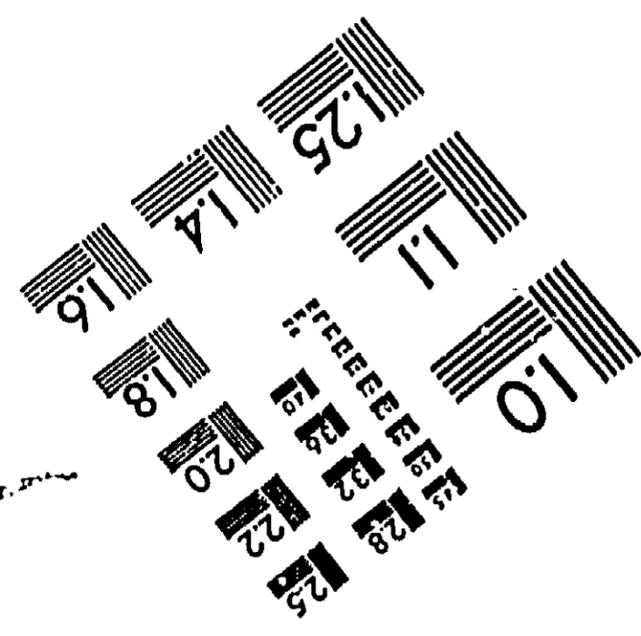
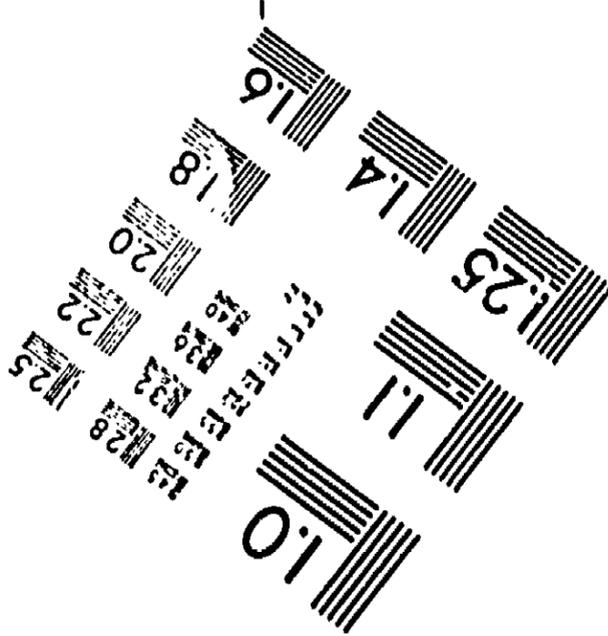
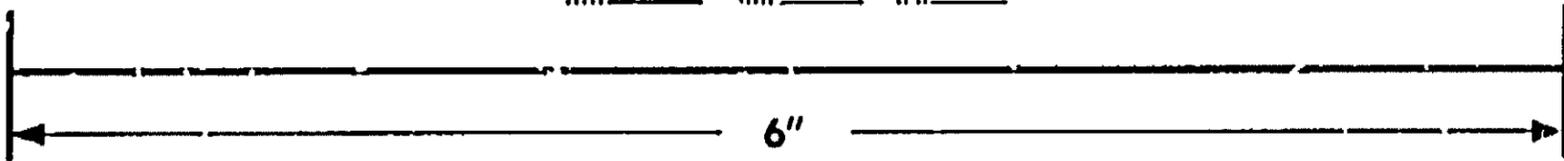
