

White

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

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Decision

Matter of: Mid-South Dredging Company--Reconsideration
File: B-256219.3
Date: October 21, 1994

S. Leo Arnold, Esq., Ashley, Ashley & Arnold, for the protester.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where the protester fails to demonstrate errors of fact or law warranting reversal or modification of prior decision.

DECISION

Mid-South Dredging Company requests reconsideration of our decision, Mid-South Dredging Co., B-256219; B-256219.2, May 25, 1994, 94-1 CPD ¶ 324, in which we denied its protest challenging the terms of invitation for bids (IFB) No. DACW03-94-B-0003, issued by the Army Corps of Engineers for station dredging of the McClellan-Kerr Arkansas River Navigation System in Arkansas and Oklahoma. Mid-South argues that our prior decision contained errors of fact about the solicitation and failed to respond to all of its protest contentions.

We deny the request for reconsideration.

Mid-South's initial protest focused largely on the Corps's use of a table of multipliers to determine payment based on the difficulty of the dredging work encountered. Under this scheme, bidders provided a unit price per dredging station under the least difficult, and generally most common, dredging conditions. Under more difficult dredging conditions--i.e., those requiring greater lengths of pipeline from the dredge to the disposal, or those requiring pumping the dredged material a greater height from the water's surface to the disposal site--the unit price was increased by a multiplier in the IFB's payment table to calculate additional payment. According to Mid-South, this bidding scheme was improper because: (1) the IFB did not include estimates for the nine different dredging conditions

included in the payment table; (2) the payment table favored bidders with smaller dredges; and (3) the multipliers used in the payment table were irrational. In addition, Mid-South challenged the inclusion of a clause setting forth a requirement for moving dredges under specified conditions of river flow.

Our prior decision upheld the Corps's payment table and rejected Mid-South's arguments that the payment table was irrational, or favored bidders with smaller dredges. The decision also explained that there is no bar to the use of such tables for portions of solicited work, and concluded that there was no requirement that the IFB provide estimates for the varying dredging conditions included in the table. With respect to the clause specifying conditions under which a dredge must move, our decision concluded that Mid-South had failed to explain why the clause overstated the agency's minimum needs and noted that Mid-South's safety concerns about the clause were beyond the scope of our bid protest jurisdiction.

In its reconsideration request, Mid-South argues that our prior decision contained errors of fact about the solicitation; misstated one of its contentions; and failed to respond to another. To obtain reversal or modification of a decision on reconsideration, the requesting party either must convincingly show that our prior decision contains errors of fact or law, or present information not previously considered that warrants reversal or modification of the decision. 4 C.F.R. § 21.12(a) (1994). We have reviewed each of Mid-South's contentions, and for the reasons stated below, we find that our prior decision was neither factually nor legally incorrect.

Estimates and Historical Data

According to Mid-South, our decision wrongly concluded both that the solicitation contained an overall estimate of the total amount of dredging and that the solicitation provided historical data about past dredging experience. With respect to whether the solicitation contained an estimate, Mid-South correctly states that the minimum number of 400 dredging stations included in the IFB is not labeled an estimate. Nonetheless, our review of the solicitation led us to conclude that the IFB is structured so that the minimum quantity operates as an estimate and provides adequate guidance to bidders regarding the preparation of bids. Our conclusion in this regard was based partially on the IFB's Variation in Estimated Quantities Clause. As stated in our earlier decision, the clause provided that if fewer than 400 stations needed dredging, the Corps would agree to an equitable price adjustment. Thus, as the name of the clause states, the minimum quantity set forth in the

IFB operates as an estimate of the amount of services to be purchased, even though the minimum quantity was not described as an estimate per se.¹

In addition, even if the minimum quantity set forth in the IFB could not be termed an estimate--as Mid-South contends--this conclusion would not require us to reverse our prior decision. The IFB anticipated an agreement that operates like a requirements contract. See Federal Acquisition Regulation (FAR) § 16.503; Gibson & Cushman Dredging Corp., B-194902, Feb. 12, 1980, 80-1 CPD ¶ 122. As such, the contracting activity anticipated allowing the contractor to fill all of the agency's dredging needs on the McClellan-Kerr Arkansas River Navigation System for the instant dredging season.² Id. Although requirements contracts generally must include estimates of the goods or services to be purchased, see FAR § 16.503(a)(1), our Office has recognized that in unusual circumstances--such as those encountered in some dredging procurements--agencies may be unable to prepare reliable estimates. Gibson & Cushman Dredging Corp., supra. In such cases, we have upheld solicitations that did not include an estimate of the

¹Mid-South's supplemental contention that our decision also misstated the IFB's minimum quantity is simply wrong. According to Mid-South, since the Variation in Estimated Quantities Clause does not anticipate a price adjustment for an underrun of less than 15 percent, the clause actually establishes a minimum quantity of 340 dredging stations, rather than 400. In our view, the fact that the clause does not anticipate a price adjustment unless an underrun exceeds 15 percent is related to the de minimis nature of such an underrun. See Tom Shaw Inc.; Merritt Dredging Co., B-210781; B-210781.2, Aug. 16, 1983, 83-2 CPD ¶ 218 (stating that the Variation in Estimated Quantities Clause is intended for situations where the variation is "substantially different" from the situation anticipated by the solicitation). The price adjustment provision does not change the fact that the IFB sets forth a firm minimum number of 400 stations that will require dredging.

