



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: LBCO, Inc.

File: B-254995

Date: February 1, 1994

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for the protester.

E. Alan Arnold, Esq., and Karl Dix, Jr., Esq., Smith, Currie
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party.

Tony K. Vollers, Esq., and Craig E. Hodge, Esq., Department
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of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Where first article items are identical to and part of the initial quantity to be delivered, and the submission of an enhanced first article price operates as a device to obtain unauthorized contract financing, the bid is materially unbalanced and must be rejected as nonresponsive where acceptance of the bid would compromise the government's rights to terminate the contract.

2. Protester who submitted nonresponsive bid is not an interested party for the purpose of challenging the responsiveness of the awardee's bid where there are other responsive bids in line for award if the protest were sustained.

DECISION

LBCO, Inc. protests the award of a contract to Evans Steel Enterprises, Inc. under Invitation for Bids (IFB) No. DAAK01-93-B-0038, issued by the U.S. Army Aviation and Troop Command for shipping containers. The protester contends that Evans' low bid was nonresponsive and should have been rejected.

We dismiss the protest because LBCO is not an interested party since its bid is ineligible for award.

On May 14, 1993, the agency issued the solicitation for a fixed-price requirements contract for a base period of 1 year, followed by four 1-year option periods. The solicitation sought bids for production of an estimated quantity of 7,450 Tricon containers, which are shipping containers that can be coupled in threes. The solicitation contained 6 contract line item numbers (CLIN), one for each of the 5 periods of performance, plus a separate CLIN for data items. CLIN 0001, covering the base period, contained a total estimated quantity of 1,660 containers, comprised of 2 sub-CLINS: CLIN 0001AA, for a production quantity of 1,657 containers; and CLIN 0001AB, for a quantity of 3 containers to be submitted as first articles after testing at contractor expense.¹ The solicitation contained the standard clause at Federal Acquisition Regulation (FAR) § 52.214-10, providing for award to the low, responsive, responsible bidder, but warning bidders that the agency might reject as nonresponsive any bid that is materially unbalanced as between line items or subline items, or so unbalanced as to amount to allowing an advance payment.

The Army received 13 bids on July 8. The low bidder, Evans, offered a unit price of \$2,986.32 for all 6 CLINS (including CLIN 0002 for the data items), and a first article unit price of \$8,628.96, or a total of \$25,886.88 for the 3 first articles. LBCO submitted the second low bid, with prices ranging from \$2,993 for the first year's production quantity to \$3,176 for the fifth year, and a first article unit price of \$127,000, or \$381,000 for the 3 first articles. On September 10, the Army awarded a contract to Evans, as the low responsive, responsible bidder. This protest, in which LBCO argues that Evans' bid was nonresponsive because the awardee took exception to the agency's required delivery schedule, followed.

The Army argues that LBCO is not an interested party to challenge award to Evans because LBCO submitted a grossly front-loaded, and hence materially unbalanced, bid. The Army claims that LBCO's bid was materially unbalanced because the unit price for the 3 first article containers, \$127,000, was more than 42 times its unit price for items to be delivered during the remainder of the initial ordering period, \$2,993. The Army also argues that the protester's bid suggests that LBCO's actual costs for production and

¹The data items were required under CLIN 0002, while CLIN 0003 contained an estimated quantity of 1,400 containers for the second ordering period; CLIN 0004, an estimated 1,400 containers for the third ordering period; CLIN 0005, an estimated 1,990 containers for the fourth ordering period; and CLIN 0006, an estimated 1,000 containers for the fifth ordering period.

testing of the three first articles are significantly lower than its bid of \$381,000. Specifically, the Army explains that LBCO offered a price reduction of only \$100,000 if the agency would waive the first article requirements, and notes that this figure is consistent with the government estimate of \$110,000.00 for production and testing of the three first articles.

As a general rule, where there is no significant difference between the scope and nature of the work required for first article and production quantities, where the first article items are identical to and part of the initial quantity to be delivered, and where the submission of an enhanced first article price operates merely as a device to obtain unauthorized contract financing, our Office has found such bids materially unbalanced per se, which must be rejected as nonresponsive. Star Dynamic Corp., B-248919.3; B-250459, Jan. 26, 1993, 93-1 CPD ¶ 63.