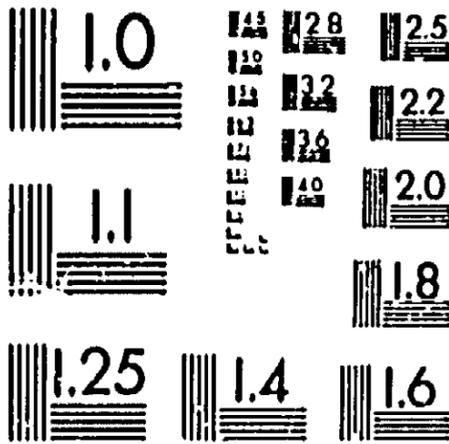
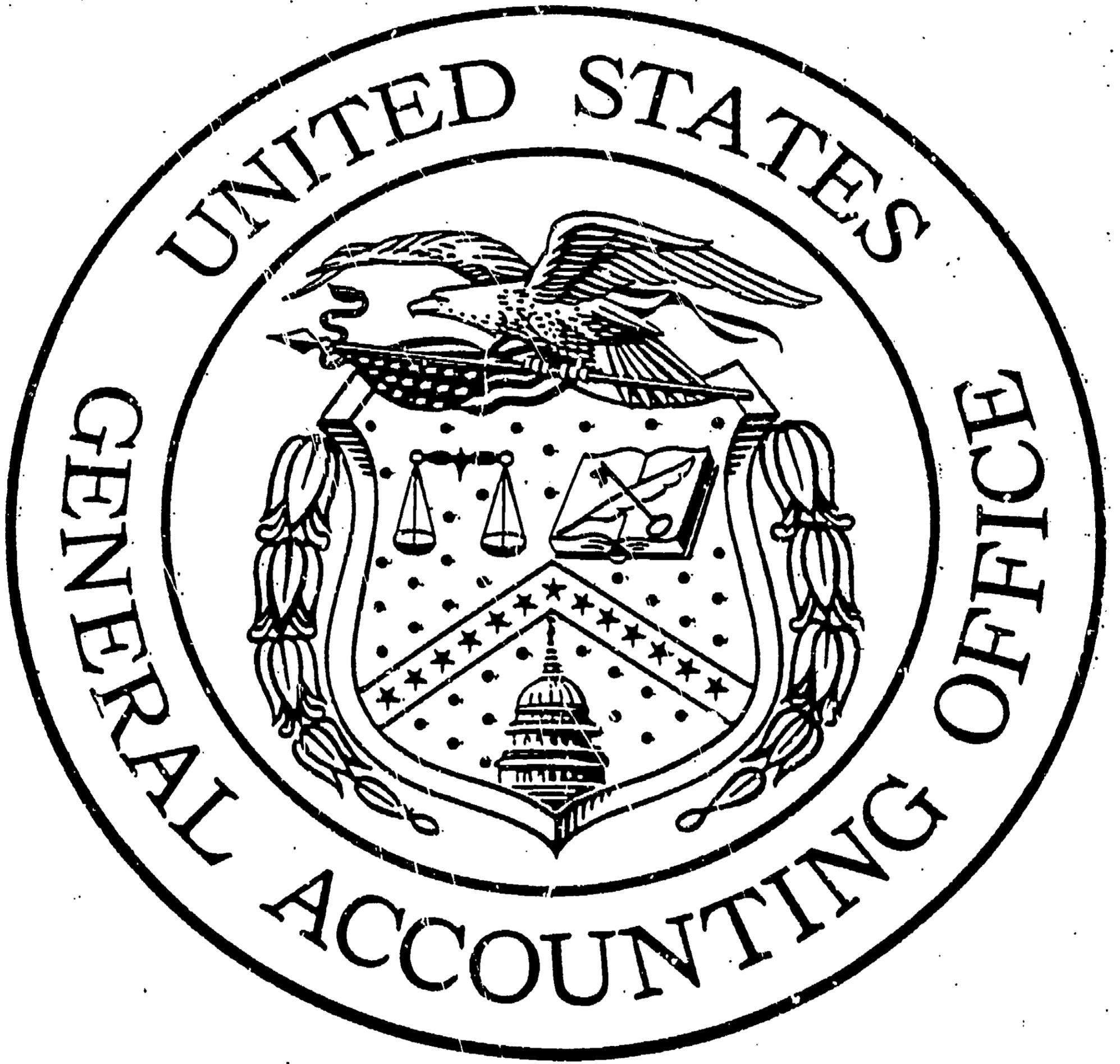


