



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: M&M Services, Inc.

File: B-228717

Date: October 21, 1987

DIGEST

1. Bid to provide transportation services is not mathematically or materially unbalanced where its base-year price is less than 30 percent greater than its prices for each of 2 option-years to reflect the bidder's actual costs, and the bid will become low during the first of the two options which the government expects to exercise.

2. General Accounting Office will not review contracting agency's affirmative determination of a bidder's responsibility absent a showing of possible fraud or bad faith on the part of the agency or an alleged failure to apply definitive criteria contained in the invitation.

DECISION

M&M Services, Inc. protests any award to Transcontinental Enterprises, Inc. under invitation for bids (IFB) No. DABT10-87-B-0098, issued by the Department of the Army for the transportation of ammunition and explosives. The IFB required bidders to submit separate prices for a base year plus two 1-year options, and provided that award would be based on the lowest total price, including the options. M&M argues that Transcontinental's low bid is heavily front-loaded and materially unbalanced, and therefore should be rejected. M&M also contends that Transcontinental should be found nonresponsible, principally because of an alleged lack of prior experience with explosives. We deny the protest in part and dismiss it in part.

The IFB contained separate pricing schedules for each year. Within each schedule, bidders were required to insert unit and extended prices for estimated quantities of certain transportation services, plus a monthly and extended yearly price to provide supervisory and dispatch services. The aggregate of the extended prices was the total price for that year. The IFB incorporated the "Evaluation of Options"

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clause, Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.217-5 (1986), which warned that the government could reject an offer as nonresponsive if it is materially unbalanced as to prices for the basic requirement and the option quantities. The clause explained that a bid is unbalanced when it contains prices significantly less than cost for some work and prices that are significantly overstated for other work.

Five bids were submitted. Transcontinental and M&M submitted the two lowest bids of \$818,988 and \$862,650, respectively, with annual prices as follows:

	Transcontinental	M&M
Base Year	\$321,036	\$287,550
1st Option	\$248,976	\$287,550
2nd Option	\$248,976	\$287,550

Because Transcontinental's total price was more than \$43,000 below M&M's second low price and approximately \$201,000 lower than the government estimate, the Army requested that Transcontinental verify its bid. Transcontinental did so, and also submitted an explanation of its prices since M&M had indicated it would protest that the bid was unbalanced. Transcontinental explained that its base-year price was higher than its option-year prices to recover start-up costs and the actual costs to lease vehicles in the first year. After M&M filed its protest, the Army further requested copies of Transcontinental's work papers and other data used in preparing its bid. Transcontinental's work papers indicated approximately \$15,000 of start-up and equipment costs. The major part of the approximately \$72,000 difference between its base-year and option-year prices was attributed to vehicle leasing costs; Transcontinental submitted a copy of a letter from the prospective lessor stating that a 1-year lease with two 1-year options for renewal would cost \$70,000 in the first year plus \$22,000 for each option year (\$114,000 total) or, alternatively, that a lease for a fixed-term of 3 years would cost \$38,000 per year (\$114,000 total also).

The Army reasoned that Transcontinental properly priced its bid to reflect the costs of a lease with a fixed-term of only 1 year since Transcontinental stood to lose money under a fixed-term of 3 years if the options were not exercised. Because Transcontinental's base-year price was not significantly higher than its cost, the agency concluded that the bid was not unbalanced. The Army also concluded that Transcontinental's bid did not create a reasonable doubt that acceptance of the bid would result in the lowest ultimate cost to the government--since the Army expects to

award the options, as it has done historically, and Transcontinental's bid would become low during the first of the 2 option years.

The protester basically argues that Transcontinental's bid is so grossly front-loaded that its base-year price is tantamount to a prohibited advance payment in excess of the services' actual value. See 31 U.S.C. § 3324(a) (1982). The protester cites decisions in which we found front-loaded bids materially unbalanced, *per se*, so as to require their rejection. See, e.g., Riverport Industries, Inc., 64 Comp. Gen. 441 (1985), 85-1 CPD ¶ 364, *aff'd*, Riverport Industries, Inc.--Request for Reconsideration, B-218656.2, July 31, 1985, 85-2 CPD ¶ 108; Nebraska Aluminum Castings, Inc., B-222476, June 24, 1986, 86-1 CPD ¶ 582, *aff'd*, Nebraska Aluminum Castings, Inc.--Request for Reconsideration, B-222476.2, Sept. 23, 1986, 86-2 CPD ¶ 335, and Nebraska Aluminum Castings, Inc.--Second Request for Reconsideration, B-222476.3, Nov. 4, 1986, 86-2 CPD ¶ 515.

