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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: R.P. Densen Contractors, Inc.
File: B-222627
Date: October 7, 1986

DIGEST

Protest is sustained where the evaluation method used by the agency resulted in award of a contract to a bidder who was not low for any possible combination of work that could be required.

DECISION

R.P. Densen Contractors, Inc., protests the award of a contract to Petroleum Recycling, Inc., under invitation for bids (IFB) No. DLA140-86-B-0014, issued by the Defense Personnel Support Center (DPSC) in Philadelphia. The fixed-price contract, which provided for increasing or decreasing the price to be paid depending on the work required, was for the clean-up of a section of the DPSC complex that had been contaminated by oil. The protester complains that the agency's application of the solicitation's evaluation formula resulted in its bid being determined to be higher than the awardee's bid even though its bid was lower for all possible combinations of work.

We sustain the protest.

The solicitation provided that the contractor would be required to excavate designated areas to a depth of two feet, remove the debris, and backfill the resulting cavities. The estimated amount of sand, ballast (which is gravel used in constructing railroad beds), and earth to be removed was 170 tons. Also required was the removal and storage of an estimated 12 railroad rails and the removal and disposal of an estimated 64 railroad ties. The solicitation required a lump-sum base price on these estimated quantities as well

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as additive and deductive unit prices for either increasing or decreasing the work required by up to 40 tons of sand, ballast or earth, 2 rails, and 10 railroad ties. If the variations exceeded these quantities, a price adjustment would be negotiated.

The IFB contained the following evaluation clause:

"Bid evaluations, for award purposes, will be based on the aforementioned base bid (170 tons of sand, ballast or earth, or any combination thereof and the 12 rails and 64 RR ties) with an adjustment in such bid price based on the unit variation prices and material as shown on the bid form. The algebraic sum of all the plus and minus adjustments (tonnage, rails, ties) will be algebraically applied to the base bid price of each bid and the resulting low bid will be used to determine the apparent low bidder for award purposes."

The bids of Densen and Petroleum Recycling were as follows:

	<u>Densen</u>	<u>Petroleum</u>
Base bid	\$39,611	\$45,460
Unit price for increase in quantities:		
rails	+100	+550
ties	+10	+75
sand, ballast, earth	+233	+175
Unit price for decrease in quantities:		
rails	-50	-650
ties	-3	-105
sand, ballast, earth	-140	-225

Using the evaluation formula described in the solicitation, the agency totalled each bidder's additive and deductive unit prices for the rails, ties, and earth. It then multiplied those sums by the maximum variations in quantities specified

in the solicitation and added (or subtracted, if negative) the resulting products from the base bids. The calculation of each bidder's evaluated price can be illustrated as follows:

Densen

Base bid			\$39,611
		<u>Multiplier</u>	
Rails	\$100 + (-50) ^{1/}	2	+100
Ties	10 + (-3)	10	+70
Earth	233 + (-140)	40	
			<u>3,720</u>
		Total	\$43,501

Petroleum

Base bid			\$45,460
		<u>Multiplier</u>	
Rails	\$550 + (-650)	2	-200
Ties	75 + (-105)	10	-300
Earth	175 + (-225)	40	
			<u>-2,000</u>
		Total	\$42,960

Because Petroleum's evaluated price of \$42,960 was less than Densen's evaluated price of \$43,501, the agency awarded a contract to Petroleum.

Densen filed a protest with this Office alleging that no possible combination of quantity increases or decreases would result in a lower net price from Petroleum. For example, says Densen, if the agency increased the work involved by the maximum 2 rails, 10 ties and 40 tons of earth, Densen's net

^{1/} This calculation produces the same result as adding an amount for the maximum additive quantity and then subtracting an amount for the maximum deductive quantity.

price would have been \$49,231 while Petroleum's net price would have been \$54,310. Similarly, if the agency decreased the work by the maximum 2 rails, 10 ties and 40 tons of earth, Densen's price would have been \$33,881 compared to Petroleum's price of \$34,110. The protester claims that the same holds true for any other possible combination.

The agency argues that Densen's protest is untimely. The agency says that Densen's protest is essentially a challenge to the reasonableness of the solicitation's evaluation clause. Since the alleged impropriety was apparent from the face of the solicitation, the agency contends that our Bid Protest Regulations require the protest to have been filed prior to bid opening. See 4 C.F.R. § 21.2(a)(1) (1986). Densen did not file a protest with the agency, however, until after bid opening. The agency concludes that Densen's subsequent protest to this Office is therefore untimely. 4 C.F.R. § 21.2(a)(3).

