



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bean Dredging Corporation

File: B-239952

Date: October 12, 1990

Michael H. Payne, Esq., Starfield & Payne, for the protester.
Linda J. Selinger, Esq., Army Corps of Engineers, for the agency.
Barbara R. Timmerman, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that maintenance dredging solicitation requesting a lump sum price instead of unit prices for government estimated quantities places too much risk on the contractor and results in bidders not bidding on an equal basis is denied, where the record shows the method of contracting chosen by the agency significantly reduces the agency's administrative burden and bidders can reasonably estimate the project cost given the availability of historical data and the apparent nature of the risks.

DECISION

Bean Dredging Corporation protests the decision of the Army Corps of Engineers to issue invitation for bids (IFB) No. DACW29-90-B-0061 for maintenance dredging of the Mississippi River Gulf Outlet navigation channel on a lump sum basis without including in the solicitation cubic yard estimated quantities of the material to be dredged. Bean contends that this approach places an unreasonable amount of risk on the bidders and prevents them from competing on an equal basis.

We deny the protest.

The bid schedule requested a fixed sum for mobilization and demobilization of dredging equipment and a unit price for dredging 580 channel stations. A station is a section of channel 100 feet long and dredging of 580 stations was

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required. After receipt of the protest, the Corps amended the solicitation to request a lump sum bid, rather than unit prices since the quantity of 580 stations was a firm quantity. Both parties acknowledge that this change does not affect the issues in this protest.

The IFB informed bidders that they could obtain copies of the government's estimates of the quantity of material that would need to be dredged, and that historical data about previous dredging performed on the channel was available for inspection. The agency expressly disclaimed any warranty with respect to the accuracy of this information, and provided that furnishing this information will not provide a basis for a claim against the government. In the past, solicitations for maintenance dredging generally included the government's estimated quantity of the material to be dredged and payment was determined by the actual number of cubic yards which were removed (based on hydrographic surveys conducted during the performance period).

Bean contends that the IFB is defective and violates the guidance contained in FAR § 36.207(b) (FAC 84-45) as to when lump sum pricing is to be used instead of unit pricing. First, Bean argues that since the agency has not provided bidders with a reliable quantity estimate or identified the type of the material to be dredged, each bidder must devise its own estimate which, according to Bean, makes it highly probable that the firms will not be bidding on the same basis. Second, Bean contends that this method of procurement puts undue risk on bidders. Bean notes that under the cubic yard method a "Variations in Estimated Quantities" clause and the inclusion of a "Differing Site Conditions" clause provided equitable relief to firms if quantities or conditions actually encountered during performance varied substantially from what was represented in the solicitation. Bean asserts that this IFB forces all of this financial risk onto the contractor.

The Corps states that the lump sum method of soliciting bids for dredging enables the agency to significantly reduce its administrative costs and will allow it to prepare the solicitation in advance of its needs so as to issue it in a timely fashion as channel conditions and funding dictate. The Corps contends that the present solicitation and available historical data on the quantity and type of material contains sufficient detail to permit experienced bidders to intelligently prepare their bids. As support for its position, it notes that other sections of this channel have been successfully dredged five times in the past 3 years using the lump sum method on contracts awarded at reasonable prices, after adequate competition.

The determination of the government's minimum needs and the best method of accommodating them is primarily the procuring agency's responsibility, since government procurement officials are the ones who are most familiar with the conditions under which supplies, equipment and services have been employed in the past and will be utilized in the future. Southern Dredging Co., Inc., B-229786.2, July 7, 1988, 88-2 CPD ¶ 17. Accordingly, our Office will not question an agency's determination in these matters unless the determination has no reasonable basis. Id.

We conclude from our review of the record that the Corps' request for lump sum rather than unit prices for estimated quantities was reasonably based, and that the Corps was not required to specify in the IFB the quantity or type of material to be dredged. While Bean protests this unfairly shifts the financial risks of encountering unexpected underwater conditions and preparing an accurate estimate from the agency to the contractor, we are not persuaded that experienced dredging companies cannot reasonably estimate the project costs involved given the obvious nature of the risks and the extensive historical data available. An agency is not prohibited from offering to competition a proposed contract imposing maximum risks upon the selected contractor and minimum administrative burdens upon the agency. Argus Servs., Inc., B-234016.2; B-234017.2, Sept. 12, 1989, 89-2 CPD ¶ 227.

Further, the Corps states that the dredging history for this channel is relatively consistent and would be expected to contain a minimal risk of surprise. As indicated in the IFB, this data was available for review by potential bidders.

Bean has not rebutted the Corps assertion that contracts for dredging at other sections of this same channel have been awarded reasonable prices and successfully completed under this lump sum method. Indeed the New Orleans District has successfully used this method of contracting twenty-four times during the last 5 years.

The Corps states without persuasive rebuttal that the lump sum method will significantly reduce its administrative burdens and save approximately 60 percent in construction survey costs over the cubic yard method since the Corps will not have to conduct extensive hydrographic surveys during contract administration to determine the cubic yards that have been removed in order to pay the contractor or to prepare an exact government estimate.

With respect to Bean's concern that bidders will bid based on differing assessments of the risks, the fact that offerors may respond differently in calculating their prices is a matter of business judgment and does not preclude a fair competition. American Maid Maintenance, 67 Comp. Gen. 3 (1987), 87-2 CPD ¶ 326.

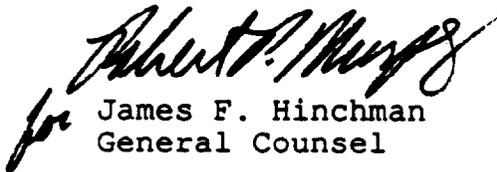
Finally, we do not agree with the protester that FAR § 36.207(b) mandates unit pricing on this IFB. That section provides:

"Lump-sum pricing shall be used in preference to unit pricing except when--

- (1) Large quantities of work such as grading, paving, building outside utilities, or site preparation are involved;
- (2) Quantities of work, such as excavation, cannot be estimated with sufficient confidence to permit a lump-sum offer without a substantial contingency;
- (3) Estimated quantities of work required may change significantly during construction; or
- (4) Offerors would have to expend unusual effort to develop adequate estimates."

In our view, this language simply means that if the exception exists there is no longer a "preference" for lump sum pricing, and the agency may use its discretion to choose whichever method of pricing, including lump sum, that best meets its needs.

The protest is denied.


for James F. Hinchman
General Counsel