

DECISION

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

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PK: II
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FILE: B-216396.2

DATE: November 2, 1984

MATTER OF: Keco Industries, Inc.

DIGEST:

In a situation where a bidder violates an IFB's level pricing provision, the determinative issue as to the responsiveness of the bid is whether or not this deviation worked to the prejudice of other bidders. Therefore, an unlevel low bid will not be found to be nonresponsive where it cannot be shown that the second low bidder conceivably could have become low if it had been permitted to unlevel its bid in the same manner as did the offending bidder.

Keco Industries, Inc., the second low bidder, has protested the award of a contract for air conditioners to ATACS Corporation under invitation for bids (IFB) No. DAA-J10-84-B-A182, issued by the Department of the Army Troop Support Command. Keco contends that ATACS' apparent low bid was nonresponsive due to a failure to bid certain pre-production units at the same price bid for the base quantity units, contrary to the terms of the solicitation, and therefore that the bid should have been rejected.

The protest was initially filed with this Office on September 13, 1984. By letter of October 4, Keco withdrew the protest. Shortly thereafter, Keco filed a motion for a preliminary injunction before the Federal District Court for the Eastern District of Virginia (Civil Action No. 84-1023-A) which, by order of October 12, granted ATACS' motion to intervene in the matter, denied Keco's motion for a preliminary injunction, and requested an advisory opinion from this Office.

We find Keco's position to be without legal merit.

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Background

The IFB was issued on July 13, 1984, as a 2-year solicitation for the procurement of a total of 4,086 air conditioners. The solicitation was structured so that the first-year base requirement was for 583 production units (item 0001 AA) and 2 pre-production units (item 0001AB), with an option for the government to purchase an additional 585 units (item 0002). Under the first-year requirement, bidders were also to price various related technical manuals and test and validation reports (items A001 through A011). The second-year base requirement was for 1,458 production units (item 0003 AA) with an option to purchase an additional 1,458 units (item 0004). Bids were to be submitted on a unit price basis.

Under the terms of the solicitation, bidders were required to submit the same unit prices for the base quantities for the 2 years, that is, to level price those units, but could submit varying unit prices for the option quantities for the 2 years. By a written clarification message of July 26, which was never formally incorporated into the solicitation by amendment, the contracting officer cautioned bidders that a failure to level price the pre-production units would render a bid nonresponsive. The solicitation also provided that bids were to be evaluated for purposes of award by adding the total price for all option quantities to the total price for the base quantities.

Bids were opened on August 22. ATACS' bid was low, with Keco's second low, as follows:

First Program Year

	Item No.	Quantity	Unit Price	Total
ATACS	0001 AA	583	\$ 4,450	\$ 2,594,350
	0001 AB	2	\$ 18,000	\$ 36,000
	A001-A011	-	-	\$ 153,500
	0002	585	\$ 4,150	\$ 2,427,750
			Total	\$ 5,211,600

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Keco	0001 AA	583	\$ 4,491	\$ 2,618,253
	0001 AB	2	\$ 4,491	\$ 8,982
	A001-A011	-	-	\$ 18,007
	0002	585	\$ 4,491	\$ <u>2,627,235</u>
			Total	\$ 5,272,477

Second Program Year

	Item No.	Quantity	Unit Price	Total
ATACS	0003 AA	1,458	\$ 4,450	\$ 6,488,100
	0004	1,458	\$ 4,150	\$ <u>6,050,700</u>
			Total	\$12,538,800
Keco	0003 AA	1,458	\$ 4,491	\$ 6,547,878
	0004	1,458	\$ 4,491	\$ <u>6,547,878</u>
			Total	\$13,095,756

Total Multiyear Requirements

ATACS	\$17,750,400
Keco	\$18,368,233

From the above, it can be seen that ATACS failed to level price item 0001 AB, the pre-production units. The Army, however, concluded that this failure did not make the firm's bid nonresponsive, and awarded ATACS the contract on September 11; the Army then exercised the first-year option on September 22.

Protest and Analysis

Keco urges that it was prejudiced by the Army's acceptance of ATACS's allegedly nonresponsive bid. In this regard, the firm asserts that it was the low, responsive bidder for the first-year requirement, although admittedly not low for the entire contract period. Keco believes that had it been permitted to bid in the same manner as ATACS, that is, by submitting an unlevel bid, it might have been able to displace ATACS as the low bidder. We do not agree.

