



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Continental Collection & Disposal, Inc.--
Protest and Request for Reconsideration

File: B-238842.2; B-238842.3

Date: June 25, 1990

Ken Mathews, for the protester.

Herbert F. Kelley, Jr., Esq., Office of the Judge Advocate General, Department of the Army, for the agency.

Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest allegation that awardee's bid was unbalanced is denied where, while containing understated prices for some items, the bid did not contain enhanced prices for other items and was, therefore, not mathematically unbalanced.
2. Protest allegation by the third-low bidder that the second-low bid was unbalanced is dismissed as academic where the General Accounting Office has found that the low bid was properly accepted.
3. Protest allegation that the lowest bidders' method of bidding certain line items without charge or at reduced prices will preclude the agency from enforcing deductive penalties for poor contract performance is considered abandoned, and therefore, dismissed where the protester failed to comment on the agency's report with regard to the issue.
4. Request for reconsideration of a decision dismissing an earlier protest as untimely is denied where, despite the protester's new statement that it had earlier advised the agency that the procurement should have been set aside for small and disadvantaged businesses, the record reflects that this was not communicated to the agency or to the General Accounting Office in writing until after bid opening.

DECISION

Continental Collection & Disposal, Inc. protests the award of a contract to the A.J. Fowler Corporation, under

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invitation for bids (IFB) No. DABT39-90-B-0016, issued by the Department of the Army for refuse collection and related services at Fort Sill, Oklahoma. In its protest, Continental principally alleges that the awardee's bid and the bid of the next low bidder--the Inland Service Corporation--were unbalanced. Continental also requests reconsideration of our notice dated March 7, 1990 (B-238842.1), dismissing as untimely its earlier protest of the Army's decision not to set aside the IFB for small and disadvantaged businesses.

We deny the protest in part and dismiss it in part; we deny the request for reconsideration.

The IFB was issued on January 26, 1990, contemplating a refuse collection contract with a 6-month base period beginning on April 1, to be followed by four 1-year option periods. Award was to be made on the basis of the low bid inclusive of options. For the base period and each of the option periods, bidders were requested to provide prices for seven line items.

Bids were opened on February 26. Of the nine bids received, the three lowest were structured as follows:

<u>Bid Prices</u>	<u>Fowler</u>	<u>Inland</u>	<u>Continental</u>
BASE PD.(ITEM 0001):			
Item AA--Collection From Housing Area	\$ 44,891	\$ 84,912	\$ 36,000
Item AB--Collection From Rest of Fort	\$ 113,400	\$ 172,404	\$ 77,304
Item AC--Cleaning Dumpsters	\$ FREE	\$ 6,000	\$ 30,000
Item AD--Painting Dumpsters	\$ FREE	\$ 900	\$ 15,000
Item AE--Cleaning Compactor	\$ FREE	\$ 2,210	\$ 5,200
Item AF--Litter Barrels	\$ FREE	\$ 900	\$ 15,000
Item AG--Management	\$ FREE	\$ 1,800	\$ 24,000
<u>TOTAL BASE PRICE</u>	<u>\$ 158,291</u>	<u>\$ 269,126</u>	<u>\$ 202,504</u>
Option Year 1 (0002)	\$ 316,581	\$ 538,252	\$ 405,008
Option Year 2 (0003)	\$ 316,581	\$ 239,700	\$ 405,008
Option Year 3 (0004)	\$ 316,581	\$ 239,700	\$ 405,008
Option Year 4 (0005)	\$ 316,581	\$ 239,700	\$ 405,008
<u>TOTAL PRICE</u>	<u>\$1,424,615</u>	<u>\$1,526,478</u>	<u>\$1,822,536</u>

Following confirmation of Fowler's bid price and a determination of the firm's responsibility on the basis of a

favorable plant facilities survey, the low bidder was awarded a contract on March 1. Continental filed this protest against that award on March 12.

The protester's principal allegation is that Fowler's bid was unbalanced because, except for the first two line items involving refuse collection from residential housing (item AA) and the rest of the Fort (item AB), within the price schedule for each performance period the awardee indicated that it would perform the other services (i.e., cleaning, painting, emptying barrels, and on-site management) for "FREE." In Continental's view, this method of bidding constitutes a per se violation of the IFB's prohibition against unbalanced bidding because the "FREE" items represent understated prices for the services to be rendered.^{1/}

In response, the Army essentially submits that Fowler's bid is not unbalanced because, although it contains "nominal" pricing for some line items, it does not contain enhanced pricing for other items--an essential precondition to "mathematical" unbalancing. The agency also argues that since Fowler's 6-month base period price is one-half of its price for each of the 12-month option periods and since, for each performance period, its prices are lower than Continental's, there is simply no possibility that the awardee's bid was impermissibly "front-loaded," or that its acceptance would result in a contract which was not at the lowest cost to the government--essential preconditions for "material" unbalancing.

