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DECISION



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

FILE: B-209745 et al.

DATE: June 28, 1983

MATTER OF: Natural Landscape Contractors, Inc.

DIGEST:

1. A protester fails to meet its burden of proof in challenging a solicitation's estimates for landscaping services where the protester submits no evidence that the estimates are wrong but merely alleges that as a contractor under previous contracts, it found the actual work to be "drastically curtailed" from the estimates.
2. There is no basis to conclude that a solicitation's estimated quantities caused bids submitted under the solicitation to be materially unbalanced, where the estimated quantities are not shown to be inaccurate.
3. A contracting officer did not abuse his discretion in deciding that the Government's need for landscaping services would be better served under a requirements contract rather than an indefinite quantity contract (which guarantees that a minimum quantity of services will be ordered) since the quantity of services needed depended upon factors that were not predictable, so that it was not in the Government's interest to commit itself to a specified minimum.

Natural Landscape Contractors, Inc. (NLC), protests the award of any contract for landscape maintenance and grass cutting services under eight solicitations¹ issued by the General Services Administration (GSA). NLC, which did not submit bids under the solicitations, alleges that the solicitations' estimated quantities of work were so unrealistic that bidders were forced to submit unbalanced bids.

¹ B-209746, GS-11C-20342; B-209745, GS-11C-20346, B-209818, GS-11C-20364; B-209820, GS-11C-30000, B-209817, GS-11C-30001; B-209819, GS-11C-30002, B-210567, GS-11C-30019, B-210180, GS-11C-30020.

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We deny the protest.

Each solicitation, which sought the services for a different location in GSA's National Capital Region, generally contained the same detailed standard specifications defining the manner in which those services were to be carried out. For some services, the specifications noted the expected frequency of performance, while for others the specifications merely stated that performance would be at the direction of Government representatives. The solicitations also included bid sheets that listed all of the individual services sought, such as "FERTILIZING - Ornamentals" and "INSECT & DISEASE CONTROL - Turf," and noted an estimated frequency for each service, including services that the specifications stated would be performed at the Government's direction. Bidders were required to list on the bid sheets a unit price and a total price for each service, with the total price being the unit price multiplied by the estimated frequency. The bid sheet cautioned that the frequencies, which were the same for the initial contract year and each of the two 1-year options, were only estimates and that the Government did not guarantee any maximum quantities of work. Award was to be made to the bidder with the lowest aggregate price.

NLC contends that the solicitations' estimated quantities were unrealistic. The firm draws upon its experience as a contractor under other GSA solicitations in which similar estimates apparently were used, and asserts that it found the actual work for the required services to be "drastically curtailed" from the estimates. NLC believes that bidders submitting bids based on the estimates would have to submit improper unbalanced bids, that is, bids based on nominal prices for overestimated work and enhanced prices for underestimated work, so that award to the low bidder might not result in a contract at the lowest cost to the Government.

GSA argues that the estimates were reasonable. The agency asserts that the estimates represented the best information available since they were based in large part on proper horticultural procedure and on previous years'

experience under GSA contracts. GSA notes that changing weather conditions render it difficult to predict precisely how frequently the services will be needed.

When an agency solicits bids for a requirements contract on the basis of estimated quantities, the agency must base its estimates on the best information available. There is no requirement, however, that the estimates be absolutely correct. Rather, the estimated quantities simply must be reasonably accurate representations of anticipated actual needs. Space Services International Corporation, B-207888.4 et al., December 13, 1982, 82-2 CPD 525. The mere presence of a risk factor in Government estimates does not render the estimates inaccurate, since there is no requirement that competitive bidding be based on specifications stated so precisely that they eliminate the possibility that the successful contractor will encounter unforeseen conditions or be required to perform slightly more or less work than specified. 41 Comp. Gen. 484 (1962).

A protester challenging an agency's estimates bears the burden of proving that those estimates are not based on the best information available, otherwise misrepresent the agency's needs, or result from fraud or bad faith. JETS Services, Inc., B-190855, March 31, 1978, 78-1 CPD 259. NLC, however, has not submitted any evidence to support its allegation that the estimates do not accurately represent GSA's actual needs, but instead has chosen to rest solely on its statement that, during NLC's performance of similar contracts for GSA, the firm found the actual services required were "drastically curtailed" from the estimates. In our view, NLC, faced with GSA's response to the protest, might reasonably have provided at least some specific evidence concerning its contract experiences to support its allegation. Under the circumstances, we see no basis to question GSA's position that, in the types of procurements involved here, greater precision in estimation is impracticable because the factors that affect the required services are largely unpredictable. All the record in this protest shows is the protester's disagreement with the agency's position, and we therefore cannot conclude from

B-209745 et al.

the record that the estimates are inaccurate. See Jensen-Kelly Corporation, B-208685, B-208960, January 10, 1983, 83-1 CPD 21.