²We recognize that during the course of this protest, the Corps argued that the contract here was not a requirements contract. The Corps's view of this type of contract is not dispositive. The Corps is awarding only one dredging contract for this river system this year and will order all of its dredging requirements from the company selected for award. Accordingly, we conclude that the contract is a requirements contract. Gibson & Cushman Dredging Corp., supra.

required services.³ See Canon U.S.A., Inc., B-213554, Aug. 20, 1984, 84-2 CPD ¶ 195; Klein-Sieb Advertising and Public Relations, Inc., B-200399, Sept. 28, 1981, 81-2 CPD ¶ 251.

With respect to Mid-South's contention that our prior decision erred in stating that the solicitation provided historical data about past dredging experience, Mid-South mischaracterizes the decision. Our prior decision expressly stated that the solicitation here did not include historical information about past dredging activity because the information was considered unreliable. Instead, the decision explained that the situation here is like that in Bean Dredging Corp., B-239952, Oct. 12, 1990, 90-2 CPD ¶ 286, wherein the Corps made historical information available, but declined to include such information in the solicitation and disclaimed any warranty with respect to the accuracy of historical experience.⁴

Mid-South also argues that we should reverse our prior decision because the Corps did not make the historical information available in this procurement until Mid-South filed its protest. In our view, whether the historical information about past dredging experience was available before the protest was filed--as opposed to being available to all bidders prior to that time--does not raise a matter requiring reversal of our prior decision. All parties agree that the historical information at issue here is nearly meaningless. In fact, Mid-South admits that the historical information does not provide insight into the Corps's dredging needs for any given year and concedes that the information is not sufficiently reliable to form the basis for an estimate. Given Mid-South's assessment of the value of the historical data about this procurement, we fail to understand how Mid-South can argue that the solicitation is fatally flawed without the information, or that we should

³Our conclusion that in certain limited circumstances solicitations may properly lack estimated quantities, also answers Mid-South's contention that our prior decision failed to analyze the impact of the solicitation's lack of a maximum quantity. If a solicitation may properly lack an estimated quantity in some circumstances, it follows that such a solicitation may also properly lack a maximum quantity.

⁴Although we noted that the historical information in Bean was "relatively consistent," we explained that the information was apparently not sufficiently reliable to form the basis for an estimate in the solicitation.

reverse our prior decision because the historical information was not available until Mid-South filed its protest.

River Conditions

Mid-South next complains that our decision misstated the nature of its challenge to the solicitation's clause setting forth the requirement for moving dredges under specified conditions of river flow. Our decision stated that if Mid-South was arguing that the clause requires dredge operators to navigate under unsafe conditions, it raised a matter outside our bid protest jurisdiction.⁵ While our review of Mid-South's reconsideration request provides no basis to reverse our earlier decision, we will address a secondary issue raised by Mid-South--i.e., whether the clause adequately informed bidders about the size of equipment needed for performance.

As set forth in our previous decision, the clause, as amended, states:

"The Contractor is to be able to move the dredge and attendant plant to the next assigned location in river flows up to 100,000 cfs [cubic feet per second] on the Arkansas River portion of the navigation system, N.M. [nautical mile] 19.0 to

⁵Our characterization of Mid-South's challenge to this clause as raising a matter of safety was drawn from Mid-South's own pleadings. For example, the following references to safety appear just in the January 11, 1994, initial protest letter: p.3, "The 1994 [s]olicitation also adds provisions regarding the safe operation of the dredge and attendant plant.;" p.7, "The [s]pecifications are vague and ambiguous regarding responsibility and undermine legitimate safety concerns.;" p.8, "The use of specific flows and current velocities as a basis for contractual performance contradicts the discretionary authority and responsibility for safe operation of vessels;" and p.9, "The [s]olicitation's requirements regarding the capacity of the dredge to move in flows of up to 100,000 CFS [cubic feet per second] and the capacity of the discharge line and attendant plant to work in current velocities of 10 feet per second are overly broad and inconsistent with overriding safety concerns."

