

Johnson



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: DOD Contracts, Inc.

File: B-227689.2

Date: December 15, 1987

DIGEST

1. Submission of a below-cost bid, allegedly for the purpose of "buying-in," is not illegal and the government may not withhold award merely because a responsive bid is below cost.
2. Protester's speculation that awardee does not intend to perform contract properly at the bid price concerns a matter of contract administration which is not reviewable under bid protest function.
3. Disparity between awardee's line item bid prices and government estimate and other bids does not establish that a mistake was made in a bid since the awardee, in its business judgment, may decide to submit a below-cost bid.
4. A low bid for a requirements type contract that is mathematically unbalanced is not materially unbalanced unless it can be shown that the government's estimates are so unreliable that award to the low bidder will not result in the lowest cost to the government.

DECISION

DOD Contracts Inc. protests the award of a contract for maintenance services for the United States Naval Base at Guantanamo Bay, Cuba to Burns & Roe Services Corp (B&R), under invitation for bids (IFB) No. N62470-86-B-7904 issued by the Department of the Navy. DOD alleges that B&R's bid should have been rejected as erroneous or unbalanced, and as an attempted "buy-in."

We find the protest without merit.

The IFB included a schedule of all work to be performed and required prices for a base year and for four option years. The prices for each year included one lump sum entry for all fixed quantity work listed in the work schedule which was not specifically included in the indefinite quantity item

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list in the IFB, and a total for the listed indefinite quantity work. This latter total was required to be accompanied by a breakdown by separate unit and extended line item prices for each listed category of indefinite quantity work. The extended prices were to be calculated on the basis of the estimated annual quantities indicated on the schedule. Award was to be made for the lowest total aggregate price for all line items.

B&R submitted the low bid of \$18,444,023, and DOD submitted the next low bid of \$21,624,429, as follows:

	<u>DOD</u>	<u>B&R</u>
Base year/fixed quantity items:	\$3,511,528	2,175,101
Base year/indef. quantity items:	1,293,315	881,728
Base year/Total:	4,804,843	3,056,829
1st option/fixed quantity items:	2,770,436	2,422,233
1st option/indef. quantity items:	1,339,965	985,483
1st option/Total:	4,110,401	3,407,716
2nd option/fixed quantity items:	2,899,800	2,701,749
2nd option/indef. quantity items:	1,336,595	1,092,670
2nd option/Total:	4,236,395	3,794,419
3rd option/fixed quantity items:	2,899,800	2,830,763
3rd option/indef. quantity items:	1,336,595	1,156,003
3rd option/Total:	4,236,395	3,986,766
4th option/fixed quantity items:	2,899,800	2,972,566
4th option/indef. quantity items:	1,336,595	1,225,727
4th option/Total:	4,236,395	4,198,293
 Bid Total:	 21,624,429	 18,444,023

Three other bids were received ranging from \$23,553,517.55, to \$32,962,843.

The crux of DOD's protest is that B&R's bid included extremely low unit prices for various indefinite quantity line items. For example, DOD points out that B&R's unit craft hour labor prices (which consist of the cost of labor plus associated materials for 1 hour of designated categories of work) averaged approximately \$1.44 for the base year, while the average price of the other bids per craft hour unit was \$10.54. DOD contends that for this work and other low priced items under B&R's bid it would be impossible for B&R to adequately perform the services at the bid prices, and that B&R will seek change orders to avoid losing money.

DOD contends that notwithstanding B&R's verification of its bid at the request of the Navy, B&R's bid should have been rejected either as a below-cost, attempted "buy-in," or because an obviously mistaken bid must be rejected even when the bidder claims that there is no mistake in its bid. See H. Martin Construction Co., B-201352, Apr. 8, 1981, 81-1 C.P.D. ¶ 268.

The fact that B&R may have submitted a bid that will not cover its costs and is allegedly an attempted "buy-in" provides no basis for protest. Salz Lock and Safe, B-227547, July 6, 1987, 87-2 C.P.D. ¶ 18; American Maid Maintenance, B-225571, Jan. 9, 1987, 87-1 C.P.D. ¶ 47. Rather, a prospective contractor's ability to perform the contract at the price it bid is a matter of responsibility for the agency to determine before contract award. American Maid Maintenance, B-225571, supra. Here, the Navy has found B&R responsible. Our Office will not review an agency's affirmative determination of responsibility in the absence of a showing of possible fraud or bad faith by the procuring officials or that definitive responsibility criteria have not been met. Id. Neither exception has been alleged in this case. Moreover, DOD's allegation that B&R will seek to obtain change orders is nothing more than speculation that the agency will fail to ensure that B&R will comply with its contractual obligations, which is a matter of contract administration that is not reviewable under our bid protest function. 4 C.F.R. § 21.3(f)(1) (1987).