Although the protest is couched in terms that allege an improper evaluation, we agree with the agency that Densen's protest to this Office is untimely because it is basically a protest of an apparent solicitation defect. The agency's evaluation of bids was based on the terms of the evaluation clause contained in the solicitation, and the protester has not shown how the clause reasonably could be read as describing any evaluation formula other than that which the agency used. If the protester objected to the formula described in the solicitation, it was required to raise the issue prior to bid opening. Even if the protester viewed the solicitation as confusing, that issue too should have been raised prior to bid opening.

Even though this protest is untimely, we will consider it on merits nevertheless. In our view, the solicitation's evaluation clause and the agency's determination of the low bidder were so materially defective in light of clear statutory requirements that we should consider the protest under the significant issue exception to our timeliness rules. 4 C.F.R. § 21.2(c); Southeastern Services, Inc., et al., 56 Comp. Gen. 668 (1977), 77-1 CPD ¶ 390, aff'd sub nom. Dyneteria, Inc.--Reconsideration, B-187872, Aug. 22, 1977, 77-2 CPD ¶ 134.

The agency contends that the solicitation provision for additive and deductive prices was necessary because of the nature of the work involved. The quantities of rails, ties,

and earth listed in the solicitation were only estimates, and the quantities actually to be removed might vary. If the estimates should prove to be incorrect, says the agency, a delay of 3 to 5 days to negotiate a price adjustment could not be tolerated, particularly since once the contaminated area had been disturbed, a rainstorm could result in further environmental damage. The agency says it selected its evaluation scheme because it needed a convenient means to compare prices that would take account of as many as possible of the 8505 combinations of work that might actually be required.

We have no reason to question the agency's decision to require bidders to agree in advance to specific unit prices for increases or decreases in quantity. See, e.g., Thomas Constr. Co., Inc., B-184810, Oct. 21, 1975, 75-2 CPD ¶ 248, aff'd Aug. 20, 1976, 76-2 CPD ¶ 179. Agencies must use evaluation schemes, however, that are designed to give reasonable assurance that award to the lowest evaluated bidder will result in the lowest cost to the government during contract performance. Exclusive Temporaries of Georgia, Inc., B-220331.2, et al., Mar. 10, 1986, 86-1 CPD ¶ 232. See Thomas Constr. Co., Inc., B-184810, supra (bids containing additive and deductive prices for various alternatives evaluated on the basis of the base bid and the alternatives actually selected for contract award). To this end, when the exact amount of work to be performed is not known precisely, the solicitation must contain the agency's best estimate of what will be required, see Downtown Copy Center, 62 Comp. Gen. 65 (1982), 82-2 CPD ¶ 503, and the agency must use this estimate to determine the low bidder. Edward B. Friel, Inc., 55 Comp. Gen. 231 (1975), 75-2 CPD ¶ 164. Where the method for evaluating bids provides no assurance that an award will in fact result in the most favorable cost to the government, the IFB is materially defective. Temps & Co., B-221846, June 9, 1986, 65 Comp. Gen. ___, 86-1 CPD ¶ 535.

In this case, the IFB's evaluation clause provided, in short, that the "algebraic sum of all the plus and minus adjustments . . . will be algebraically applied to the base bid." As applied by DPSC, the evaluation method essentially consisted of adding an amount to the base bid to account for the maximum additive quantities of rails, ties, and earth, and then subtracting from that total an amount for the maximum deductive quantities. Although the agency may have thought its formula would serve the government's best interests, its approach did not measure the probable cost

to the government for the work reasonably expected to be required. Rather, the DPSC method assumed that the contract price would be both increased and decreased by the maximum amounts. Since the quantities of rails, ties, and earth actually removed obviously could not at once be both greater than and less than the estimated quantities, we do not think that this evaluation formula could reasonably assure that the contract would be awarded to the firm whose price would prove to be lowest. In fact, our analysis of the evaluation method shows, as the protester contends, that the agency's interpretation of the evaluation clause, and consequently its selection of the low bidder, resulted in award of a contract to a bidder whose price could not be low for any possible combination of increases and decreases in the work actually required.

In the circumstances, we conclude that the DPSC's evaluation was inconsistent with the requirement of the Competition in Contracting Act of 1984 that award in a sealed bid procurement be made to the responsible source that submits the lowest responsive bid. See 10 U.S.C. § 2305(b)(3) (Supp. III 1985).

We sustain the protest. The contract was completed before the protest was filed; therefore, no remedial action is possible. We deny Densen's claim for the costs of preparing its bid because, as indicated above, the defect in the solicitation was apparent prior to bid opening, yet Densen chose to incur the costs of bidding rather than filing a protest at a time when corrective action would have been possible. Similarly, we deny Densen's claim for the costs of filing and pursuing its protest. See Temps & Co.--Claim for Costs, B-221846.2, Aug. 28, 1986, 65 Comp. Gen. _____, 86-2 CPD ¶ 236.

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