In the cases where we found that bidders had improperly used their bids as devices to obtain unauthorized contract financing the firms bid extremely high prices for first articles relative to the prices for production quantities in the contract's basic term, where start-up costs for such things as equipment and tooling are allocable to the entire production quantity. In such cases the start-up costs should be amortized over the total contract period. Islip Transformer & Metal Co., Inc., B-225257, Mar. 23, 1987, 87-1 CPD ¶ 327; Nebraska Aluminum Castings, Inc., B-223928, Oct. 17, 1986, 86-2 CPD ¶ 463. The contractor, not the government, must normally bear the risk that the contractor might not recover its full costs for equipment and tooling if first article approval is not obtained. See Nebraska Aluminum Castings, Inc., B-223928, *supra*.

A different rule applies to front-loaded pricing of base years relative to option periods. A bidder properly may allocate start-up and equipment costs to the base period where the bidder would have no use for the equipment at the end of the contract's basic term since, if these costs were allocated throughout the potential life of the contract and the options were not exercised, the bidder would never be able to recover its full cost of performance. Nebraska Aluminum Castings, Inc.--Request for Reconsideration, B-222476.2, *supra*; see also Fidelity Moving & Storage Co., B-222109.2, May 21, 1986, 86-1 CPD ¶ 476. Such is the case here, since Transcontinental does not own and does not intend to purchase the vehicles (which then would have residual value after the contract's duration), but intends only to lease them for the contract's term.

Although an award to Transcontinental would not constitute a prohibited advance payment, a bid containing a front-loaded base-year price nevertheless may be rejected if it is materially unbalanced. See, e.g., Crown Laundry and Dry Cleaners, Inc., B-208795.2 et al., Apr. 22, 1983, 83-1 CPD ¶ 438. Prohibited unbalanced bidding entails two aspects: 1) mathematical unbalancing (the definition of unbalancing in the IFB), where not every element of the bid carries its proportionate share of the total cost plus profit; and 2) material unbalancing, where reasonable doubt exists that acceptance of a mathematically unbalanced bid would result in the lowest ultimate cost to the government. Fidelity Moving & Storage Co., B-222109.2, supra.

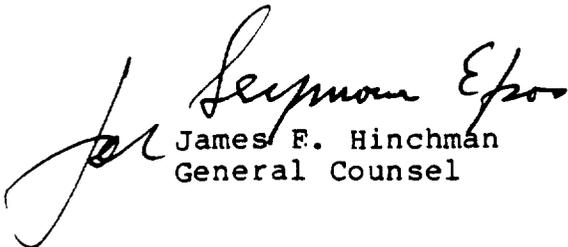
A bid may be regarded as mathematically unbalanced on its face where it is extremely front-loaded and radically different from the pricing pattern evident in other bids. See Howell Construction, Inc., B-225766, Apr. 30, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 455. We have recognized, however, that a difference of 25 to 50 percent between the base-year price and the option-year prices is not necessarily sufficient to find a bid mathematically unbalanced, and in such a case we may consider the bidder's explanation of its pricing structure to determine whether the prices carry their proportionate share of the actual costs of performance. See Integrity Management International, Inc., B-217016, Dec. 11, 1984, 84-2 CPD ¶ 654. The difference between Transcontinental's option-year prices and its base-year price was not extreme (less than 30 percent). Although the bid did deviate from the pricing pattern of the other four bidders (who offered the same price for the base year and each option year), we believe Transcontinental satisfactorily has explained that its base-year price accurately reflects start-up and equipment costs properly allocable to that year. We therefore agree with the Army's position that the bid was not mathematically unbalanced.

Given our conclusion that M&M's bid is not mathematically unbalanced, there is no basis to find the bid materially unbalanced. See Integrity Management International, Inc., B-217016, supra. We point out, however, that we have stated that a mathematically unbalanced bid is not materially unbalanced where, as here, the bid is not extremely front-loaded; the bid would become low during the first of two option years; and the contracting agency anticipates exercising the options. See Howell Construction, Inc., B-225766, supra.

Regarding the protester's allegation that Transcontinental should be determined nonresponsible, the contracting officer must determine Transcontinental responsible in order to

award it the contract. See FAR, 48 C.F.R. §§ 9.103 and 9.105-2. This Office will not review such a determination absent a showing of possible fraud or bad faith on the part of the agency or an alleged failure to apply definitive responsibility criteria in the solicitation. Bid Protest Regulations, 4 C.F.R. § 21.3(f)(5) (1987); ALM, Inc., B-225679.3, May 8, 1987, 87-1 CPD ¶ 493. Since neither exception applies here, we dismiss this aspect of M&M's protest.

We deny the protest in part and dismiss it in part.

James F. Hinchman
General Counsel