprises, Inc., et al., supra, and now permits the inclusion of option provisions in solicitations for food services. We believe this matter may properly be viewed as one of widespread interest to the procurement community, Wyatt Lumber Company, B-196705, February 7, 1980, since the defense agencies award numerous food services contracts each year. Thus, we will treat this aspect of the protest on the merits.

In a memorandum dated December 18, 1979, the Navy representative to the DAR Council forwarded to the Naval activities the newly revised DAR 1-1502. Specifically, this provision precludes the inclusion of option provisions in solicitations in certain situations and provides in 1-1502(c):

"In recognition of (i) the Government's need in certain service contracts for continuity of operation and (ii) the potential cost of disrupted support, options may be included in service contracts if there is an anticipated need for a similar service beyond the first contract period. * * *"

K.P. cites our decision in Palmetto Enterprises, supra, for the proposition that our Office "specifically prohibited options in food service contracts because the industry is so highly competitive."

Our conclusion in Palmetto Enterprises, Inc., supra, that the agency improperly included option provisions in the solicitation was based on prior DAR § 1-1502(b)(i) which stated that option provisions shall not be included in solicitations if "the supplies or services being purchased are readily available on the open market." It was on this basis

that we recognized in Palmetto the highly competitive nature of the food service industry. DAR now has been revised to eliminate the reference to "services" in 1502(b)(i) and to add the new section "c". In accordance with § 1-1502(c), the Navy found that there is an anticipated need for food services beyond the first contract period and therefore included options in the IFB. Our review of the minutes of the DAR Council and other background information concerning the revision of DAR § 1-1502(b)(i) and new section "c" indicates that these changes were designed to permit options in, among other things, contracts for food services. Inasmuch as the revised DAR provision has eliminated the prohibition in 1502(b)(i) concerning service contracts, we think that the Navy properly included the options in this IFB. Accordingly, Palmetto Enterprises, Inc., supra, is modified to the extent it is now inconsistent with the current regulatory provisions governing options in food service contracts.

Nonetheless, K.P. believes that the Navy did not make the appropriate "findings" under 1-1502(c)(i) and (ii) concerning the need for "continuity of operation" and the "potential cost of disrupted support" before including the option provision in the IFB. Contrary to K.P.'s belief, DAR § 1-1502 does not require that findings be made concerning the "continuity of operation" or the "potential cost of disrupted support" before including an option period in a solicitation: it merely recognizes that these factors are present in "certain service contracts." The relevant findings required to be made before an option quantity can be evaluated for award are set forth in DAR § 1-1504. DAR § 1-1502 only concerns the inclusion of options in solicitations. Moreover, the Navy made the requisite findings under DAR 1-1504 that the option periods could be evaluated for award.

Unbalancing

The IFB requested bids for each yearly period -- the basic year, option year 1 and option year 2 -- and designated each period as Lot I, Lot II and Lot III, respectively. The bids of Military and K.P., excluding support costs and including discounts, are as follows:

	<u>LOT I</u>	<u>LOT II</u>	<u>LOT III</u>
Military	\$1,323,054	\$ 1,140,183	\$1,140,183
K.P.	1,249,660.40	1,249,660.40	1,249,660.40

As K.P. points out, its bid for Lot I is almost \$74,000 less than that of Military; Military's bid is low only if Lot II and/or Lot III are evaluated.

Our Office has recognized the two-fold aspects of unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect, material unbalancing, involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is not materially unbalanced unless there is reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. Only a bid which is materially unbalanced cannot be accepted. Propserv Incorporated, B-192154, February 28, 1979, 79-1 CPD 138; Mobilease Corp., 54 Comp. Gen. 242 (1974), 74-2 CPD 185.

K.P. maintains that Military's bid is front loaded in that its bid for Lot I is significantly greater than that for Lot II or Lot III even though all lots contemplate performance of identical services. With this in mind, the protester argues that Military's bid is mathematically unbalanced because its bid for Lot I is \$182,871 or 14 percent higher than Military's bid for Lots II and III. Adhering to the second prong of the test for unbalanced bids, K.P. argues that Military's bid raises more than a reasonable doubt that its acceptance will result in the lowest cost to the Government. This doubt exists, according to K.P., because under the applicable Defense Acquisition Regulation (DAR) 1-1502(c)(ii) (1976 ed.) the Navy cannot properly include the option provisions and thus cannot properly evaluate option prices or exercise the options. However, in view of the above discussion, we find nothing improper in the use and evaluation of the options included in the solicitation.

