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DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-208309 **DATE:** May 2, 1983

MATTER OF: Southern Structures, Inc.

DIGEST:

1. Allegation that a solicitation for leasing of modular office units was defective for failing to advise bidders how much of their total bid price would be paid to them up front as delivery and installation charges, as opposed to being amortized over the term of the lease, is untimely because it was not raised prior to bid opening.

2. A mathematically unbalanced low bid is not materially unbalanced, and thus need not be rejected, where acceptance of that bid will result in the lowest cost to the Government.

3. Even if the protester is correct that the awardee was able to build financing cost savings into its bid by loading its bid price into a category of charges to be paid up front, the awardee in fact realized no competitive advantage from doing so since the awardee would have been the low bidder even without these alleged savings.

Southern Structures, Inc. protests the award of a contract to Modular Concepts, Inc. under invitation for bids (IFB) No. 10-0089-2, issued by the National Aeronautics and Space Administration (NASA), Kennedy Space Center, Florida. The solicitation sought bids for the lease with option to purchase of 196 modular office units, including delivery and installation at the Center. Southern contends that the IFB was defective because it permitted unbalanced bidding. It further argues that several of the bids, including Modular's, were unbalanced and thus should have been rejected. We deny the protest in part and dismiss it in part.

The bid schedule in the IFB required bidders to break down their total bid prices into two categories: Delivery & Installation and Lease. The Delivery & Installation charges were to be paid "up front," upon the installation of the office units at the Space Center. The lease charges, on the other hand, were to be amortized and recovered by the contractor over the term of the leases. The IFB contained no definition of Delivery & Installation, and did not specify which costs could be included under this category. Award was to be based on the lowest total price for the two categories.

A week prior to bid opening, a representative of Southern telephoned the contracting officer to request that the IFB be clarified to indicate which costs could be included under Delivery & Installation. Southern believed such clarification was necessary to obviate the possibility that some bidders might allocate all their costs to the Delivery & Installation category to maximize the amount of the contract price recovered up front. The more bidders could recover up front, the less the amount they would have to borrow and finance over the term of the leases. The resultant lower financing costs would enable these firms to bid lower prices. The contracting officer advised Southern that this was not the sort of change that would be incorporated in an IFB amendment, but also stated that "an obviously unbalanced bid could be rejected." Southern apparently did not complain further.

Bids were opened July 6, 1982. Of the 21 bids received, the five lowest were as follows:

	Delivery & Installation	Lease	Total Bid
Modular	$ 983,196	$1,788,334.72	$2,771,530.72
Facilities Leasing Co. (Alternate Bid)	1,622,684	1,620,645	3,243,329
PKH Building Systems	3,298,806	168	3,298,974
Facilities Leasing Co.	1,024,976	2,310,925	3,335,901
Southern	262,052	3,110,174.80	3,372,226.80

Award was made to Modular on September 13, notwithstanding Southern's protest, based on the contracting officer's determination that the office units were urgently needed, and that delivery would be delayed by failure to make a prompt award. See NASA Procurement Regulation (NASA PR) § 2.407-8(b)(3).

Southern argues that by failing to provide guidelines in the IFB for breaking bids down into the two categories, NASA left bidders to speculate as to the amount of the total bid NASA would be willing to pay up front as Delivery & Installation charges. The danger of this kind of ambiguity was clearly demonstrated, in Southern's view, by the five lowest bids actually received; the four lowest bidders read the IFB as permitting the loading of a disproportionate amount of their costs into the Delivery & Installation category, while Southern read the IFB more restrictively. As a result, the four lowest bidders could build cost savings into their bids while Southern could not. Southern maintains it would have submitted a bid lower than Modular's had it known NASA would allow all costs to be included in the Delivery & Installation category. It concludes that the IFB was materially defective, and asks that the award to Modular be canceled and that NASA's requirement be resolicited using a revised IFB.

NASA states that this portion of Southern's protest should be dismissed as untimely since it was not filed prior to bid opening. We agree. Under our Bid Protest Procedures, protests based on alleged defects in the solicitation must be filed--either with the agency or our Office--prior to bid opening. 4 C.F.R. § 21.2(b)(1). This portion of Southern's protest is based on an alleged ambiguity which was clear on the face of the IFB, and of which Southern was aware prior to bid opening, as evidenced by its telephone call to the contracting officer. Southern did not protest to our Office until after bid opening.

It does appear that Southern's telephone call to the contracting officer was intended as a protest to have the alleged ambiguity clarified by amendment to the IFB. Southern abandoned its protest, however, after receiving assurance that unbalanced bids could be rejected. It no longer sought to have the IFB amended and instead, prepared its bid based on the unamended IFB.

Southern also contends that the award to Modular was improper because its bid was unbalanced. It has provided "model" bids for each of the four lower bidders. These "model" bids represent the protester's view of what would constitute balanced bids from these four firms. Since Southern believes that all four lower bids, including Modular's, were unbalanced, it asks that the award to Modular be canceled and that the contract be awarded to Southern. NASA maintains that the award to Modular was proper because it will result in the lowest cost to the Government.

Contrary to Southern's argument, the mere fact that a bid may be mathematically unbalanced--i.e., based on nominal prices for some work and enhanced prices for other work--does not preclude acceptance of that bid. A mathematically unbalanced bid must be rejected only where it also is materially unbalanced, that is, where there exists a reasonable doubt whether the bid will result in the lowest ultimate cost to the Government. See K.P. Food Services, Inc., 60 Comp. Gen. 1 (1982), 82-1 CPD 289.

Modular's Delivery & Installation charges were approximately 35 percent of its total bid price. Since it is not clear from the solicitation exactly what costs were to be included in the category, we cannot tell whether that part of Modular's bid carries more than its share of the total cost of supplying the units for the lease period. There thus exists no basis for concluding that Modular's bid was mathematically unbalanced. In any event, we do not believe Modular's bid was materially unbalanced. The solicitation provided that bids would be evaluated on the basis of the lowest total bid price; it did not state that the amount included as Delivery & Installation charges would be taken into account in the evaluation process. Since Modular's total bid was the lowest received, its acceptance will result in the lowest cost to the Government.

We recognize that this conclusion--that under this solicitation a bid could not be rejected as materially unbalanced because there can be no doubt that the low bid, under the IFB evaluation scheme, would result in the lowest cost to the Government--is inconsistent with the advice given Southern which prompted it to drop its protest of the IFB provisions. Nonetheless, we do not believe Southern was prejudiced by what happened here because the fact that Modular may have taken advantage of the bidding procedure here to reduce its financing costs and thus, its total bid, does not appear to have afforded Modular an unfair competitive advantage over Southern or other bidders. The amount Modular allocated to Delivery & Installation was approximately $600,000 above the "model" amount calculated by Southern ($983,196 versus $386,356). Southern estimates that this shifting of $600,000 to the Delivery & Installation category saved Modular about $264,000 in financing costs. Modular's bid was $470,000 below the next low bid of $3,243,329 submitted by Facilities Leasing Co., however, and approximately $600,000 below Southern's $3,372,226.80 bid. Thus, it appears Modular would have been the low bidder even without this alleged $264,000 saving.

While we deny Southern's protest, we are by letter of today to the Administrator, NASA, suggesting that the agency develop a different bidding format for future similar procurements. The format used here is undesirable because it may encourage bidders to structure their bids to take advantage of the immediate payment of Delivery & Installation charges. Although it was not the case here, this could afford a bidder an unfair competitive advantage.

The protest is dismissed in part and denied in part.

for Milton J. Socolar
Comptroller General
of the United States