AYER

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Canaveral Maritime, Inc.

File: B-231857.4; B-231857.5

Date: May 22, 1989

DIGEST

1. Protest that the awardee's offer was materially unbalanced or so grossly front-loaded that contract awarded will provide awardee with unauthorized contract financing tantamount to improper advance payments, is denied where protester has not demonstrated that awardee's prices are unbalanced (i.e., do not reflect cost plus profit) and record shows that higher prices reflect awardee's higher facility rental costs during the early years of the contract.

2. Protest that contracting agency should have evaluated cost proposals on the basis of present value is denied where the solicitation indicated that cost proposals would be evaluated on the basis of average costs and the agency properly evaluated cost proposals in conformance with the solicitation's stated evaluation scheme.

3. Since procuring officials enjoy a reasonable degree of discretion in evaluating proposals, the General Accounting Office will not disturb an evaluation where the record supports the conclusions reached and the evaluation is consistent with the criteria found in the solicitation.

4. Protest relating to performance of a contract involves matters of contract administration which the General Accounting Office will not review pursuant to its bid protest function.

DECISION

Canaveral Maritime, Inc., protests the award of a contract to Leadermar, Inc., under request for proposals (RFP) No. N00033-88-R-4001, a total small business set-aside, issued by the Department of the Navy for layberth services. Canaveral, the incumbent contractor, contends that the Navy: (1) should have rejected Leadermar's offer either as

materially unbalanced, or as so grossly front-loaded that payments under the contract would be tantamount to improper advance payments; (2) abused its discretion in not evaluating proposal pricing on a present value basis; (3) improperly evaluated the dredging aspects of Leadermar's technical proposal; and (4) amended evaluation factors and award criteria without giving notice of the alterations to Canaveral.

We in part deny and in part dismiss the protest.

Issued on April 29, 1988, the RFP sought layberth services for four SL-7 fast sealift ships--two ships on the East Coast of the United States and two ships on the Gulf Coast of the United States. The protest concerns the award of the East Coast portion of the contract. The layberth consists of a pier and supporting facilities (guards, fencing, alarms, roadways, lighting, communications, and utility services) located in an area having water of navigable depth (32 feet at mean lower low water) and sufficient expanse (1,200-foot minimum turning basin, and at least 110-foot safe working area outboard of the ship) to maneuver the ships for docking.

The RFP provided that technical proposals would be evaluated on a pass/fail basis and award made to the lowest-priced, technically acceptable offeror. Technical acceptability (i.e., meeting minimum technical requirements) was evaluated on the basis of compliance with nine elements. One element (No. 5) bears directly on the issues protested here and reads in part as follows:

> "Ease of ingress and egress for movement of . . . [the] ships, e.g. maneuvering in/out of berth with tug assistance in high wind conditions, width of channel, location and dimension of turning basin, etc."

The RFP called for a 5-year, firm fixed-price, services contract priced on a per diem basis. The RFP cautioned that the "Government reserves the right to reject any offer which is materially unbalanced as to prices . . . ."

At the pre-proposal conference the agency was asked how it would determine the lowest price for purposes of award, since the RFP mentioned two approaches: (1) the average of the per diem prices, services and transit time, and (2) present value analysis. The basis of evaluation was changed by amendment several times; finally, on June 30, 1988, amendment 0005 announced that the agency would use the

average total cost to determine the lowest cost to the government, adding that "[p]ricing which is materially unbalanced between each contract year will be considered nonresponsive."

On July 29, the closing date for initial proposals, the Navy received multiple offers for the East Coast layberthing. The agency evaluated each proposal on the specified pass/fail basis, and site surveys were carried out in August. During September, the agency conducted discussions with offerors in the competitive range informing them of the deficiencies in their respective proposals. On October 3, the agency issued Amendment 0007 which closed discussions with a request for best and final offers (BAFOs). BAFOs were received October 14. The Navy reopened discussions on October 26, with Amendment 0008. On November 4, the agency received second BAFOs. The proposals were evaluated, and all second round offerors were notified on November 8, that Leadermar was the apparently successful offeror.

