28594

DECISION

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

FILE: B-215035 **DATE:** June 21, 1984

MATTER OF: Applicators, Inc.

DIGEST:

1. Protester's bid is not mathematically unbalanced since its equipment costs are properly allocable to the base period.

2. Even if it is assumed that the protester's bid is mathematically unbalanced, GAO concludes that the bid is not materially unbalanced since it will apparently result in the lowest ultimate cost to the government.

3. Protester's bid may not be rejected for offering what the agency believes to be an unusually low price for one of the line items, since, as a general rule, below-cost bids do not constitute a legal basis for precluding a contract award and the protester has argued in some detail that the agency's estimate on the cost of the work is oversstated.

Applicators, Inc. (Applicators), protests the rejection of its bid under invitation for bids (IFB) No. 3-4-58 issued by the National Park Service, United States Department of the Interior (Interior).

The IFB solicited bids for grounds maintenance work along the Baltimore-Washington Parkway in the state of Maryland. The work required by the solicitation consists of grasscutting, trimming and edging, and trash pickup. Applicators submitted the low bid, but Interior rejected the bid on the grounds that it was unbalanced as to pricing and not reasonable as to pricing. Interior then awarded the contract to Lasting Impressions, Inc. (LII), the second low bidder, which is currently performing the contract. Applicators contests Interior's findings and argues that it is the low, responsive, responsible bidder in accordance with the IFB's evaluation factors and should have received the award.

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We sustain the protest.

While Applicators' protest was pending in our Office, Applicators filed a motion for injunctive relief in the United States District Court for the District of Columbia under Civil Action No. 84-1269. This decision responds to a court request for our opinion on Applicators' protest.

The IFB provided for a 6-month base period and 2 option years. According to the IFB section, entitled "Evaluation and Award Factors," Interior was required to evaluate the bids for purposes of award by adding the total price for all options to the total price for the basic requirement. However, this section also warned potential bidders that Interior would reject as nonresponsive any bid that was materially unbalanced as to price for either the basic requirement or the option years.

Applicators and LII were the first and second low bidders, respectively. Applicators' bid was as follows:

	Supplies/ Service	Quantity	Unit	Unit Price	Amount
I.	Contract Period April 1, 1984-September 30, 1984:				
1.	Mowing	6	Mo.	$ 11,850	$ 71,100
2.	Trimming & Edging	6	Mo.	5,708	34,248
	Subtotal (Item 1 and 2):				$105,348
II.	Option Period October 1, 1984-September 30, 1985:				
1.	Trash Pickup	5	Mo.	$ 2,364	$ 11,820
2.	Mowing (4/1-10/31)	7	Mo.	8,516	59,612
3.	Trimming & Edging (4/1-10/31)	7	Mo.	4,874	34,118
	Subtotal (Items 1 thru 3):				$105,550

III. Option Period October 1, 1985-September 30, 1986:

1. Trash Pickup	5	Mo.	$ 2,364	$ 11,820
2. Mowing (4/1-10/31)	7	Mo.	8,516	59,612
3. Trimming & Edging (4/1-10/31)	7	Mo.	4,874	34,118
Subtotal (Items 1 thru 3):				$105,550
Total Bid, Contract Base Period Plus Options (I, II & III)				$316,448

LII's bid was as follows:

Supplies/ Service	Quantity	Unit	Unit Price	Amount
I. Contract Period April 1, 1984-September 30, 1984:				
1. Mowing	6	Mo.	$ 11,210	$ 67,260
2. Trimming & Edging	6	Mo.	3,120	18,720
Subtotal (Items 1 and 2):				$ 85,980
II. Option Period October 1, 1984-September 30, 1985:				
1. Trash Pickup	5	Mo.	$ 4,000	$ 20,000
2. Mowing (4/1-10/31)	7	Mo.	11,615	81,305
3. Trimming & Edging (4/1-10/31)	7	Mo.	3,232	22,624
Subtotal (Items 1 thru 3):				$123,929
III. Option Period October 1, 1985-September 30, 1986:				
1. Trash Pickup	5	Mo.	$ 4,224	$ 21,120
2. Mowing (4/1-10/31)	7	Mo.	11,527	80,695

3. Trimming & Edging (4/1-10/31)	7	Mo.	3,200	22,400
Subtotal (Items 1 thru 3):				$124,215
Total Bid, Contract Base Period Plus Options (I, II & III)				$334,124

As noted above, the IFB's evaluation factors called for Interior to add the total price for the basic requirement with the total price for all options to determine the low bidder. Under this method of evaluation, Applicators' total bid price of $316,448 clearly makes Applicators' bid low; however, upon closer examination, Interior concluded that Applicators' bid was unbalanced as to price and, for the basic requirement and the line item for trash pickup, unreasonable as to price.

