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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Earth Engineering and Sciences, Inc.

File: B-248219

Date: July 30, 1992

J. Patrick McMahon, Esq., for the protester.
Kimberly L. Frye, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
Linda S. Lebowitz, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly determined that apparent low bid under a requirements-type solicitation was materially unbalanced where the solicitation's maximum estimated quantities were reasonably accurate representations of the agency's anticipated actual needs and the bid would have resulted in the lowest cost to the government.

DECISION

Earth Engineering and Sciences, Inc. (E2SI) protests the allegedly improper rejection of its apparent low bid as materially unbalanced and the award of a contract to Environmental Restoration Company (ERC) under invitation for bids (IFB) No. N62472-92-B-0801, issued by the Department of the Navy for the removal and disposal of hazardous waste and hazardous waste residues and for the closure of a building at the Naval Air Station, Willow Grove, Pennsylvania.

We sustain the protest.

The IFB, issued on January 10, 1992, contemplated the award of a combination firm, fixed-price, definite/indefinite quantity contract to be completed within 119 calendar days of the award. The IFB stated that the award would be made to the responsible bidder whose bid, conforming to the solicitation, was deemed most advantageous to the government considering only price and price-related factors. The IFB advised that the agency could reject a bid as nonresponsive if the prices bid were materially unbalanced between line items or subline items. The IFB defined a materially unbalanced bid as one which is based on prices significantly less than cost for some work and prices significantly

overstated for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the government even though it may be the low evaluated bid, or if the bid "is so unbalanced as to be tantamount to allowing an advance payment."

The amended bid schedule contained two line items. Line item No. 0001 was for the fixed-price, definite quantity work and consisted of the following two subline items: 0001AA--preparation of a sampling and analysis plan and 0001AB--closure certification. Each of these subline items was for a quantity of one unit. Firms were required to enter on the schedule a unit price and an extended price for each subline item and a total amount for line item No. 0001. Line item No. 0002 was for the fixed-price, indefinite quantity work and consisted of 27 different subline items, including various types of material samplings and analyses and excavation and disposal work. For each of the indefinite quantity subline items, the schedule listed a maximum estimated quantity. Again, firms were required to enter on the schedule a unit price and an extended price for each subline item and a total amount for line item No. 0002. Finally, firms were required to enter on the schedule a total bid price for both line item Nos. 0001 and 0002.

Thirteen firms, including E2SI and ERC, submitted bids. E2SI was the apparent low bidder. For line item No. 0001, E2SI submitted a price of \$60,000. For line item No. 0002, E2SI submitted a price of \$1,507,740. E2SI's total bid price for both line item Nos. 0001 and 0002 was \$1,567,740. ERC was the apparent second low bidder. For line item No. 0001, ERC submitted a price of \$4,000. For line item No. 0002, ERC submitted a price of \$1,691,410. ERC submitted a total bid price for both line item Nos. 0001 and 0002 of \$1,695,410.

On March 5, ERC filed an agency-level protest arguing that E2SI's bid should be rejected as nonresponsive because its price for line item No. 0001 was materially unbalanced and front-loaded. The agency forwarded a copy of ERC's protest to E2SI. By letter dated March 11, E2SI responded that its price for line item No. 0001 was not materially unbalanced. E2SI stated that \$45,000 of its \$60,000 price for line item No. 0001 reflected the cost it would incur for having its subcontractor prepare the required sampling and analysis plan and the closure certification. E2SI submitted a copy of its subcontractor's lump-sum quotation. In reaching a decision concerning ERC's protest, the agency found that E2SI's price for line item No. 0001 was high and identified four of the subline items of line item No. 0002 which it believed were low. The agency also found that if it did not

order the indefinite quantity line items, E2SI's bid might not result in the lowest cost to the government. Accordingly, the agency determined E2SI's bid was materially unbalanced.

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. A bid is mathematically unbalanced where it is based on nominal prices for some of the items and enhanced prices for other items. Sanford Cooling, B-242423, Apr. 15, 1991, 91-1 CPD ¶ 376. Where there is a reasonable doubt that acceptance of a mathematically unbalanced bid will result in the lowest overall cost to the government, the bid is materially unbalanced and cannot be accepted. Id.; OMSERV Corp., B-237691, Mar. 13, 1990, 90-1 CPD ¶ 271.