On November 15, Canaveral filed a size status protest with the Small Business Administration (SBA) alleging that Leadermar was an affiliate of a large business concern, Gate Petroleum Co., Inc. (which includes Gate's subsidiary Gate Maritime Properties, Inc.). The SBA denied the protest on December 16, finding that the RFP was for a service contract, that Leadermar would perform all the required services, that Gate's only role would be as lessor of the layberthing facility, and that the lease (calling for Gate to construct the facility and lease it to Leadermar) was an arms length agreement. The SBA concluded that Leadermar and Gate were neither affiliates nor joint venturers. On December 28, the Navy awarded the contract to Leadermar.

Canaveral contends that the Navy should have rejected Leadermar's offer on the ground that it was materially unbalanced, or because the offer was so grossly front-loaded that payments under the contract would be tantamount to improper advance payments.

Leadermar's per diem price for the first 3 years ($3,237.60 per day) is approximately 167 percent higher than its price for the last 2 years ($1,214.10 and $1,203.50 per day). The RFP required that the services be furnished at a layberthing facility meeting stringent government structural and safety requirements. The higher pricing in the first 3 years of the contract reflects Leadermar's cost of providing the facility under a lease with Gate under which Gate would construct a layberth facility in accord with the RFP's technical requirements for Leadermar's use for a

stipulated monthly rental.1/ Generally, the lease requires Leadermar to make monthly payments to Gate during the first 3 years that are more than 4 times the amount of its monthly payments in the last 2 years.

Canaveral argues that Leadermar's offer violates the RFP provision against pricing that is materially unbalanced. The protester urges that the RFP requires essentially level pricing between contract years with some adjustment for inflation and that, since the service requirements are constant for the term of the contract, the prices should also be constant. Canaveral contends that Leadermar's pricing improperly allows Leadermar to recover a substantial portion of the construction costs of the layberthing facility in the first 3 years, and argues that the costs of capital improvements should be amortized over the contract's full 5-year term regardless of whether they are incurred by Leadermar or its landlord. Canaveral advises that it could have offered the government a lower price had it been aware that it was permissible to front-load its offer to make an early recovery of its capital investment since an early recovery would lower Canaveral's financing costs. In Canaveral's view, it is unfair to restrict the early recovery of construction cost to offerors that have entered into front-loaded leases because all offerors are confronted with facility construction costs. Canaveral also contends that Leadermar's offer may not represent the lowest cost to the government, because under the agency's present value analysis the awardee's offer only becomes low in the last month of the 5-year contract; in the event of termination before the last month, the agency will have paid an inflated amount for the facilities.

The agency disagrees, taking the position that, since there are no option quantities and there is no question of the accuracy of government estimates, there are no reasonable circumstances under which the awardee's proposal would ever be more expensive than the protester's.

The concept of material unbalancing may apply in negotiated procurements where, as here, cost or price constitutes a primary basis for source selection. See generally Merret Square, Inc., B-220526.2, Mar. 17, 1986, 86-1 CPD ¶ 259. An offer is materially unbalanced where it is based on nominal prices for some of the work and enhanced prices for other work, and award based on such an unbalanced offer cannot be

1/ We have reviewed a copy of the lease in camera.

expected to result in the lowest overall cost to the government. TLM Berthing, Inc., B-220623, Jan. 30, 1986, 86-1 CPD ¶ 111. An assessment of whether a bid is unbalanced turns on the determinative question of whether the pricing structure is reasonably related to the actual costs to be incurred in each year. By necessity, therefore, our decisions allow offerors to explain the costs behind their pricing structures. See Kidde, Inc. et al., B-223935 et al., Nov. 19, 1986, 86-2 CPD ¶ 587. Furthermore, a bid or offer that is unbalanced in the extreme should be rejected, even if low, since payments made under a contract awarded pursuant to such an offer would amount to improper advance payments. Riverport Industries, Inc., 64 Comp. Gen. 441 (1985), 85-1 CPD ¶ 364, aff'd, B-218656.2, July 31, 1985, 85-2 CPD ¶ 108. Where a bid or offer is so grossly front-loaded that its initial year price is far in excess of the services' actual value, payment under the contract would be tantamount to prohibited advance payments. See 31 U.S.C. § 3324(a) (1982).