More specifically, Interior found that Applicators' bid for the basic requirement was "forward priced." In other words, Interior believed that Applicators was charging too much for the first 6 months of performance, apparently because it was placing all of its equipment costs in that portion of the bid. Comparing the basic requirement with the two option periods, Interior noted that Applicators' bid price for mowing in the option years decreased by 39 percent and its bid price for trimming and edging decreased by 17 percent. In contrast, LII's bid and the bids from the 10 other companies that submitted bids generally show a price increase between the base period and the option years.

As to the line item in the 2 option years for trash pickup, Interior concluded that Applicators had underestimated the value of the work by more than 50 percent. Applicators only proposed a monthly charge of $2,364 for trash pickup during both option years. LII, on the other hand, proposed a monthly charge of $4,000 during the first option year and $4,224 during the second. The government's estimate for this work was $5,222 per month. Thus, in Interior's opinion, Applicators' unit price for trash pickup did not reasonably carry its share of the cost of the work plus overhead and profit.

In performing a price analysis of Applicators' pricing for trash pickup, the agency also examined Applicators' bid to determine when during the possible 30 months of the contract the government would benefit from Applicators' apparent low bid. Interior discovered that Applicators' bid did not become low until the first month of the second option year; prior to that, LII offered the best buy for the government. Further complicating this situation was the fact that Interior planned to conduct a survey under Office of Management and Budget (OMB) Circular A-76 during the upcoming year to determine whether the contract work for the Baltimore-Washington Parkway should be combined under one contract with the work for Greenbelt Park. According to Interior, if the survey recommends the combining of these two jobs, it then becomes questionable whether the options under this latest Baltimore-Washington Parkway contract would ever be exercised, which would mean that an award to Applicators would never provide any benefit to the government.

In light of these various findings, Interior concluded that Applicators' bid was mathematically unbalanced because neither Applicators' price for the basic requirement nor its price for trash pickup carried its fair share of the cost of the work plus profit. Interior also concluded that Applicators' bid was materially unbalanced because, in view of the point in the contract that Applicators' bid actually became low as well as the possibility that the agency might never exercise the options, there was a reasonable doubt that an award to Applicators would result in the lowest ultimate cost to the government. Finally, the agency concluded that Applicators' price for the basic requirement was unreasonable because it was too high and that its price for trash pickup was unreasonable because it was too low.

Based on the foregoing, Interior rejected Applicators' bid as nonresponsive and awarded the contract to LII.

Applicators maintains that the agency's rejection of its bid was arbitrary, capricious, and without a rational basis. Applicators first argues that its bid is not mathematically unbalanced. Applicators states that it has added $20,013 to the basic requirement's mowing costs to cover the purchase of a "bat wing" mower, a 1981 Ford 4600 AP tractor, and a Woods RM90 mower. According to Applicators, these equipment costs raised its price for the basic requirement's 6-month mowing work from approximately $51,000 to its bid price of $71,100. Likewise, Applicators says that it added $5,150 in "start-up and acquisition costs" to the trimming and edging portion of the work. Thus, its bid for that line item of the base period rose from approximately $29,000 to $34,248. In Applicators' opinion, the placing of these startup costs in its bid for the basic requirement is an acceptable practice as recognized by the prior decisions of our Office. Consequently, Applicators maintains that its line item bids for mowing and trimming and edging during the base period are not mathematically unbalanced.

Applicators also argues that its proposed monthly charge for trash pickup during the 2 option years is not grossly underestimated as Interior claims and, therefore, does not cause its bid to be mathematically unbalanced anymore than does the addition of startup costs to its bid for the base period. According to Applicators, the contracting officer's analysis of the work involved for this line item is overestimated. Applicators states that the contracting officer reached his estimate of $5,222 per month based on an erroneous understanding of the scope of the work. Applicators points out that the IFB states that "the initial trash pickup in April and the final trash pickup in September for all areas will be at a distance of 10 feet beyond the existing tree line, all other trash collection will be up to the tree line." However, Applicators argues that the contracting officer worked from the assumption that the entire property encompassing the Baltimore-Washington Parkway (approximately 900 acres) would have to be policed each month (November through March) in order to comply with the IFB's trash pickup requirements. According to Applicators, this erroneous assumption caused the contracting officer's estimate of the scope of the work to be five times greater than it should have been. In light of this, Applicators concludes that its proposed charge of $2,364 per month represents a true and reasonable cost for performing the work and, consequently, Interior had no grounds to maintain that Applicators' bid for trash pickup was mathematically unbalanced.