With respect to DOD's allegation that the agency may not accept an obviously mistaken bid, the bids at issue in the Martin case cited by the protester, and in similar cases, were found to contain obvious errors only because they involved either: (1) an apparent ambiguity in the bid created by the bidder, such as inconsistent unit and extended prices, or (2) some claim or conduct by the bidder indicating that a mistake had been made, followed by an attempt by the bidder to waive any claim of mistake in order to remain the low bidder. See G.T. Murphy, Inc., B-204351, Feb. 23, 1982, 82-1 C.P.D. ¶ 161. Here, in contrast, there is no such obvious error in B&R's bid. The only objective evidence suggesting the possibility of a mistake is the disparity between B&R's prices for various line items and the government estimate and the other bids for these items. That disparity does not by itself establish that a mistake was made since a bidder, in its business judgment, may decide to submit a below-cost bid. Aztech Electric, Inc. and Rod's Electric, Inc., B-223630, Sep. 30, 1986, 86-2 C.P.D. ¶ 368. Since the bid was not obviously erroneous and was verified by B&R, the contracting officer was required to consider it as submitted. See Federal Acquisition Regulation, 48 C.F.R. § 14.406-3(g)(2) (1986); Contract Services

Co., Inc., B-225651, May 18, 1987, 66 Comp. Gen. ____, 87-1 C.P.D. ¶ 521.

DOD also casts its protest in terms of an allegation that B&R's bid is unbalanced. However, the crux of this argument is again simply DOD's contention that B&R's bid is below cost in various areas. There are two aspects of bid unbalancing. First, the bid must be evaluated mathematically to determine whether each item carries its share of the cost of the work specified for that item as well as overhead and profit. If the bid is based on nominal prices for some of the work and enhanced prices for other work, it is mathematically unbalanced. The second aspect is determining whether award to a bidder that has submitted a mathematically unbalanced bid will result in the lowest overall cost to the government. If award to a party that submits a mathematically unbalanced bid may not result in the lowest overall cost to the government, the bid is materially unbalanced and cannot be accepted. The key to this latter determination is the validity of the government estimate, for it is upon that estimate that bids are evaluated for cost impact. Unless it can be shown that the government estimate is invalid, a low evaluated bid cannot be rejected merely because it is mathematically unbalanced. Rather, we have found material unbalancing only where it is shown that the government estimates are invalid. Landscape Builders Contractors, B-225808.3, May 21, 1987, 87-1 C.P.D. ¶ 533.

Moreover, there is no requirement that the estimates be absolutely correct. The estimated quantities simply must be reasonably accurate representations of anticipated actual needs. Space Services International Corp., B-207888.4 et al., Dec. 13, 1982, 82-2 C.P.D. ¶ 525. It is the protester's burden to show that the stated estimates are not based on the best information available or are otherwise deficient. Emerald Maintenance, Inc., B-225735 et al., May 6, 1987, 87-1 C.P.D. ¶ 482. Absent such showing, the low bid under a solicitation for a requirements contract should be accepted since there would be no reason to believe that contracting with the firm will not actually result in the lowest cost to the government. Id.

DOD speculates that B&R expects that the grounds maintenance items, for which B&R's prices are relatively high, may offer the highest probability of being ordered by the Navy in excess of the government's estimates. However, DOD offers no evidence whatsoever that these estimates are inaccurate; rather, DOD merely seems to infer that since B&R priced these items high, B&R expects that there is a high probability that the quantities ordered may exceed the listed estimates. Such speculation does not meet the protester's burden of proof and provides no basis to find a bid

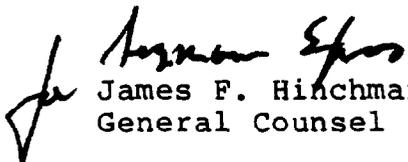
unbalanced. Kidde, Inc., Weber Aircraft Div. et al., B-223935, Nov. 19, 1986, 86-2 C.P.D. ¶ 587.

DOD has also objected that B&R's schedule of deductions may give rise to unbalancing. However, the schedule of deductions is not part of the bid, and is not used in calculating bid prices. The schedule is required to be submitted separate from the bid, within 30 days after contract award. The schedule requirement provides that unbalancing in the schedule is cause for withholding approval and requiring resubmittal of a balanced schedule. Moreover, the government reserves both the right to terminate for default if an unbalanced or deficient schedule is submitted, or to unilaterally establish a schedule of deductions. Accordingly, the schedule simply is not germane to the question of whether B&R's bid is unbalanced.

DOD also suggests that B&R's bid is front-loaded. However, B&R's price for the first year is lower than its price for any of the 4 option years; thus, it is not front-loaded. The concept of front-loading is also inapplicable here because B&R's base year bid, as well as each of its option year bids, is significantly lower than DOD's bid for the same periods. Thus, the government is insured of the benefit of receiving the lowest cost at all points in the performance of the contract. See Kitco, Inc., B-221386, Apr. 3, 1986, 86-1 C.P.D. ¶ 321.

DOD has also asserted that B&R's bid is nonresponsive to certain crew camp housing requirements for laborers contained in the solicitation. However, this allegation is apparently based on DOD's speculation concerning the facilities which B&R intends to supply. Only where a bidder provides information with its bid that reduces, limits or modifies a solicitation requirement may the bid be rejected as nonresponsive. The ARO Corp., B-225727, June 15, 1987, 87-1 C.P.D. ¶ 595. B&R did not take any exception to the housing requirements on the face of its bid, and the bid therefore is responsive. Whether B&R complies with this requirement is a matter of contract administration which, as indicated above, is not for review under our bid protest function.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel