

DECISION



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

FILE: H-219444

DATE: September 17, 1985

MATTER OF: T.L. James & Company, Incorporated

DIGEST:

Where evaluation method in invitation for bids is structured so as to encourage unbalanced bidding, the invitation is defective, per se, and no bid can be evaluated properly because there is insufficient assurance that award will result in the lowest ultimate cost to the government.

T.L. James & Company, Incorporated (TLJ), protests the proposed award of a contract to North American Trailing Company (NATCO) under invitation for bids (IFB) No. DACW60-85-B-0016 issued by the United States Army Corps of Engineers for maintenance dredging in the Charleston Entrance Channel, Charleston, South Carolina. TLJ contends that its low bid was improperly rejected as being materially unbalanced.

We believe that award under this IFB would be improper, but for a different reason, as explained below.

The bidding schedule in the IFB called for bids on mobilization and demobilization and dredging of an estimated 426,000 cubic yards (cu. yds.) of material. The IFB indicated that the contractor was required to remove 162,000 cu. yds. of the material available to be dredged, with the remaining 264,000 cu. yds. representing overdepth dredging. Overdepth dredging is the additional amount of dredging allowed because the dredging operation is incapable of precise performance.

TLJ and NATCO were the only bidders. The bids and government estimate (Govt. Est.) were as follows:

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| | Mobilization and Demobilization | Unit Price (per cu. yd.) | Dredging Ext. Price (426,000 cu. yds.) | Total |
|---------------|------------------------------------|-----------------------------|---|------------|
| TLJ | \$725,000 | \$0.40 | \$ 170,400 | \$ 895,400 |
| NATCO | 45,000 | 2.00 | 852,000 | 897,000 |
| Govt. Est. | 200,000 | 3.20 | 1,363,200 | 1,563,200 |

After bid opening, NATCO protested to the Corps that TLJ's low bid should be rejected as materially unbalanced. The Corps sustained the protest. It first determined that TLJ's bid was mathematically unbalanced because its bid price for mobilization and demobilization was more than three times greater than the government estimate and 16 times greater than NATCO's bid.^{1/} Further, TLJ indicated to the agency that the two dredges it intended to use for this project were located in Jacksonville, Florida, and Norfolk, Virginia, and the agency estimated the mobilization and demobilization cost of these two dredges would be only \$334,000. On the other hand, the unit price for dredging bid by TLJ was extremely low, being only 12.5 percent of the government estimate and 20 percent of NATCO's bid.

^{1/} The entire lump sum price for mobilization and demobilization is not required to be paid before the dredging work starts. The contract provides that only 60 percent of the lump sum price will be paid upon completion of the mobilization unless the contracting officer considers the payment excessive for mobilization, in which event the payment will be limited to actual mobilization costs with the remainder being paid in the final payment under the contract. Cf. Riverport Industries, Inc., B-216707, Apr. 1, 1985, 64 Comp. Gen. ____, 85-1 C.P.D. ¶ 364, affirmed, B-218656.2, July 31, 1985, 85-2 C.P.D. ____.

The Corps then analyzed four possible situations, none of which was the stated method of evaluation in the solicitation, in which less than the estimated maximum amount of material is removed in order to determine the true cost impact of the bids and whether TLJ's bid was materially unbalanced. It determined that in each situation, NATCO's bid would be low. Consequently, the Corps concluded that TLJ's bid would not result in the lowest ultimate cost to the government, and it intends to award the contract to NATCO.

TLJ argues that rejection of its bid was improper because unbalanced bids on dredging projects are frequently accepted by the Corps. It also asserts that an unbalanced bid is acceptable if it results in the lowest cost to the government and, since it is the low responsive bidder, it is entitled to award.

While TLJ and the Corps have correctly categorized this protest as one involving the alleged unbalancing of TLJ's bid, we believe the circumstances require the cancellation of the IFB rather than the rejection of TLJ's bid.