With regard to estimated quantities in requirements-type solicitations, consideration of the materiality of unbalancing begins with a determination of the accuracy of the solicitation's estimates of the agency's anticipated needs. Duramed Homecare, 71 Comp. Gen. 193 (1992), 92-1 CPD ¶ 126. Unless it can be shown that the agency's estimates--which are supposed to be reasonably accurate representations of the agency's anticipated actual needs--are not reliable, Outer Limb, Inc., B-244227, Sept. 16, 1991, 91-2 CPD ¶ 248, a low evaluated bid under a requirements-type solicitation cannot be rejected merely because it is mathematically unbalanced since there would be no reason to believe that acceptance of the low bid would not actually result in the lowest cost to the government. DOD Contracts, Inc., B-227689.2, Dec. 15, 1987, 87-2 CPD ¶ 591.

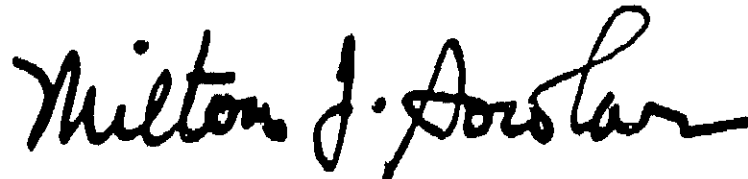
Here, the agency states that E2SI's bid was mathematically unbalanced because E2SI's bid for line item No. 0001 was \$60,000 while the government estimate was \$2,500 and 10 of the 12 other bids ranged from approximately \$3,300 to \$14,000. The agency also identified four subline items of line item No. 0002 which it believed were understated.

Even assuming that this establishes mathematical unbalancing, there is no evidence in the record which suggests, and the agency has never argued, that the solicitation's maximum estimated quantities for the indefinite quantity line items were not based on the best information available or were otherwise deficient. In response to an inquiry from our Office, the agency reported and confirmed that its estimates for the removal and disposal of hazardous waste and hazardous waste residues were accurately based on its knowledge of the materials stored at the facility and on the physical condition of the site and the surrounding area. The agency also reports that the amounts of hazardous waste and hazardous waste residues

removed and disposed of to date by ERC under its contract closely reflect the maximum estimated quantities in the solicitation. Thus, even if E2SI's low bid was mathematically unbalanced, because the solicitation's maximum estimated quantities were reasonably accurate representations of the agency's anticipated actual needs, the bid was not materially unbalanced as there is no reasonable basis for viewing the bid as representing other than the lowest cost to the government.¹

Therefore, we find that the agency improperly rejected E2SI's apparent low bid as materially unbalanced. Accordingly, we sustain the protest. Since the contract has been substantially performed, we find that the agency should award E2SI its reasonable bid preparation costs and its reasonable costs of filing and pursuing its protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1), (2) (1992).

The protest is sustained.



Acting Comptroller General
of the United States

¹To the extent the agency is concerned that E2SI's price for line item No. 0001--\$60,000--is front-loaded, we note that its price for this line item represents only 3.8 percent of its total bid price of \$1,567,740. A front-loaded bid is not materially unbalanced unless it is grossly front-loaded. In prior decisions, we have found gross front-loading where 40 percent of the total price was front-loaded, see Riverport Indus., Inc., 64 Comp. Gen. 441 (1985), 85-1 CPD ¶ 364, aff'd, B-218656.2, July 31, 1985, 85-2 CPD ¶ 108, and where 25 percent was front-loaded, see Edgewater Mach. & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 CPD ¶ 630. See also Westbrook Indus., Inc., 71 Comp. Gen. 139 (1992), 92-1 CPD ¶ 30; Government Leasing Corp., B-245939, Jan. 27, 1992, 92-1 CPD ¶ 117; and Inventory Accounting Serv., B-245906, Jan. 27, 1992, 92-1 CPD ¶ 116 (all cases where 50 percent or more of the total price for a base year and two option years was front-loaded into the base year price). We do not think a price that is less than 4 percent of the total bid price should be viewed as grossly front-loaded.