As to Interior's arguments that Applicators' bid price for the basic requirement is unreasonably high and its bid price for trash pickup is unreasonably low, Applicators believes that its explanation for why its bid cannot be considered to be mathematically unbalanced also refutes any argument that its bid is unreasonable as to price. But, in the alternative, Applicators argues that if the contracting officer did in fact believe that Applicators' price for trash pickup was extremely low, then he was aware of a possible mistake in bid and, under the Federal Procurement Regulations, 41 C.F.R. § 1-2.406-3(d)(1) (1983), he was required to request that Applicators verify its bid. If this had been done, Applicators believes that it would have then been able to point out the error in the government's estimate and, thus, have avoided at least this part of the current protest. Since no request for verification was made, Applicators sees this omission as another example of the arbitrary and capricious way this entire procurement has been handled by the agency.

Because Applicators has, in its opinion, shown that its bid is not mathematically unbalanced, it concludes that material unbalancing simply cannot exist. Nevertheless, Applicators sees Interior's determination that its bid was materially unbalanced as yet another example of the agency's arbitrary and capricious behavior. In other words, one of the reasons that Interior gave for finding Applicators' bid materially unbalanced was that there was reasonable doubt whether the options would be exercised in light of the OMB Circular A-76 survey being conducted to determine whether the work for the Baltimore-Washington Parkway and Greenbelt Park should be combined under one contract in the years to come. In Applicators' opinion, if the agency allowed this factor to be considered in evaluating the bids, then it evaluated the bids in a manner contrary to the method specified in the IFB. Applicators argues that whether or not the option would be exercised is "clearly a speculative determination" which the contracting officer should not have considered; the IFB required him to evaluate the bids by adding the total price for the basic requirement to the total price for the option years. Since he has admitted to allowing an additional factor not specified in the IFB to affect his evaluation, the contracting officer has, in Applicators' opinion, acted in an arbitrary and capricious manner and his evaluation of the bid must be considered to be fatally flawed.

Based on the foregoing arguments, Applicators concludes that it has shown that its bid is neither mathematically nor materially unbalanced, that its bid is not in any way unreasonable as to price, and that in several instances the agency acted in an arbitrary and capricious manner in its conduct of the procurement. In light of these conclusions, Applicators argues that Interior's rejection of its bid lacked a rational base. Applicators therefore requests that LII's contract be terminated for the convenience of the government and that it be awarded the remainder of the work.

Our office has recognized that unbalanced bidding entails two aspects. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect--material unbalancing--involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is materially unbalanced if there is a reasonable doubt that award to the bidder submitting the mathematically unbalanced bid will result in the lowest ultimate cost to the government. Consequently, a materially unbalanced bid may not be accepted. Reliable Trash Service, B-194760, August 9, 1979, 79-2 CPD 107.

We have also held that, while our Office will closely scrutinize the use of the startup costs as a justification for front-loading bids, startup costs can be factored into the initial bid period so long as that period reflects its proportional share of the cost and profit. Professional Reprographic Services, B-210608, June 13, 1983, 83-1 CPD 653. Therefore, the fact that Applicators front-loaded the base period of its bid is not, by itself, a reason to conclude that its bid is mathematically unbalanced. We must determine whether Applicators' front-loading has caused the base period of its bid to carry a disproportionate share of the cost and profit of the total work.

Applicators has explained that it calculated its base bid by adding the cost of the new equipment it needed to what it would have charged just for the services. Interior believes that it is improper for Applicators to include all its equipment costs in the the base period and points out that Applicators' base bid for mowing is 39 percent higher than its bid for the same services during the option years and its base bid for edging and trimming is 17 percent higher than its bid for the option years. In Interior's opinion, Applicators' bid is structured so that it will receive a windfall if the options are not exercised.

However, we have recognized that a difference of 25 to 50 percent between the base bid and the bid on the option years does not render a bid mathematically unbalanced. Propserv Incorporated, B-192154, February 28, 1979, 79-1 CPD 138. In addition, we have held that equipment costs are properly allocable to the base period when the bidder has no use for the equipment following contract performance. Roan Corporation, B-211228, January 25, 1984, 84-1 CPD 116. Applicators has stated that the equipment it intends to purchase is only suitable for the work along the Baltimore-Washington Parkway and that it will have to sell the equipment for salvage at the end of the contract period. If it spread the costs over the option years and the options were not exercised, Applicators claims that it would not be able to recover its legitimate costs of performance and would suffer a loss. Consequently, Applicators sees it as only fair and proper that it be allowed to recover all of its equipment costs during the base period.

We do not find the difference in the prices contained in Applicators' bid to be so great as to render the bid mathematically unbalanced on its face as Interior appears to argue. Propserv Incorporated, supra. In addition, we believe that it was proper for Applicators to allocate all of its equipment costs to its bid for the base period since it would have no use for the equipment after the contract ended and, if these costs were allocated throughout the potential life of the contract and the options were not exercised, the protester would never be able to recover its full costs of performance. Roan Corporation, supra. We conclude, therefore, that Applicators' bid was not mathematically unbalanced.

