

145787



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Duramed Homecare
File: B-245766
Date: January 30, 1992

D. Whitney Thornton, II, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.

Jon A. Katis for Empire Home Medical, Inc., an interested party.

William E. Thomas, Jr., Esq., and Sandra J. Bender, Department of Veterans Affairs, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A solicitation for a requirements contract should be canceled and resolicited where the incumbent's low bid contained nominal prices for some items and enhanced prices for other items, and thus was mathematically unbalanced, and where the mathematically unbalanced bid might not result in the lowest ultimate cost to the government because the solicitation's estimates and item descriptions did not reasonably reflect the government's actual anticipated requirements.

DECISION

Duramed Homecare protests the anticipated award of a contract to Empire Home Medical, Inc. under invitation for bids (IFB) No. 640-5-92, issued by the Department of Veterans Affairs (VA) for oxygen and related services for the VA Medical Center in Palo Alto, California. Duramed argues that Empire's bid should be rejected as mathematically and materially unbalanced.

We sustain the protest.

The IFB contemplated the award of a requirements contract for 1 year with 4 options years for estimated quantities of liquid and gaseous oxygen delivered to the residences of VA outpatients and for various other related services, including the delivery and set-up of oxygen concentrators and cylinders. Bids were solicited for four "groups" of items: (a) concentrators; (b) oxygen cylinders; (c) oxygen refills;

and (d) maintenance and repairs. The concentrator group contains four individual items and the oxygen cylinder group contains three individual items. The oxygen refill group has two items: gas oxygen and liquid oxygen. The maintenance and repair group has only one item.

Unit and total prices were solicited for each item for the base and option years, and offerors were informed that award would be made to the low-priced, responsive and responsible bidder, and were warned that materially unbalanced bids may be rejected. VA evaluated offerors' prices by adding the total prices for all options to their prices for the basic requirement.

Of the three bids received by VA, Empire, the incumbent contractor, submitted the low bid of \$943,960.60, Duramed submitted the second low bid of \$1,334,353.10, and the third low bid price was \$1,706,989. In pertinent part, Duramed, Empire, and the third bidder bid as follows:

Delivery and Set-Up of Oxygen Concentrators
(Estimated 3 set-ups per month)

	<u>Empire</u>		<u>Duramed</u>		<u>Third Bidder</u>	
	Unit	Total	Unit	Total	Unit	Total
	Price	Price	Price	Price	Price	Price
	Set-up		Set-up		Set-up	
Base Year	\$N/C	/\$ 0	\$50	/\$ 1,800	\$55	/\$ 1,980
1st Option	10	/ 360	55	/ 1,980	55	/ 1,980
2nd Option	15	/ 540	60	/ 2,160	55	/ 1,980
3rd Option	20	/ 720	65	/ 2,340	60	/ 2,160
4th Option	25	/ 900	65	/ 2,340	60	/ 2,160
TOTAL		\$2,520		\$10,620		\$10,260

Pick-up, Clean and Calibrate Concentrators
(Estimated 3 pick-ups per month)

	<u>Empire</u>		<u>Duramed</u>		<u>Third Bidder</u>	
	Unit	Total	Unit	Total	Unit	Total
	Price	Price	Price	Price	Price	Price
	Pick-up		Pick-up		Pick-up	
Base Year	\$N/C	/	\$25	/\$ 900	\$65	/\$ 2,340
1st Option	N/C	/	25	/ 900	65	/ 2,340
2nd Option	N/C	/	35	/ 1,260	65	/ 2,340
3rd Option	N/C	/	35	/ 1,260	70	/ 2,520
4th Option	N/C	/	35	/ 1,260	70	/ 2,520
TOTAL		\$ 0		\$5,580		\$12,060

Supply of E-Cylinder Systems¹

(Estimated quantity of 208 systems per month)

	<u>Empire</u>		<u>Duramed</u>		<u>Third Bidder</u>	
	Unit	Total	Unit	Total	Unit	Total
	Price	Price	Price	Price	Price	Price
	System		System		System	
Base Year	\$5	/\$12,480	\$20	/\$49,920	\$32	/\$79,872
1st Option	5	/ 12,480	22.50	/ 56,160	32	/ 79,872
2nd Option	5	/ 12,480	25	/ 62,400	32	/ 79,872
3rd Option	5	/ 12,480	25	/ 62,400	35	/ 87,360
4th Option	5	/ 12,480	25	/ 62,400	35	/ 87,360
TOTAL		\$62,400		\$293,280		\$414,336

Supply of Gaseous Oxygen

(Estimated quantity of 6,457 cubic feet per month)

	<u>Empire</u>		<u>Duramed</u>		<u>Third Bidder</u>	
	Unit	Total	Unit	Total	Unit	Total
	Price	Price	Price	Price	Price	Price
	Cu.ft.		Cu.ft.		Cu.ft.	
Base Year	\$.60	/\$46,490.40	\$.25	/\$19,371.00	\$.40	/\$30,993.60
1st Option	.60	/ 46,490.40	.275	/ 21,308.10	.40	/ 30,993.60
2nd Option	.70	/ 54,238.80	.30	/ 23,245.20	.43	/ 33,318.12
3rd Option	.70	/ 54,238.80	.35	/ 27,119.40	.43	/ 33,318.12
4th Option	.80	/ 61,987.20	.35	/ 27,119.40	.46	/ 35,642.64
TOTAL		\$263,445.60		\$118,163.10		\$164,266.08