In cases dealing with a bidder's failure to level price^{1/} its bid, the determinative issue is whether or not this deviation worked to the prejudice of other bidders for the award. ABL General Systems Corporation, 54 Comp. Gen. 476 (1974), 74-2 CPD ¶ 318. We held in ABL that a submitted bid was nonresponsive where it contained a unit price for a base quantity and a higher unit price for an unevaluated option quantity in violation of an IFB provision that the option unit price was not to exceed the unit price for the base quantity. We found this deviation to be prejudicial because, although ABL was the low bidder on the base quantity, if the second low bidder had also been able to unlevel its bid by increasing the unit price for the option quantity, then the second low bidder conceivably could have reduced its unit price bid for the base quantity with the dollar reduction being added to the unevaluated option price. Since the IFB provided that evaluation was only to be made on the base quantity price, the second low bidder, whose bid price already was close to ABL's, could then have become the low bidder. Id. at 479.

In Keco Industries, Inc., 54 Comp. Gen. 967 (1975), 75-1 CPD ¶ 301, Keco's multiyear bid deviated from the requirement that like items be priced the same for each program year, because Keco had submitted a higher unit price for the first-year requirement than it did for the second and third-year requirements in that it had included certain nonrecurring costs in the first-year unit price. The second low bidder protested that Keco's bid was nonresponsive because Keco had failed to level price the first-year quantity. However, we noted that Keco's bid was significantly low on all alternatives: the first program year (including the nonrecurring costs), the second program year, the third program year, and the aggregate amount. We saw no prejudice occasioned by Keco's failure to level price the first-year quantity

^{1/}The purpose of a level pricing provision is to prevent bidders from lowering their prices in evaluated portions of the bid and inflating their prices in unevaluated portions to the government's detriment.

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because the second low bidder could not have become low if it had been permitted to bid in a like manner. Id. at 970.

However, in Keco Industries, Inc., B-195520.2, Jan. 7, 1980, 80-1 CPD ¶ 17, we held that the agency's rejection of the firm's bid as nonresponsive was proper where Keco had telegraphically reduced its unit prices for particular first-year multiyear requirements prior to bid opening, but had left the second-year unit prices for the same items unchanged, thereby violating the IFB provision that unit prices for the same items had to be identical for the 2 program years. We found the possibility of prejudice to other bidders in this case because of the closeness of the bidding--Keco's evaluated bid, considering only the items that had been reduced in the first-year, was 5 percent lower than the awardee's bid on the first year, 2 percent higher on the second year, and less than 2 percent lower in the aggregate. For the other items, Keco was 6 percent lower on the first year, 1 percent lower on the second year, and 4 percent lower overall. We concluded that Keco's unlevelled bid was non-responsive and therefore properly rejected.

We held in Sentinel Electronics, Inc., et al., 60 Comp. Gen. 202 (1981), 81-1 CPD ¶ 52, that a bid was properly rejected where, although the bidder literally complied with the IFB's level option pricing provision, a lump sum price reduction offered for the base quantity had the potential for prejudice because it effectively reduced the protester's per unit cost for the base quantity substantially below that for the unevaluated option quantity, thereby circumventing the level pricing requirement. We noted the possibility that other bidders effectively could have reduced their base quantity unit prices below that of the protester if they had been able to offer the same lump sum price reduction as the protester did. Therefore, we concluded that the protester's bid was properly rejected as nonresponsive, even though it was apparent that the protester had not meant to violate the level option pricing provision.

In Numax Electronics Inc., B-206127.2, Oct. 8, 1982, 82-2 CPD ¶ 317, a situation similar to that in ABL, supra, we held that Numax's bid was properly rejected as non-responsive where the firm had violated the level option pricing provision by offering the same unit price for the option quantity as it did for the base quantity only if the agency exercised the entire option; Numax had increased the per unit option price for progressively smaller increments of the option quantity. We emphasized that the determinative issue was not that Numax had violated the level option pricing provision, but whether this deviation had prejudiced the other bidders. We concluded that there was indeed the possibility of prejudice because, although Numax's bid was low in the aggregate, it was conceivable that the second low bidder could have underbid Numax on the base quantity with the dollar reduction being added to its option price if it had been allowed to violate the level option pricing provision as well. Since the IFB provided that evaluation was to be made on the price of the base quantity only, the second low bidder thus could have become the apparent low bidder.

In the present matter, we find essential differences in the structuring of the IFB from the structuring of the solicitations in these prior cases. Significantly, there was no level option pricing provision included in this IFB. Clause H3(b.) provided that:

"...Varying prices may be offered for option quantities depending on the quantities actually ordered and the date or dates when ordered."

Clause H5(6) provided that:

"The unit price of each item in the multi-year requirements shall be the same for all program years included therein."

