



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Breckenridge Corporation; Viking Coal
Company, Inc.

File: B-237010.2, B-237423, B-237480

Date: February 16, 1990

Peter J. Casella, for Breckenridge Corporation and
B. Michael Smith, Esq., for Viking Coal Co., Inc., the
protesters.
Lester Edelman, Esq., Department of the Army, for the
agency.
Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Protest that government estimate is unreasonably low is denied where the contracting agency's explanation of the estimate demonstrates that it is reasonable.
2. Protest that evaluation of bids is improper is sustained where there is no assurance that the award will be based on the lowest cost to the government.

DECISION

Breckenridge Corporation protests that the Army Corps of Engineers improperly rejected as unreasonably priced the bid it submitted in response to invitation for bids (IFB) No. DACW59-89-B-0039 (IFB 39), issued for the construction of the Carrion Bay Campgrounds at Stonewall Jackson Lake, West Virginia. Breckenridge also challenges the evaluation criteria for determining the low bidder under IFB No. DACW59-89-B-0047 (IFB 47), issued by the Corps for the construction of Deluxe 28 and Deluxe 38 campgrounds at Stonewall Jackson Lake. Viking Coal Company, Inc., protests the government estimate and the evaluation scheme for both IFB 39 and IFB 47.

We sustain the protests to the extent that they challenge the evaluation of bids.

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IFB 39 was issued on July 8, 1989, for the construction of the Carrion Bay Campgrounds at Stonewall Jackson Lake, West Virginia. IFB 47 was issued on August 17, 1989, for the construction of Deluxe 28 and Deluxe 38 campgrounds at Stonewall Jackson Lake. Each IFB was divided into schedule A, which consisted of 41 line items concerning site work; schedule B, which consisted of five line items for the construction of two washhouses and three restrooms; and schedule C, which combined the site work and construction work detailed in schedules A and B. Bidders were permitted to submit bids for one, two or three schedules. The IFB reserved to the government the right to make a single award under schedule C or two awards under schedules A and B based on the low cost to the government. The IFB provided, however, that the award would be based on schedule C if the Corps did not receive "awardable bids" for both schedules A and B.

Bid opening for IFB 39 was held on September 7, and three bids were received. Viking submitted a bid of \$3,440,000 for schedule A; Breckenridge submitted a bid of \$1,377,491 for schedule B; and J.F. Allen submitted a bid of \$4,919,985 for schedule C. While the combined bids of Viking and Breckenridge for schedules A and B (\$4,817,491) were lower than Allen's bid for schedule C (\$4,919,985), Breckenridge's low bid exceeded the Corps's \$970,500 estimate for schedule B work by 41.94 percent. The Corps therefore found that an award to Breckenridge was precluded by 33 U.S.C. § 624(a)(2) (1982), which provides that no contract award for river and harbor improvement can be made at more than 25 percent above the government estimate.^{1/} Consequently, since the Corps did not have an awardable bid for schedule B, in accordance with the evaluation criteria in the IFB, it decided to award the contract to Allen under schedule C.

IFB 47 was scheduled to be opened on September 18, 1989. However, bid opening was postponed indefinitely after Breckenridge filed its protest challenging the IFB's evaluation criteria.

Concerning IFB 47, both Viking and Breckenridge protest that the evaluation criteria are defective in that they may permit an award at other than the lowest cost. Viking also

^{1/} The protesters do not dispute that the work called for under the IFBs is subject to 33 U.S.C. § 624(a)(2).

raises this issue with respect to IFB 39.2/ The protesters explain that if the combined bids for schedules A and B are less than the bid for schedule C, but either A or B is not awardable under 33 U.S.C. § 624(a)(2), the award will be made to the schedule C bidder at a cost greater than the combined cost of awards to the schedule A and B bidders. This is illustrated by the facts concerning IFB 39, where the combined bids (\$4,817,491) of Viking and Breckenridge are \$102,495 less than Allen's bid (\$4,919,985) for schedule C; the IFB nevertheless called for award to be made to Allen since, pursuant to 33 U.S.C. § 624(a)(2), Breckenridge may not receive award because its bid is more than 25 percent higher than the government estimate for schedule B.

The Corps concedes that under the evaluation scheme it may make an award at other than the lowest cost. The Corps argues, however, that both Breckenridge and Viking were aware of the criteria which would be used to evaluate bids, and thus accepted the risk inherent in submitting a bid for either schedule A or B, but not C. The Corps does not believe that the fact that the government might make award at other than the lowest cost causes the IFBs to be defective. We disagree.

A contracting agency may solicit sealed bids only if, among other factors, award will be made based on lowest price. See 10 U.S.C. § 2304(a)(2)(A)(ii) (Supp. IV 1986); Duracell, Inc.; Altus Corp., B-239538 et al., Feb. 12, 1988, 88-1 CPD ¶ 145. Accordingly, the Corps could not properly make award under schedule C at a price higher than the combined low bids for schedules A and B, as it did by making award to Allen under IFB 39. Moreover, such an award is inconsistent with the purpose of the limitation in 33 U.S.C. § 624(a)(2), to ensure that contracts covered by the statute are awarded at reasonable prices.

Further, contrary to the Corps's position, we find that award to Breckenridge under schedule B was not precluded by application of 33 U.S.C. § 624(a)(2). The Corps's decision was based on comparison of Breckenridge's price with the government estimate for schedule B; since the bid price exceeded the estimate by more than 25 percent, the Corps concluded that award could not be made to Breckenridge

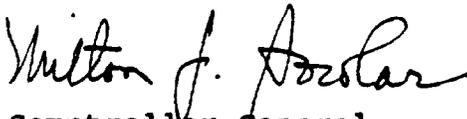
2/ Insofar as IFB 39 is concerned, Viking's protest is untimely since Viking has raised this issue after bid opening. See KASDT Corp., B-235899, July 19, 1989, 89-2 CPD ¶ 63. However, we are considering the issue because it has been timely raised regarding IFB 47.

consistent with the statute. In our view, it is not reasonable to evaluate the bids for schedules A and B separately by reference to the individual government estimates for the two schedules; instead, the Corps should compare the total of both bids with the combined government estimates for schedules A and B. This approach ensures that the evaluation for purposes of 33 U.S.C. § 624(a)(2) is done consistently for all bids; just as any single bid for the combined work is evaluated against the combined estimate for schedule C, so should the combined bids for schedules A and B, covering precisely the same scope of work, be evaluated against the combined estimates for schedules A and B.

With regard to IFB 39, since the combined bids for schedules A and B (\$4,817,491) were within 25 percent of the combined government estimate for the two schedules (\$4,147,655), the Corps properly could make award to Viking for schedule A and to Breckenridge for schedule B. Accordingly, we recommend that the Corps terminate the contract awarded to Allen and make awards to Viking and Breckenridge, if they are otherwise eligible. With regard to IFB 47, under which bid opening has been postponed, we recommend that the Corps proceed with bid opening and make award consistent with our findings in this decision. We also find that Breckenridge and Viking are entitled to recover the costs incurred in filing and pursuing the protests.

Finally, the protesters object to the fact that the government estimate for schedule C in both IFBs is higher than the sum of the estimates for schedules A and B. Breckenridge also protests that the Corps's estimate for schedule B of IFB 39 was too low. We need not reach these issues, given our conclusion that awards to Breckenridge and Viking are proper based on comparison of the combined bids with the combined estimates for schedules A and B.

The protests are sustained to the extent that they challenge the evaluation of bids.



**Acting Comptroller General
of the United States**