NLC also asserts that the estimates fostered improper unbalanced bidding. In order to prove its assertion, NLC would have to demonstrate a reasonable doubt that award to the low bidder, whose bid NLC must first show to be mathematically unbalanced (that is, based on nominal prices for some work and enhanced prices for other work), would not result in the lowest ultimate cost to the Government. Mobilease Corporation, 54 Comp. Gen. 242 (1974), 74-2 CPD 185. NLC asserts that it is unable to offer the necessary proof now since the firm is presently in the process of obtaining documents from GSA. NLC therefore requests that we grant the firm an open-ended extension of the time for submission of this evidence.

An unbalanced bidding allegation, however, basically concerns the issue of whether the solicitation's estimates are sufficiently accurate to permit a determination that the low bid actually represents the lowest cost to the Government. See TWI Incorporated, 61 Comp. Gen. 99 (1981), 81-2 CPD 424. It is only if the estimates are wrong that acceptance of a low mathematically unbalanced bid cannot reasonably be expected to cost the Government less than acceptance of another bid. Id. Since NLC has not shown that the estimates are inaccurate, we have no basis to conclude that the estimates preclude reasonable determinations that award to the lowest bidder will result in the lowest cost to the Government in each case. See Space Services International Corporation, supra. We must conclude, therefore, that NLC's position has no legal merit in any event, and consequently we see no need for the requested extension.

NLC argues that GSA should have guaranteed bidders a minimum and maximum amount of work and therefore should have used an indefinite quantity contract for the services, which includes such guarantees, instead of a requirements contract, which generally only states a maximum. GSA, on

B-209745 et al.

the other hand, asserts that the use of a requirements contract here was proper since it was impossible to determine in advance the precise quantities of the services that GSA would need. We see no reason to disagree with GSA's position.

In both requirements contracts and indefinite quantity contracts, the exact quantity of items or services that the Government will purchase is not specified. Federal Procurement Regulations (FPR) § 1-3.409(b)(1) and (c)(1) (1964 ed.). An indefinite quantity contract may be used "where it is impossible to determine in advance the precise quantities of the * * * services that will be needed * * * and it is not advisable for the Government to commit itself for more than a minimum quantity." FPR § 1-3.409(c)(2). The sole condition for use of a requirements contract, on the other hand, is the impossibility of determining in advance the precise quantities needed. FPR § 1.3-409(b)(2).

We have consistently recognized that the determination of how best to satisfy the Government's needs, which in this case concerns selection of the most appropriate contract type, falls within the contracting officer's discretion and thus we will not substitute our judgment absent a clear showing that the contracting officer abused his discretion. 48 Comp. Gen. 62 (1968); National Chemical Laboratories of Pa., Inc., B-186134, June 29, 1976, 76-1 CPD 421. While NLC may be correct in asserting that its own interests would be better protected under an indefinite quantity contract, with a minimum quantity provision, we have no basis to conclude that the contracting officer abused his discretion in deciding that the Government's needs would be better served under a requirements contract. The services required here depend upon factors that are not susceptible of long-range prediction, such as the weather and the perishability of the plants, and we believe those factors reasonably rendered inadvisable a commitment to a minimum quantity. Therefore, we will not object to GSA's use of requirements contracts. See John Bransby Productions, Ltd., B-207968, September 20, 1982, 82-2 CPD 243.

Finally, NLC complains that GSA awarded contracts under the seven solicitations in the face of NLC's protests. In each case, however, GSA submitted written determinations and findings to this Office signed by,

B-209745 et al.

among others, the assistant regional administrator and the regional counsel, citing the urgent need for the services. In doing so, GSA complied with applicable provisions of the FPR, specifically sections 1-2.407-8(b)(3) and (4), and our Bid Protest Procedures. See 4 C.F.R. § 21.4 (1983). In this regard, we point out that Federal court is the proper forum for seeking injunctive relief to prevent award while a bid protest is pending.

We deny the protest.

for Milton J. Arosola
Comptroller General
of the United States