First, where an IFB fails to include a clause warning bidders of the possible rejection of unbalanced bids as nonresponsive, the appropriate action ordinarily is to cancel the IFB rather than to reject the unbalanced bid. Lear Siegler, Inc., B-205594.2, June 29, 1982, 82-1 C.P.D. ¶ 632.

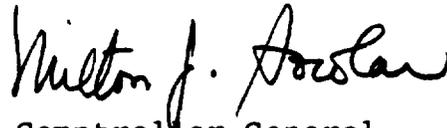
Second, the evaluation method used in an invitation must comport with the statutory requirement for free and open competition. This requirement means that any bid evaluation basis must be designed so as to assure that a reasonable expectation exists that an award to the lowest evaluated bidder will result in the lowest cost to the government in terms of actual performance. Low Enterprises, B-182147, Dec. 13, 1974, 74-2 C.P.D. ¶ 340. Thus, our Office has held that an evaluation basis which encourages the submission of unbalanced bids, i.e., bids based on speculation as to which items are purchased infrequently or frequently, is inappropriate. Global Graphics, Inc., 54 Comp. Gen. 84 (1974), 74-2 C.P.D. ¶ 73; 47 Comp. Gen. 748 (1968); 44 Comp. Gen. 392 (1965).

It is clear that the method of evaluation used here encouraged the unbalanced bidding to the extent that there is doubt that an award to the apparent low bidder would

result in the lowest ultimate cost to the government. Under the evaluation scheme, bidders furnished a unit price for dredging, and that unit price was multiplied by 426,000 cu. yds., the estimated maximum amount of material available for dredging. The Corps indicated by its analysis of TLJ's bid that the estimate of 426,000 cu. yds. is out of line with the agency's experience with dredging projects and the anticipated overdepth dredging for this project. For example, the agency advises that, in the three previous dredging operations in Charleston, the quantity of material actually removed equaled 76.5 percent of the government's advertised estimate of available material. While TLJ's bid, if accepted, would be low if the entire estimate of available material was removed, it would not be low if only that percentage was removed. It appears that TLJ intentionally prepared an unbalanced bid, and its apparent low bid would not result in the lowest cost to the government if the amount of material actually dredged is less than 95 percent of the amount used for evaluation purposes, since so much of its bid price is for mobilization and demobilization. We note that the agency states in its report responding to the protest that 426,000 cu. yds. was "only an estimate which, based on historical data from previous contracts, is not sufficiently accurate to permit a determination that [a] bid is actually the lowest." Thus, this evaluation method does not provide for bids to be evaluated on the basis of the government's best estimate.

The evaluation method incorporates more work than is expected to be performed in the selection of the lowest bidder and, therefore, it does not obtain the benefits of full and free competition required by the procurement statutes. See Chemical Technology, Inc., B-187940, Feb. 22, 1977, 77-1 C.P.D. ¶ 126. Where, as here, the evaluation method in an IFB is structured so as to encourage unbalanced bidding, the invitation is defective, per se, and no bid can be properly evaluated because there is insufficient assurance that any award will result in the lowest cost to the government. Allied Container Manufacturing Corp., B-201140, Mar. 5, 1981, 81-1 C.P.D. ¶ 175; Southeastern Services, Inc. and Worldwide Services, Inc., 56 Comp. Gen. 668 (1977), 77-1 C.P.D. ¶ 390. Further, revised evaluation criteria, such as the agency chose to use here in determining TLJ's bid to be materially unbalanced, may not be used after bid opening to determine award, because bidders have not had an opportunity to compete on that basis. Southeastern Services, Inc. et al., supra; Edward B. Friel, Inc., 55 Comp. Gen. (1975), 75-2 C.P.D. ¶ 164.

Since the Corps did not obtain a true and realistic picture of the actual cost sufficient to assure award to the lowest responsible bidder, we recommend that the Corps cancel the IFB and resolicit its requirement on the basis of an evaluation method which reflects its best estimate of the actual work to be performed.

A handwritten signature in cursive script, reading "Milton J. Auster".

Acting Comptroller General
of the United States