IMAGE EVALUATION TEST TARGET (MT-3)



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DECISION



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

FILE: B-205611

DATE: June 7, 1982

MATTER OF: Jimmy's Appliance

DIGEST:

1. Question regarding bidder's status as small business under total small business set-aside for rental and maintenance of laundry equipment is not matter of bid responsiveness since question does not relate to bidder's commitment or obligation to provide required services in conformance with material terms of solicitation, but rather to bidder's status and eligibility for award. Thus, contracting agency was correct in permitting bidder to correct erroneous certification indicating bidder was large business in order to reflect bidder's actual status as small business.
2. Although low bid was higher on contract for 10-month base period than it was for two 1-year options, thus appearing to be mathematically unbalanced, bid may be accepted because material unbalancing is not present since there is no reasonable doubt that award will not result in lowest ultimate cost to Government.
3. Insertion in low bid of unit prices per appliance, instead of monthly unit price as required by IFB, was not material deviation requiring rejection of bid as nonresponsive, but was matter of form having no effect on services being procured, since the correct total prices were entered for each period and monthly unit price was easily ascertainable by simple arithmetical calculation.

Jimmy's Appliance (J.A.) protests the award of a contract to Lane Good Housekeeping Store (Lane) under invitation for bids (IFB) No. F29651-81-B-0069 issued by the Air Force. The IFB, a total small business set-aside, was for rental and maintenance of washers and dryers at Holloman Air Force Base, New Mexico, for a base 10-month period with 2 option years.

J.A. asserts that Lane was nonresponsive because it certified in its bid that it was not a small business and that the Air Force improperly permitted Lane to amend its bid after bid opening to change this certification. J.A. further asserts that Lane's bid was unbalanced and that J.A., not Lane, was the low bidder under a proper evaluation of the bids and that Lane's bid was also nonresponsive because it indicated what appears to be the number of appliances to be supplied rather than the performance periods required under the unit designation in the IFB.

Based on the following, we deny the protest.

Lane certified in its bid that it was not a small business and that it was provided goods manufactured by other than a small business. The Air Force contracting officer suspected a mistake in Lane's representation that it was not a small business and, pursuant to Defense Acquisition Regulation (DAR) § 2-406.1 (1976 ed.), requested Lane to verify its small business status. Lane responded that it had mistakenly certified, since it was a small business. The contracting officer permitted Lane to correct its bid as a clerical error.

After learning that the correction was permitted, J.A. filed a protest with the Air Force asserting that Lane had submitted a below-cost bid, that Lane was nonresponsive because it had certified itself to be other than a small business and that, in view of its various affiliations, it was likely that Lane was, in fact, not a small business. The Air Force denied the protest on the grounds that it had no reason to believe that Lane could not perform the contract at the stated price and that the large business status representation was properly corrected as a clerical error in view of the contracting officer's knowledge that under prior transactions Lane had always represented that it was a small business. J.A. then filed its protest with our Office.

The solicitation in this case was issued on standard form 33, which provides:

"The offeror represents as part of his offer that:

- "1. SMALL BUSINESS * * * He [] is, is not, a small business concern. If offeror is a small business concern and is not the manufacturer of the supplies offered, he also represents that all supplies to be furnished hereunder [] will, [] will not, be manufactured or produced by a small business concern in the United States, its possessions, or Puerto Rico."

The bidder must first represent whether it is a small business concern. While a bidder must be small in order to be eligible for award under a small business set-aside, once the award has been made, the first representation imposes no contractual requirement which the Government would have the right to enforce during contract performance. Any question concerning the accuracy of the representation, which affects the bidder's eligibility for award, may be decided by the SBA on the basis of information outside the bid. Therefore, we do not believe the first representation by itself properly should be viewed as involving a matter of responsiveness.

The second representation applies only to contracts for the furnishing of supplies and not to contracts, as here, for services. Unlike the first representation, this portion of the "Small Business" clause does concern a performance obligation of the bidder, should it become the contractor, enforceable by the Government. It reflects the view that, when a contract for supplies is awarded under a small business set-aside, the socio-economic aims of the set-aside program are served only if the supplies are manufactured by a small business concern. Therefore, bidders on small business set-asides for supplies must obligate themselves, in their bids, to provide supplies manufactured by a small business concern. A bidder's failure to make such a commitment in its bid renders the bid nonresponsive because without such a commitment the Government would not be able to require the bidder, even though it is a small business, to supply items manufactured by a small business as required by the solicitation.

In the case at hand, however, there is no solicitation or contract small business-related requirement which the Government would have the right to enforce during contract performance. The only requirement in this type of procurement is that the bidder actually be small to be eligible for award.