There are two aspects to unbalanced bidding--"mathematical" unbalancing and "material" unbalancing. A bid is not

^{1/} In its protest, Continental also alleged that Fowler's method of bidding would preclude the agency from enforcing a contract provision which assigned percentage penalties for the inadequate performance of various services. In the agency report, however, the Army noted that since the penalty deductions were, by the terms of the IFB, to be taken as a percentage of the total amount invoiced by the contractor each month, the practice of offering certain "FREE" line items would not interfere with the government's ability to administer the contract as alleged. Since Continental has declined to address the issue further in its comments on the agency report, we consider this protest ground abandoned, and therefore, dismiss it without further consideration. Robertson & Penn, Inc., B-234082, Apr. 10, 1989, 89-1 CPD ¶ 365.

subject to rejection because of unbalancing unless it is found to be both mathematically and materially unbalanced. The first involves a mathematical evaluation to determine whether a bid is based on understated prices for some work and inflated prices for other work. The Taylor Group, B-234294, May 9, 1989, 89-1 CPD ¶ 436. In this regard, it is necessary to show that a bid contains both understated and overstated prices in order to conclude that it is mathematically unbalanced. Consolidated Photocopy Co., Inc., B-234137, Apr. 18, 1989, 89-1 CPD ¶ 386.

The second aspect--material unbalancing--involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is materially unbalanced if there is a reasonable doubt that the acceptance of a mathematically unbalanced bid will result in a contract award at the lowest ultimate cost to the government. The Taylor Group, B-234294, supra. In procurements involving base and option periods, material unbalancing typically occurs where a bid is "front-loaded" to capture a disproportionate part of the total price upon which bids are evaluated during early phases of contract performance in anticipation that low-priced options will not be exercised later; however, where an awardee's base and option period prices are all lower than those of other bidders, then there is no doubt that the award will result in the lowest ultimate cost to the government and, therefore, material unbalancing has not occurred. Earthworks of Sumter, Inc., B-234594, May 30, 1989, 89-1 CPD ¶ 518.

Continental's contention regarding unbalancing rests solely on the premise that Fowler's offer of certain items at no cost necessarily understates the price for the services associated with those items. However, the protester has not alleged, and the record does not disclose, that Fowler's bid also contains enhanced prices for other items--as required by our case law, and the IFB prohibition against unbalanced bidding, to establish mathematical unbalancing. Thus, since the bid is not mathematically unbalanced it cannot be materially unbalanced and we have no basis for concluding that Fowler's bid should have been rejected and we, therefore, deny this ground of protest. Consolidated Photocopy Co., Inc., B-234137, supra.

In its protest, Continental also alleges that the bid of the second-low bidder, Inland Service, was unbalanced. Since we have found that Fowler, the low bidder, was entitled to award, this allegation is dismissed as academic without further consideration. Northwest Cleaning Serv., B-234780, May 31, 1989, 89-1 CPD ¶ 523.

Finally, in a separate letter, Continental has requested reconsideration of our March 7 notice (B-238842.1) dismissing its earlier protest which was filed on March 7 and which challenged the Army's decision not to set aside the IFB for small and disadvantaged businesses. We dismissed that protest as untimely pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990), which require that protests involving alleged improprieties which are apparent prior to bid opening be filed prior to that time--in this case, February 26. The record reflects that Continental had previously filed a written protest with the agency on February 28--after bid opening; since its initial protest to the Army was, thus, untimely, our Regulations required dismissal of its March 7 protest to this Office. See 4 C.F.R. § 21.2(a)(3); Illumination Control Sys., Inc., B-237196, Dec. 12, 1989, 89-2 CPD ¶ 546.

In its request for reconsideration, Continental states that it had advised the Army on several unspecified occasions prior to bid opening of its concerns about the decision not to set aside the IFB. However, for the purposes of determining whether a protest is timely or not, an agency-level protest must be submitted in writing; an oral complaint is not sufficient. Bulkley Dunton--Reconsideration, B-237323.2, Nov. 20, 1989, 89-2 CPD ¶ 480. Thus, Continental's request is denied because it does not show that our dismissal notice contained errors of fact or law or a failure to consider information that warrant reversal or modification. See 4 C.F.R. § 21.12 (a); National Medical Staffing, Inc.--Request for Recon., B-236562.4, Dec. 29, 1989, 89-2 CPD ¶ 607.

The protest is denied in part and dismissed in part; the request for reconsideration is denied.



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James F. Hinchman
General Counsel