Supply of Liquid Oxygen

(Estimated quantity of 4,510 liters per month)

	<u>Empire</u>		<u>Duramed</u>		<u>Third Bidder</u>	
	Unit	Total	Unit	Total	Unit	Total
	Price	Price	Price	Price	Price	Price
	Liter		Liter		Liter	
Base Year	\$1.50	/\$81,180	\$2.00	/\$108,240	\$2.54	/\$137,464.80
1st Option	1.50	/ 81,180	2.25	/ 121,770	2.54	/ 137,464.80
2nd Option	1.50	/ 81,180	2.25	/ 121,770	2.54	/ 137,464.80
3rd Option	1.50	/ 81,180	2.35	/ 127,182	2.72	/ 147,206.40
4th Option	1.50	/ 81,180	2.40	/ 129,888	2.72	/ 147,206.40
TOTAL		\$405,900		\$608,850		\$706,807.20

Duramed questioned Empire's pricing for several line items, since, as indicated above, Empire's bid was very low for some items and very high for others. VA informed Duramed that whether Empire's bid was unbalanced was of no concern to Duramed, and Duramed filed this protest prior to award. VA has not made an award pending our decision in this matter. 4 C.F.R. § 21.4(a) (1991).

¹The IFB provided for the supply and refill of type "E" and "H" oxygen cylinders. Type "E" cylinders are portable units while type "H" cylinders are stationary backup units to the in-home oxygen concentrator.

A bid that is mathematically and materially unbalanced may not be accepted for award. Howell Constr., Inc., 66 Comp. Gen. 413 (1987), 87-1 CPD ¶ 455. In determining whether a bid is impermissibly unbalanced, the bid must first be shown to be mathematically unbalanced, which involves the assessment of whether each element of the bid carries its share of the costs of the work plus profit or whether the bid is based on nominal prices for some work and enhanced prices for other work. Outer Limb, Inc., B-244227, Sept. 16, 1991, 91-2 CPD ¶ 248. Next, the bid must be materially unbalanced, that is, there must be a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the government. USA Pro Co., Inc., B-220976, Feb. 13, 1986, 86-1 CPD ¶ 159. With regard to estimated quantities in requirements contracts, consideration of the materiality of unbalancing begins with a determination of the accuracy of the solicitation's estimate of the agency's anticipated needs, since the unbalanced bid will only become less advantageous than it appears if the government ultimately requires a greater quantity of the overpriced items and/or a lesser quantity of the underpriced items. See Edward B. Friel, Inc. et al., 55 Comp. Gen. 488 (1975), 75-2 CPD ¶ 333.

While VA concedes that Empire's bid was mathematically unbalanced, Empire argues that this is not so. The record shows that Empire bid no charge, or only a nominal amount, for the delivery and set-up of government owned oxygen concentrators as well as for the pick-up and cleaning of the concentrators. As the agency notes, these are items that should logically bear some contract cost. In addition, there is a large disparity between Empire's bid prices for the E-cylinder systems, and for gaseous and liquid oxygen, and the prices of the other bidders for these same items. Based on this record, we find that Empire's bid contained nominal prices for some items and enhanced prices for other items, and thus, is mathematically unbalanced.

Duramed argues that Empire's bid is also materially unbalanced because it is based upon inaccurate government estimates, the inaccuracy of which Empire was aware as the incumbent contractor. Specifically, Duramed argues that from reviewing Empire's bid it is apparent that VA's estimate for gaseous oxygen was significantly understated and VA's estimate for liquid oxygen was significantly overstated. Duramed also complains that while the IFB provided for the supply of four complete E-cylinder systems per patient, Empire admits that it only priced the supply of one complete system and three additional cylinders, which resulted in Empire's bid being significantly lower for this item than the other bids.

VA initially asserted that the IFB estimates for gaseous and liquid oxygen were based upon actual past usage. However, in the course of this protest, VA admitted that the records of actual oxygen usage cannot be found. The agency states that the estimate of liquid oxygen usage was copied from a prior solicitation and that the estimate of gaseous oxygen usage was provided orally by a person who is no longer employed by the agency and cannot be located. We scheduled a hearing to obtain the testimony of a government witness concerning the agency's estimates of oxygen usage and supply of E-cylinder systems. Because the agency was unable to provide a knowledgeable witness, no hearing was held. Empire contends that its experience under the prior contract supports the IFB oxygen supply estimates, and has submitted to us and to VA the invoices under which Empire billed the agency for the supply of gaseous oxygen. Duramed contends that the invoices supplied by Empire do not confirm the accuracy of the IFB estimates.