Here, there is no question concerning Lane's obligation to provide the required service in accordance with the material terms and conditions of the solicitation. Rather, the only question which exists is whether Lane is a small business under the size standards established by the SBA. See 13 C.F.R. § 121.3, et seq. (1981). This question relates solely to Lane's status and its eligibility for award under the set-aside and does not reflect upon Lane's commitment to provide the required service. See generally Northern Virginia Chapter, Associated Builders and Contractors, Inc.--Reconsideration, B-202510.2, August 3, 1981, 81-2 CPD 85; Anderson-Cottonwood Disposal, B-194885, August 8, 1979, 79-2 CPD 98.

However, when a bidder asserts that it erroneously certified itself as a large business on a small business set-aside, we believe there is enough doubt as to the bidder's actual status to warrant referral of the matter to the SBA, which is empowered to make conclusive determinations regarding the size status of bidders under 15 U.S.C. § 637(b)(6) (1976). See Cabrillo Food Service Inc., B-185172, August 6, 1976, 76-2 CPD 107. In this instance, we note that the matter was submitted to the SBA, which concluded that there was no specific evidence to question Lane's size status. J.A. was advised of this determination and of its right of appeal to the Size Appeals Board, but it apparently declined to exercise this right. Consequently, the SBA determination in this respect is conclusive. See Alliance Properties, Inc., B-205253, November 10, 1981, 81-2 CPD 398.

J.A.'s allegation that it, not Lane, was actually the low bidder is based on the argument that the agency should not have considered the option year prices in evaluating the bids. In this respect, the IFB included the following proviso from DAR § 7-2003.11(b) (1976 ed.):

"A. Bids and proposals will be evaluated for purposes of award by adding the total price for all option quantities to the total price for the basic quantity. Evaluation of options will not obligate the Government to exercise the option or options.

"B. Any bid or proposal which is materially unbalanced as to prices for basic and option quantities may be rejected as non-responsive. An unbalanced bid or proposal is one which is based on prices significantly less than cost for some work and prices which are significantly overstated for other work."

Lane's bid was \$44,627.08 for the 10-month base period, \$9,674.31 for the first option year, and \$10,674.31 for the second option year for a total of \$64,975.70. J.A.'s bid was \$34,149.50 for the 10-month base period, \$40,779.40 for the first option year, and \$40,779.40 for the second option year for a total of \$115,708.30. J.A. argues that, since the award was for the first year only, it offered the lowest bid. It argues also that Lane's bid is materially unbalanced.

In particular, J.A. contends that the evaluation of price based on base plus option year was improper. This is an untimely allegation that the price evaluation format contained in the solicitation is defective. J.A. did not file its protest until after bid opening. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1981), require that protests based upon alleged improprieties in any type of solicitation apparent prior to bid opening be filed prior to bid opening.

Regarding J.A.'s allegation that the Lane bid was unbalanced, 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 a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. Consequently, only a bid found to be materially unbalanced may not be accepted. Propserv Incorporated, B-192154, February 28, 1979, 79-1 CPD 138; Mobilease Corporation, 54 Comp. Gen. 242 (1974), 74-2 CPD 185. In the present case, the contracting officer found that J.A.'s first year bid properly reflected its proportional share of the cost of the total contract, since it included equipment and setup costs. However, even if it were mathematically unbalanced, it is reasonably certain that the final cost to the Government will be \$64,975.70, after exercise of the option years, which will be significantly lower than the next low, J.A., bid, which was for a total of \$115,708.30; thus Lane's bid is not materially unbalanced. Reliable Trash Service, B-194760, August 9, 1979, 79-2 CPD 107.

Finally, J.A. asserts that Lane's bid is nonresponsive because it contains what appears to be the number of appliances in place of performance periods. The solicitation requested unit prices per month with a total price entry for 10 months in the base period and for 12 months in each option year. Lane entered the number of appliances being supplied as the "unit," instead of monthly units, then entered a price per appliance as the unit price and multiplied to arrive at the total entered price for each period. There is no question regarding the total prices, and the intended monthly "unit" price is easily determined simply by dividing the price entered by Lane's as the total for any given period by the number of months stated to be applicable to the period. Thus, since Lane's total price is clearly entered and its unit price is obvious and readily ascertainable from the face of its bid, Lane's failure to enter monthly unit prices is merely a matter of form which has no material effect on its price. Building Maintenance Corporation, B-190642, February 17, 1978, 78-1 CPD 143.

B-205611

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The protest is denied.

Milton F. Fowler
for Comptroller General
of the United States

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