



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: JCMCS
File: B-409407
Date: April 8, 2014

Conan N. Louis, Esq., CNL Solutions, for the protester.
Lt. Col. Brian J. Chapuran, Department of the Army, for the agency.
Kenneth Kilgour, Esq., and David A. Ashen, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

A below-cost bid is not improper and provides no basis for challenging an award; instead, whether a bidder can perform, even where the bid price is below cost, involves the agency's affirmative determination of that bidder's responsibility, which GAO generally will not review absent circumstances not present here.

DECISION

JCMCS, of Washington, DC, protests the Department of the Army's award of a contract to M&F Concrete, of Manassas, Virginia, under invitation for bids (IFB) No. W91QV1-13-B-0010, for general concrete services at facilities in Virginia and the District of Columbia. The protester argues that M&F's bid price is so low that the agency should have concluded that M&F is not a responsible bidder.

We dismiss the protest.

The solicitation, set aside for small, disadvantaged business concerns in the Small Business Administration's 8(a) program, sought fixed-price bids for the performance of general concrete work for a base period of one year with four option years. Award was to be made to the low-priced, responsible bidder whose bid was responsive to the terms of the IFB.

The agency received sealed bids from ten firms, including JCMCS and M&F. Abstract of Offers. M&F had the lowest bid price of \$20,514,321.50, significantly lower than JCMCS's bid, which was the second lowest (\$36,374,996). *Id.* The contracting officer determined that M&F's bid was responsive to the IFB and award

was made to M&F. Contracting Officer's Statement of Facts at 3. This protest followed.

As an initial matter, JCMCS argues that the awardee's bid prices were unrealistically low. Below-cost prices on fixed-price contracts are not prohibited, and whether a bidder can perform at its bid price is a matter of bidder responsibility, which is not reviewable by our Office absent circumstances not present here. See Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2013); JND Thomas Co., Inc., B-402240, Jan. 28, 2010, 2010 CPD ¶ 40 at 3; TECOM, Inc., B-215291, June 19, 1984, 84-1 CPD ¶ 644. Although all of the protester's contentions essentially revolve around the argument that the bid accepted here was too low, the protester also raises other arguments based on the awardee's low bid price, none of which lead our Office to change our view that this protest lacks merit.¹

First, the protester argues that the agency failed to use any of the price analysis techniques set out in Federal Acquisition Regulations (FAR) Part 15, Contracting by Negotiation. See Amended Protest at 3-4. As a general matter, the requirements of FAR Part 15 apply to negotiated procurements and not procurements conducted using sealed bidding, which is covered by FAR Part 14. That said, FAR § 14.408-2(a) advises that the price analysis techniques in FAR § 15.404-1(b) "may" be used as guidelines. There is no requirement, however, for the use of price analysis techniques in assessing bid prices.

JCMCS also asserts that, given M&F's unrealistically low prices, the awardee cannot meet the solicitation requirement to pay labor rates compliant with the applicable Davis Bacon Act wage rates. A bidder may remain eligible for award even if lower wage rates than those required by a prevailing wage rate determination are offered by the firm, where the firm accepts (and is therefore obliged to meet) a requirement to compensate employees at prevailing rates, and the firm is otherwise determined to be responsible. See Triple H Servs., B-298248,

¹ JCMCS also asserts that the agency improperly precluded JCMCS from examining M&F's bid documents at the bid opening. A public bid opening is a fundamental aspect of sealed bidding. Pursuant to FAR § 14.402-1(c), agencies are directed to permit the examination of bids by interested persons if it does not interfere with the conduct of government business. However, JCMCS' allegation that the agency did not provide it with that opportunity here does not provide a basis for objecting to the award to M&F Concrete. See Verner, Liipfert, Bernhard & Mcpherson, B-178888, Oct. 26, 1973 (failure to permit bidders to examine bids is a procedural deficiency with no adverse affect on the award decision); cf. Healthcare Tech. Solutions Int'l, B-299781, July 19, 2007, 2007 CPD ¶ 132 at 5 (GAO will not consider a protest challenging the adequacy of an agency debriefing because the adequacy and conduct of a debriefing is a procedural matter that does not involve the validity of an award).

B-298248.2, Aug. 1, 2006, 2006 CPD ¶ 115 at 3. Here, there is no indication that the awardee has taken exception to any of the terms of the solicitation, including the obligation to comply with the Davis Bacon Act wage rates.

JCMCS next argues that M&F's bid is so low that the bid must be unbalanced. This argument, by itself, fails to state a basis for protest. Unbalanced pricing exists where the prices of one or more items are significantly overstated, despite an acceptable total evaluated price (typically achieved through underpricing one or more of the other line items). ABSG Consulting, Inc., B-404863.7, June 26, 2013, 2013 CPD ¶ 185 at 6; General Dynamics--Ordnance & Tactical Sys., B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217 at 5. Low prices, by themselves, are not improper and do not themselves establish (or create the risk inherent in) unbalanced pricing. Id.

Despite failing initially to state a valid basis for arguing that the bid is unbalanced, in an attachment to its comments on the agency report, JCMCS identifies one line item (out of several hundred total line items) which it believes M&F overbid--contract line item 0036AA, for surveying, engineering, and permitting. JCMCS Comments, Tab 6, Response to M&F's Unit Price Schedule at 6. JCMCS bid the item at \$1,000. The protester asserts that M&F's unit price of \$10,000, or \$60,000 total at the solicitation's estimated quantity of 6, was "way high." Id.; compare JCMCS Proposal at 62 with M&F's Proposal at 62.

We disagree that this information establishes that the bid is unbalanced. The prior contract for the agency's concrete requirement included a unit price of \$11,750 for this item, while the independent government cost estimate (IGCE) was \$23,397.17, both substantially more than M&F's unit price. Agency Report, Tab 10, M&F Bid Comparison at 5. Furthermore, while the protester relies on the typical cost of a survey crew to arrive at its estimate of a reasonable bid price, the item is actually for surveying, engineering, and permitting, and thus encompasses more work, which could account for the discrepancy between the protester's calculations and the prior contract price and the government estimate for the work. In any case, the value of this one line item is de minimis, and JCMCS has made no showing that, in view of M&F's overall \$15,860,675 price advantage, there would be any risk to the government associated with M&F's allegedly unbalanced bid, including the allegedly inflated bid of \$10,000 for each of six estimated projects. See Serco, Inc., B-406683, B-406683.2, Aug. 3, 2012, 2012 CPD ¶ 216 at 10 (noting that, where an unbalanced offer is received, agencies are not required to reject it, but should consider the risk to the government of unreasonably high prices for contract performance).

The protest is dismissed.

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General Counsel