Therefore, bidders had to offer the same unit prices for items 0001 AA and 0003 AA, the base quantities for the 2 years, but could offer varying unit prices for items 0002 and 0004, the option quantities. ATACS' bid for the above items was properly made, the firm bidding a unit price of \$4,450 for the 2-year base quantities and \$4,150

for the 2-year option quantities. The only issue, then, is whether ATACS' failure to level price the pre-production units in the first year is analagous to those cases where a true level option pricing provision was violated to the prejudice of other bidders.

As indicated previously, the contracting officer informed bidders by means of a July 26 clarification message that clause H5(6) required that the unit price for the pre-production units had to be the same as that for each item in the multiyear requirements, and that a failure to level price the pre-production units would render the bid nonresponsive.

ATACS alleges that it never received this message, and correctly observes that the message was never incorporated into the solicitation by means of a formal amendment. Nevertheless, we will analyze the bids to see whether or not this unleveling of ATACS' price for the pre-production units may have worked to the prejudice of other bidders. Our rationale is that, irrespective of the July 26 message, clause H5(6) seemingly indicates that the two pre-production units, as they are part of the base quantity, are to be priced the same, the interpretation reached by the contracting officer.

A key point here is that, unlike the situation in previous cases such as ABL, Sentinel Electronics, and Numax, supra, option prices submitted under this solicitation were evaluated for purposes of award. Clause M5(a.) specifically provided that:

"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."

Therefore, under the evaluation scheme, award would only be made to that bidder whose total price for the multiyear requirements, including the option quantities, was low.

We fail to understand Keco's allegation that the firm was low for the first year. It is true that Keco's bid was low in the first year as to the combined prices for the base quantity, the pre-production units, and the technical materials^{2/}, but that fact is irrelevant because the firm's price for the option quantity was also evaluated. ^{3/} Consequently, Keco's actual total bid for the first-year requirement, which must include the option quantity prices, was \$5,272,477 as opposed to ATACS' bid of \$5,211,600, a difference of \$60,877. For the second year, again including both the base and option quantity prices, Keco's total bid was \$13,095,756 against \$12,538,800 for ATACS, a difference of \$556,956. In the aggregate, Keco's total bid for the 2 program years was \$18,368,233 versus \$17,750,400 for ATACS, a difference of \$617,833 in ATACS' favor.

Keco argues by way of affidavit from its president that the firm would have increased its unit prices for the first-year requirement had it been able to submit an unlevel bid. Keco contends that this unleveling would have resulted in an increase of payments by the government during the initial stage of the procurement, thereby increasing the firm's "cash flow" so as to enable it to reduce its unit prices for the second year. Accordingly, Keco believes that this manner of bidding would have enabled it to bid a lower aggregate price than ATACS. We see no merit in the argument.

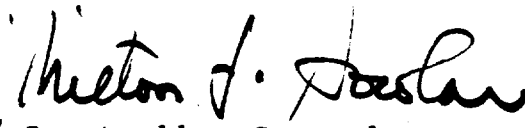
^{2/}For these 3 items Keco's bid was \$2,645,242 versus ATACS' bid of \$2,783,850 for the same items.

^{3/}We note that evaluated options are included in a solicitation with the expectation that they will be exercised. Here, the first-year option was in fact exercised shortly after award.

We believe that Keco's statements as to how it would have structured its bid had it been allowed to unlevel its unit prices are purely speculative, and self-serving. More importantly, the determinative issue in this type of case is, as we have indicated, whether the other bidders could have lowered their bids below that of the offending bidder if they had been permitted to unlevel their prices in the same manner. See Keco Industries, Inc., 54 Comp. Gen., supra, at 970. The only unleveling done by ATACS was to price its pre-production units at \$18,000 each. Thus, under the standard to determine prejudice, Keco would only be found to be harmed by ATACS' unleveling if Keco possibly could have become low by bidding "in the same mannner," that is, by also unleveling its price for the pre-production units.

We fail to see the possibility of prejudice to Keco occasioned by ATACS' limited deviation from the level pricing requirement. The effect of ATACS' unleveling of its price for the pre-production units only increased its bid for that item by \$27,100, which is a de minimis amount given the \$617,833 difference between the firms' total bids for the multiyear requirements. In our view, it is inconceivable that Keco could have overcome this difference if it had been allowed to unlevel its price for the pre-production units as well, and we note that the firm does not even attempt to suggest that it could have done so.

Accordingly, since we fail to find any possible prejudice to Keco, we believe the Army acted properly in accepting ATACS' low bid and in awarding the firm the contract.

for 
Comptroller General
of the United States