Given these references--and numerous more like them throughout the pleadings--our Office reasonably concluded that one of Mid-South's predominant concerns regarding this clause was whether contractors would be forced to move their dredges under unsafe water conditions.

N.M. 395.0, in river flows up to 15,000 cfs on the Verdigris River portion of the navigation system, N.M. 395.0 to N.M. 444.8, and in current velocities of 10 feet per second on the White River portion of the navigation system, N.M. 0.0 to N.M. 9.8."⁶

In its reconsideration request, Mid-South correctly states that during the course of this protest the Corps admitted that there are numerous river conditions wherein agency officials would agree that moving a dredge would be unwise even though the river flow is below the level stated in the challenged clause. In addition, both Mid-South and the Corps agree that a river flow of 100,000 cfs mean different things under different conditions. According to Mid-South, some of these river conditions are more or less dangerous depending on the size of the boat or tow used to move the dredge from place to place. In Mid-South's view, since the clause above--together with the exceptions the Corps has recognized--creates a lack of certainty about the conditions under which the contractor will be required to move, the Corps should specify the size of equipment that bidders should use to ensure successful performance.

As a preliminary matter, the clause at issue here is very similar to the previously unstated requirement that a dredge operator must be prepared to move to the next work station as directed whenever the river is safe to navigate. What is now stated--that was before left unsaid--is that the Corps will assume that this river system is safe to navigate whenever the river flow is 100,000 cfs or less, absent exigent circumstances. The Corps explains that it reached this conclusion based on its experience with the river system over several years and its recognition that commercial traffic resumes (after flood conditions) when the river flow falls below 100,000 cfs. Given the Corps's familiarity with its own needs and how best to fulfill them, we will defer to the agency's judgment about when river

⁶The clause defines river flows as the "mean daily flow within the reach in question as determined by the Little Rock District Reservoir Control Section." Current velocities are defined as "the surface velocity acting on the specific piece of equipment in question as measured with a current meter by Government survey"

conditions are appropriate for safe navigation. See Corbin Superior Composites, Inc., B-242394, Apr. 19, 1991, 91-1 CPD ¶ 389, recon. den., B-242394.4, June 7, 1991, 91-1 CPD ¶ 547.⁷

During the course of this protest the Corps also explained that while it has no interest in ignoring any contractor's concerns about safe navigation, it has competing interests in requiring movement throughout the river system and in ensuring that bidders will offer to perform the work with equipment of sufficient size to permit such movement. In attempting to strike a balance between these interests, the Corps stated that it wanted bidders to be prepared to lease, hire, or otherwise procure additional tug capability if their own equipment was unable to navigate the river system under the conditions set forth in the clause.

In reviewing Mid-South's request for reconsideration in this area, we note that there is no suggestion by Mid-South or the Corps that Mid-South would be unable to perform the work required here. In fact, Mid-South has significant experience as the Corps's dredging contractor for this river system. Rather, Mid-South expresses concern that other bidders, less knowledgeable about this river system, will be lured into bidding lower prices for dredging without full knowledge of the kind of equipment necessary to ensure successful performance. This matter, however, involves the Corps's ability to assess the responsibility of its bidders, and is an area where an agency is afforded a wide degree of discretion. See Consolidated Indus. Skills Corp., 69 Comp. Gen. 10 (1989), 89-2 CPD ¶ 328.

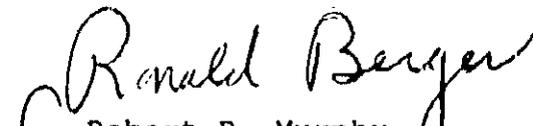
We agree with Mid-South that the solicitation here places greater risk on the bidders--in particular, the risk that the contractor will be required to engage costly additional assistance to move its dredge from one location to another under some river conditions. Nonetheless, there is nothing improper about an agency decision to allocate such risk to the contractor. See Bean Dredging Corp., supra.

Mid-South's final issue involves an argument that it claims was not addressed in our prior decision. Specifically, Mid-South argues that the agency never responded to Mid-South's request for clarification. Although our prior decision did not explicitly address this contention, it was considered as part of our earlier review. The agency's failure to respond to Mid-South's clarification request, does not, in and of itself, provide a basis for sustaining

⁷Subsequent reconsideration requests were also denied. See B-242394.5, Aug. 20, 1991, 91-2 CPD ¶ 169, and B-242394.7, Dec. 20, 1991, 91-2 CPD ¶ 566.

the protest. Rather, the protest stands or falls based on the propriety of the solicitation itself. Thus, while we agree that an agency should respond to requests for clarification, and take such other steps as needed to avoid unnecessary litigation, we do not agree that its failure to do so constitutes a valid basis for sustaining a challenge to the terms of the solicitation.

The request for reconsideration is denied.


for Robert P. Murphy
Acting General Counsel