We find no merit to the argument that the agency was required to reject the awardee's offer as materially unbalanced. First, although the awardee's prices are higher for the first 3 years than they are for the last 2 years, this fact alone does not establish that the awardee's prices do not reflect the cost of the work plus a proportionate share of the profit. Our in camera review of the awardee's proposal and lease shows that variations in the cost of the awardee's rent account for the appearance of front-loading and that the awardee's profit remains constant through the term of the contract. The protester contends that our analysis should not stop at Leadermar's costs, but should extend beyond the lease to Gate's costs in order to determine if Gate is making an improper early recovery of its capital investment. We do not agree. In effect, this is substantially the same argument that the protester made to SBA when it attempted to establish that Leadermar was an affiliate of Gate. SBA rejected the argument, finding that the relationship between Leadermar and Gate was such that the lease was an arms length agreement. Consequently, while the record shows that the awardee and the protester used different approaches in pricing their offers, there is no indication that the awardee's prices are not reflective of cost plus profit.

Neither do we find Leadermar's pricing so grossly front-loaded as to provide the awardee with unauthorized contract financing tantamount to advance payments. Leadermar's pricing structure merely reflects the higher lease costs during the first 3 years of contract performance. Leadermar's profit as a percentage of the price charged to the

government remains constant over the entire 5-year period. The per diem payments and other contract payments (for connect/disconnect services and for reimbursement of contractor expenditures) will be invoiced by the contractor and paid by the government only after the government's receipt of the services. While the early high rent may allow Gate a prompt recovery of the cost of constructing the facility, we cannot say that the rent is not a legitimate cost that Leadermar must pay in order to provide the services to the Navy. It does not appear, therefore, that Leadermar will receive payments in advance of work actually performed.

Canaveral next contends that the agency abused its discretion because it did not evaluate pricing on a present value basis, and that had it done so it would have found that Canaveral's 5-year price is significantly lower than Leadermar's 5-year price. While it was not clear from the original solicitation how cost proposals would be evaluated, any ambiguity in this regard was eliminated on June 30, when the Navy issued amendment 0005 which indicated that the agency would evaluate cost proposals on the basis of average cost and that it would not use the present value method of evaluation. Since agencies are required to evaluate proposals on the basis set forth in the solicitation, Patio Pools of Sierra Vista, Inc., B-228187 et al., Dec. 31, 1987, 87-2 CPD ¶ 650, the Navy's evaluation of proposals on the basis of average costs was proper. Accordingly, Canaveral's protest that the agency should have evaluated costs on the basis of present value is denied.

To the extent that Canaveral objects to the solicitation's stated method of cost evaluation, the protest is untimely under section 21.2(a)(1) of our Bid Protest Regulations, which provides that protests based upon alleged improprieties incorporated into a solicitation by amendment must be filed not later than the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1988). Canaveral did not protest until January 12, 1989, more than 5 months after the July 29 closing date for receipt of initial proposals.2/

Canaveral contends that the agency improperly evaluated the dredging aspects of Leadermar's technical proposal and that the proposal should have been rejected for failure to meet mandatory technical requirements. After filing its initial

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2/ The agency report provides calculations supporting the agency's position that Leadermar is low under "any reasonable price analysis scheme (i.e., total cost, average cost, or present value)."

protest, Canaveral ascertained, in February 1989, that Gate applied for a permit for dredging and constructing a layberth facility. The protester obtained a copy of the United States Army Corps of Engineers' notice of a permit application and learned that Gate planned to dredge less than was required. Although the protester has not seen the awardee's proposal, its argument is based on the assumption that the information in the landlord's permit application mirrors information found in the awardee's technical proposal, and that the proposal shows that the awardee planned to dredge less than the required amount. That simply is not the case.

The Navy concedes that if the facility is dredged as shown in the application, the depth of the water at the layberth facility will be too shallow to comply with the RFP's mandatory technical requirements. In this regard the application seeks permission to dredge to a depth of only 32 feet 0 inches mean low water (MLW--the average of all low tides over a particular period of time) when the RFP required a minimum depth of 32 feet 0 inches mean lower low water (MLLW--the average of the lowest of the two daily tides of a particular period of time). The agency advises that the difference between the depth provided by dredging to 32 feet MLW as opposed to dredging to 32 feet MLLW is only about 1.8 inches. The Navy reports that Leadermar did offer in its proposal to comply with all layberth requirements including those relating to the depth of the water.