In response to the Army's contentions, LBCO argues that its bid is not unbalanced because it will incur extremely high costs associated solely with testing the first articles. Thus, in LBCO's view, there is a significant difference between the scope and nature of the work required to produce the first articles and the work required to manufacture the production units. In addition, LBCO argues that the government estimate for the first articles is unreasonable, and that the agency can not properly conclude that LBCO's bid is "grossly front-loaded" because LBCO's first article unit costs are only 40 times the cost of production units and the price of CLIN 0001AB is less than 2 percent of the total contract price.

As an initial matter, we note that the Army has correctly indicated that LBCO's first article price is 42 times higher than its unit prices for the base year ordering period. On the other hand, LBCO has correctly indicated that its first article prices are a very small percentage of the total contract price if the Army exercises all options and orders all of the estimated quantities of containers.

LBCO is mistaken however, in contending that a bid cannot be materially unbalanced simply because the first article price does not constitute a significant percentage of the total price. Fidelity Technologies Corp., B-232340, Nov. 23, 1988, 88-2 CPD ¶ 511 (agency correctly rejected bid as materially unbalanced even though the first article price represented only 5.8 percent of total contract price). Here, as in Fidelity, we conclude that other information in the record supports the Army's determination that LBCO's bid was materially unbalanced.

Although LBCO provided detailed information to our Office regarding numerous costs that it contends are applicable only to its 3 first articles,² the Army's report on this protest discounted LBCO's claims regarding some of these costs. As stated above, the Army discounted LBCO's assertions that these costs are unique to producing the first articles because of the alternate price LBCO offered if the agency would agreed to waive first article testing. (The IFB here required delivery of the 3 first article containers even if testing were waived.) In response, LBCO argues that the \$100,000.00 price reduction it offered if the first article testing requirement were waived may not form the basis for a conclusion that the remaining costs represented a possible advance payment for production costs.

In our view, the Army reasonably interpreted LBCO's price reduction as additional evidence that its first article price of \$381,000 was materially inflated. The Army noted that FAR § 15.814(d)(2) suggests that contracting officers attempt to discern whether an offeror is materially unbalanced as between first article units and production units by comparing the first article price with an alternate proposal from the same offeror which does not include first article testing.

Here, the agency was able to make such a comparison. After concluding that the only difference between the first articles and the production units was the testing, and after noting that LBCO offered only a \$100,000 reduction if the testing were waived, the agency compared the remaining price for the 3 first articles--i.e., \$281,000--to the unit price of the production units--i.e., \$2,993 in the base year--and concluded that the price was materially unbalanced.³

Put simply, the rule against accepting an unbalanced bid operates to protect the government from paying bidders for goods or services that have not been provided. Thus, award to a bidder offering inflated first article prices creates an undesirable financial risk for the government should

²For example, LBCO provided a breakdown of the costs of special equipment, the costs of changes to its production line, and the associated overhead and general and administrative expense associated with these costs.

³As an aside, LBCO also argues that the government's estimate of \$110,000 for the 3 first articles is unreasonable, and should not lend credibility to the Army's claim that LBCO's proffered price reduction is, in fact, very close to the government's estimate for the cost of producing the 3 first articles. Despite its claims, LBCO has not shown why the government estimate is unreasonable.

contingencies arise after the first articles have been accepted, Edgewater Mach. & Fabricators, Inc., 65 Comp. Gen. 488 (1985), 85-2 CPD ¶ 630. In such cases, we have concluded that inflated first article prices are like an advance payment to the contractor,⁴ Nebraska Aluminum Castings, Inc., B-222476, June 24, 1986, 86-1 ¶ 582, aff'd, B-222476.2, Sept. 23, 1986, 86-2 CPD ¶ 335, reaff'd, B-222476.3, Nov. 4, 1986, 86-2 CPD ¶ 515. Where, as here, there is another firm that could produce the containers at a lower price if the protester's contract were terminated, the protester's incentive to complete performance in accordance with contract terms would be greatly reduced.

Under the circumstances, we find that LBCO's bid is materially unbalanced and could not be accepted, even if the agency did reject the low bid. The bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988), provide that only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (1993). Since LBCO would not be in line for contract award even if its protest were sustained, it is not an interested party. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7.

The protest is dismissed.



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Associate General Counsel

⁴As an aside, we note that LBCO argues that its higher price for the first articles does not provide an advance payment, since as a small business, LBCO is entitled to progress payments in the amount of 85 percent of its incurred costs. A contractor's right to progress payments for work associated with first article approval is, however, unrelated to the reasonableness of its first article price. Islip Transformer & Metal Co., Inc., B-225527, Mar. 23, 1987, 87-1 CPD ¶ 327.