Based on its analysis of Empire's records, VA now states that its actual usage of liquid oxygen in 1991 was 4,165 liters for 11 months.² The IFB, however, provided an estimated usage of 4,510 liquid liters per month, or 54,120 liters per year, almost 12 times the amount of liquid oxygen actually used in 1991. The VA admits that there is a significant difference between the stated estimate and the agency's 1991 actual usage, and that it was only copied from a previous solicitation.

After this discrepancy came to light in the course of this protest, VA hypothesized that usage of liquid oxygen may increase in the immediate future. Specifically, VA states that the Martinez VA Medical Center is projected to close and that an unstated percentage of their patients would be serviced by the Palo Alto VA Medical Center. VA also states that the Palo Alto Medical Center "is just now getting back on its feet as a result of the damage done by Loma Prieta earthquake in October 1989" and that in-hospital patient levels are lower than before the earthquake but are increasing. Notwithstanding the agency's hypothesis, there is no information in the record to indicate how VA's actual usage of liquid oxygen would be affected by the potential closing of the Martinez VA Medical Center; indeed, no information is provided to show that the agency's actual usage of liquid oxygen will increase.³

²If this figure were annualized over 12 months, the estimated use of liquid oxygen would be 4,544 liters per year.

³In this regard, we do not see how the agency's claim that its in-patient levels will increase will affect in any way the amount of oxygen to be delivered to out-patients.

Since VA has made no effort to identify its current requirements for liquid oxygen or to quantify its anticipated future requirements, we find that the IFB's estimated liquid oxygen usage, which was simply copied from a prior solicitation, is not a realistic estimate. See FAR § 16.503(a)(1). While there is no requirement that the estimates be absolutely correct, they must be based on the most current information available and be reasonably accurate representations of the government's anticipated actual needs. Id.; see All Weather Contractors, Inc., B-217242, July 23, 1985, 85-2 CPD ¶ 71.

The IFB's significant overstatement of the government's requirements for liquid oxygen, of which Empire as the incumbent would reasonably be aware, resulted in a substantial distortion of the apparent savings offered by Empire's bid. Based upon the overstated estimate in the IFB for liquid oxygen, Empire's bid for this item appeared to be \$202,950 lower than Duramed's. However, Empire's bid for liquid oxygen, based upon the agency's actual usage of liquid oxygen in 1991, is only \$17,055 less than Duramed's.⁴

We also find that the IFB did not accurately state the government's requirements for E-cylinder systems. The IFB set forth 208 E-cylinder systems per month as the government's anticipated needs. According to the IFB, an E-cylinder system includes the oxygen cylinder (tank), regulator, stand, tubing, cart, cannula⁵ and humidifier. VA states that it anticipates the use of E-cylinder systems by an estimated 52 patients, each of whom will only require one complete system. The agency contends that the estimate for this bid item is based on the assumption of renting four oxygen tanks per patient per month, rather than for four E-cylinder systems as stated in the IFB.

Duramed states that it calculated its bid on the basis of providing 208 complete systems each month, as provided for in the IFB.⁶ Empire, on the other hand, states that, prior to the issuance of the IFB, it learned that VA actually sought a bid for four oxygen cylinders per month per

⁴We used the 1991 annualized figure of 4,544 liters of liquid oxygen to calculate this figure. Duramed's recalculated 5-year price for this item is \$51,120, while Empire's is \$34,080.

⁵A "cannula" is a device that is inserted into the nose for administering oxygen.

⁶The third bidder's bid apparently also was calculated on the same basis.

patient, rather than four systems per month per patient, and calculated its bid on this basis. These explanations account for the obvious price disparities for this item.

Thus, the record shows that the bidders did not bid on an equal basis for this item. We find that if the solicitation accurately set forth the government's actual anticipated needs, the difference between Duramed's and Empire's bids for this item would not have been as great as the \$230,880 savings apparently offered by Empire for this item.

We conclude that Empire's bid, based upon inaccurate estimates and erroneous descriptions of the government's requirements, might not result in the lowest ultimate cost to the government. Empire's total bid appears to be \$390,392.50 lower than Duramed's total bid. However, we conclude that Duramed's total bid is \$26,382.50 lower than Empire's, based upon the agency's 1991 usage of liquid oxygen and if the prices for the E-cylinder systems are disregarded. While Empire has submitted voluminous documentation of gaseous oxygen invoices, the evidence regarding gaseous oxygen usage is not clear and it may be that Duramed's total bid would be even more advantageous to the government if calculated based on the best current information available. Accordingly, we find that Empire's bid was materially unbalanced and cannot be accepted.

We sustain the protest.

We recommend that the VA cancel the IFB, review all of its estimates based upon the most current information available, and resolicit its requirements under a solicitation that sets forth realistic estimated quantities.⁷

See FAR § 16.503(a)(1); Edward B. Friel, Inc. et al., supra. In addition, Duramed is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). Duramed should submit its certified claim for its protest costs directly to the agency within 60 working days of receipt of this decision. 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(f)(1)).

Milton L. Jordan
for Comptroller General
of the United States

⁷While we have not reconsidered the accuracy of the gaseous oxygen estimates, given the admitted lack of documented estimates, the agency should confirm the estimates for these and all other IFB items before resoliciting this requirement.