With regard to whether Military's bid is mathematically unbalanced, while it is true that Military's bids for Lots

II and III are approximately \$180,000 less than its bid for Lot I, there is no evidence that its bid prices for Lots II and III represent nominal prices for these lots. As Military points out, its bid for Lots II and III each represent 31.6 per cent of its total bid price while Lot I represents 36.7 per cent of the total. We do not find the difference in Military's bid prices so great as to render its bid mathematically unbalanced. In Properserv, supra, the questioned bid was \$18,000 per month for the basic term (three months) and \$14,000, \$13,000 and \$12,000 per month respectively for the three option years. In that case, even though the bid for the basic term was approximately 30 percent greater than the option I bid price and was 50 percent greater than the third year option bid price, we did not find the bid to be mathematically unbalanced. Compare Reliable Trash Service, B-194760, August 9, 1979, 79-2 CPD 107, where the questioned bid was mathematically unbalanced because the first option year bid price of \$530,468 exceeded the bid prices for the second and third option years by approximately 90 percent and the bid price for the basic period was substantially greater than other bidder's prices for the same period. Even though, as the protester points out, all lots here contemplate the performance of identical services, that alone does not render the bid unbalanced, and we will not look behind a bid in an attempt to ascertain the business judgment that went into its preparation. See e.g. Reliable Trash Service, supra; S.F. & G., Inc., dba Mercury, B-192903, November 24, 1978, 78-2 CPD 361.

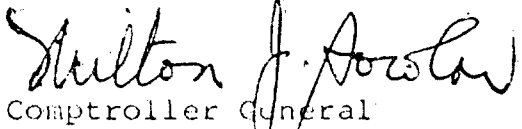
Even if we assumed Military's bid is mathematically unbalanced, we do not find Military's bid to be materially unbalanced. The IFB provided that for purposes of award the total price for all option quantities would be added to the total price for the basic quantity. The record shows that the requirement for mess attendant services is certain to exist during the option period and that there is a reasonable expectation that funds will be available to exercise those options because of the nature of the service involved. Thus, because the Navy expects to exercise their options, it can evaluate the options. Military's bid is not materially unbalanced because it offered the lowest ultimate cost to the Government. Reliable Trash Service, supra.

In this connection, K.P. cites our decision in Safemasters Company, Inc., 58 Comp. Gen. 225 (1979), 79-1 CPD 38, for the proposition that a "mathematically unbalanced bid is materially unbalanced unless it is 'low * * * under all possible situations.'" We believe that the protester has misinterpreted our decision in that case. Safemasters involved the improper termination of Safemaster's contract because of improprieties in the award process. We stated that even though the solicitation improperly contained option provisions, that fact did not justify termination because none of the bidders including Safemasters submitted unbalanced bids or otherwise attempted to benefit in the event the Government failed to exercise the options and, additionally, because Safemaster's was the "low bidder under all possible situations." That statement was meant to explain our finding that no bidder would be prejudiced by award to Safemaster's despite the improper inclusion of the option provision in the solicitation. Our statement that Safemaster's was low under "all possible situations" was not a new definition of a materially unbalanced bid.

Debarred Bidder

Finally, K.P. maintains that an individual (X) who is on the debarred bidders list for violation of the Service Contract Act, 41 U.S.C. § 351 et seq. (1976) has a substantial interest in Military, and, therefore, Military is ineligible for award. K.P. argues that circumstances have changed since the Department of Labor (DOL) ruled in 1979 that X did not have a substantial interest in Military, and, in fact, X now does have a substantial interest in Military. However, we will not consider the question of whether this individual has a substantial interest in Military because the Service Contract Act provides that the Federal agency head and the Secretary of Labor are to enforce the Act. Enviro-Development Company, B-195215, July 12, 1979, 79-2 CPD 30. This enforcement power includes making determinations regarding affiliations with debarred individuals or firms. See Integrity Management International, Inc., B-187555, December 21, 1976, 76-2 CPD 515. Thus this matter should properly be pursued with the Navy or the Department of Labor.

The protest is denied.


For the Comptroller General
of the United States