In reviewing protests concerning the evaluation of proposals, we do not reevaluate the proposals and make our own determinations about their respective merits since that is the responsibility of the contracting agency, which is most familiar with its needs and which must bear the burden of any difficulties resulting from a defective solicitation. Tiernay Turbines Inc., B-226185, June 2, 1987, 87-1 CPD ¶ 563. Instead, we examine the record to determine whether the agency's judgment was reasonable and in accord with listed criteria and whether there were any violations of procurement statutes and regulations. See ORI, Inc., B-215775, Mar. 4, 1985, 85-1 CPD ¶ 266.

The RFP required offerors to submit:

> "(1) the completed layberthing survey form and associated technical information and drawings specified in the attachment [attachment B] . . . ."

Offerors were further required to address ease of ingress and egress for movement of the ships, and the provision of a

110-foot safe working area for tugs, lighterage vessels, and fendering surrounding the ships.

We have reviewed Leadermar's proposal and supporting submissions in camera in view of the protester's allegation and the RFP's requirements. Leadermar's proposal states that the firm intends to lease a layberth facility that will be constructed to meet the RFP's specified minimum water depth of 32 feet MLLW for the berth and access routes to the navigational channel and that Leadermar will maintain the 32 foot MLLW depth by maintenance dredging or otherwise.

The proposal also states that the berth will be wide enough for safe docking and undocking and permit safe working of tugboats. The record shows that the agency was aware in September as a result of the site survey that the depths at the proposed site were such as to require some dredging to achieve a depth of 32 feet MLLW across the full breadth of the berth. In October the agency required Leadermar to furnish evidence that permits to allow the dredging would be obtainable. Leadermar responded by furnishing the agency with a hydrographic survey which showed depths referenced to MLW for the length and breadth of the berth and from the berth down to the navigational channel. Leadermar also furnished copies of previously issued permits for more extensive dredging work of a similar nature in the same area. The hydrographic survey showed that a portion of the outer edge of the berth (furthest from the shoreline) would have to be dredged from its current 25 to 27.9 foot MLW depth down to 32 feet MLLW.

In our view, the agency had sufficient information to conclude that the proposed site was technically acceptable. The RFP did not require offerors to provide hydrographic surveys based on either MLW or MLLW elevations, nor did the RFP require submission of approved permits with offers. What was required was sufficient information to find that the offeror could reasonably be expected to provide a facility having the required depth even if it had to be obtained by dredging. In its proposal, as well as during discussions, Leadermar clearly indicated that it intended to provide a layberthing facility that would meet the RFP's requirements and that it would dredge the channel where necessary. Consequently, we conclude that the record supports the Navy's conclusion that Leadermar's proposal was technically acceptable and that the evaluation was consistent with the criteria found in the solicitation. Accordingly, this portion of the protest is denied.

To the extent that Canaveral contends that the awardee might not provide a facility dredged to the promised depth of

32 feet MLLW, the concern involves a matter of contract administration which our Office will not review pursuant to our bid protest function. 4 C.F.R. § 21.3(m)(1); see Skyline Products--Request for Reconsideration, B-231775.2, Aug. 11, 1988, 88-2 CPD ¶ 138. This aspect of the protest is dismissed.

Finally, Canaveral contends that the agency improperly waived or changed requirements for the benefit of Leadermar without amending the solicitation to allow other offerors an equal opportunity to compete under the changed requirements. Specifically, the protester argues that the agency failed to advise offerors that unbalanced offers were acceptable, and that facilities with less than the required water depth were technically acceptable. In view of our findings above that Leadermar's proposal is not materially unbalanced, and that the Navy properly conducted its technical evaluation on the basis of its understanding that Leadermar would honor its promise to dredge the waters of its facility to the required depth, we find no merit in either assertion.

The protest is denied.

James F. Hinchman
General Counsel