Interior has cited two of our prior decisions, Solon Automated Services, Inc., B-206449.2, December 20, 1982, 82-2 CPD 548, and Crown Laundry and Dry Cleaners, Inc., B-208795.2, B-209311, April 22, 1983, 83-1 CPD 438, in support of its argument that Applicators' bid is mathematically and materially unbalanced. However, we believe that both these cases can be distinguished on their facts. In both situations, the front-loading was extreme and the bids did not provide any price advantage to the government until very late into the final option period. Applicators' front-loading, on the other hand, is quite modest in comparison and has a rational basis; moreover, its bid price becomes almost equivalent to LII's during the last months of the first option period and is clearly lower throughout the second option year. Consequently, we do not find either Solon or Crown to be controlling here.

We have concluded that Applicators' bid is not mathematically unbalanced; however, if, for the sake of argument, we assumed that it were, we would nevertheless conclude that the bid is not materially unbalanced. As noted above, a bid is materially unbalanced if there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the government. Reliable Trash Service, supra. The determination of whether reasonable doubt exists is a factual one which varies depending upon the particular circumstances of each procurement. Solon Automated Services, Inc., supra.

Previously, our material unbalancing analysis has been limited to determining whether the government reasonably expected to exercise the options. See, for example, Jimmy's Appliance, B-205611, June 7, 1982, 82-1 CPD 542. If the exercise was reasonably anticipated, we concluded that the bid was not materially unbalanced. However, in more recent cases involving extreme front-loading and where the mathematically unbalanced bid does not become low until the end of the final option year, we have modified the material unbalanced test somewhat. In these cases, we have recognized that, despite the intent to exercise the options, intervening events could cause the contract not to run its full term, resulting, therefore, in an inordinately high cost to the government and a windfall to the bidder. Under that type of factual situation, we have held that there was a reasonable doubt whether the mathematically unbalanced bid would ultimately provide the lowest cost to the government. See Lear Siegler, Inc., B-205594.2, June 29, 1982, 82-1 CPD 632; Solon Automated Services, Inc., supra; and Crown Laundry and Dry Cleaners, Inc., supra.

Here, we have concluded that Applicators' front-loading is not on the same scale as the front-loading that caused our concern in some of the earlier cases. Moreover, the possible findings of Interior's A-76 survey are not at the level of intervening events which should affect the possible exercise of the options. It seems highly conjectural that associating the immediate work with an A-76 program will result in prices for the immediate work for the option years below Applicators' option prices given Applicators' understated prices for those years. Moreover, if Interior kept to its A-76 schedule, it appears that it would not be in a position to contract until about September 1985. Given the usual delays and the uncertainty of any A-76 results, the assurances are not very strong that the second option year will not be exercised. Further, since the grounds maintenance in question is an ongoing requirement for which funding can be expected in the future, we conclude that there is a reasonable expectation that the options will be exercised. Under these circumstances, Applicators' bid offers the lowest ultimate cost to the government and, thus, even if considered to be mathematically unbalanced, it is not materially unbalanced and may not be rejected on that ground.

Interior has also argued that Applicators' bid for trash pickup is unbalanced because its price for that line item is too low. Since Applicators has shown that its base bid is only enhanced by the addition of equipment costs which we have concluded are properly allocable to that portion of its bid, the agency is in effect saying that Applicators has submitted a below-cost bid for trash pick-up. However, our Office has held that the fact that a firm may have submitted a below-cost bid does not constitute a legal basis for precluding a contract award. Microform, Inc.--Reconsideration, B-208117.2, September 27, 1983, 83-2 CPD 380.

In addition, Applicators has argued in some detail that Interior's estimate of the cost of the work is overstated. Although the IFB's specifications for trash pickup are not as clearly drafted as they might be, we agree with the protester's general interpretation. Part III, section "A," of the IFB specifically states that the initial and final trash pickups of the mowing season will be at a distance of 10 feet beyond the existing tree line while all other trash collection will be up to the tree line. Applicators has agreed to comply with these requirements at its stated monthly price. Interior seems to believe that Applicators should have prepared its bid using the rather inexact estimate of "Approximately 900 acres" as specified in part I of the IFB entitled, "Scope of Work." We note however, that this estimate encompasses not only trash pickup, but all the other requested services as well. We do not believe that part I was intended to mean that trash pickup had to be performed on 900 acres, but that within those approximate 900 acres certain trash pickup services--specified in part III--had to be done. Applicators simply made an exact survey of the work area before it calculated its bid price. There is no indication that Applicators' bid does not bind the company to perform the work in full compliance with the specifications. Under these circumstances, we do not believe that Interior has demonstrated that Applicators' bid for trash pickup services is improper.

Based on the foregoing, we conclude that Applicators' bid was not mathematically or materially unbalanced. Therefore, Interior had no basis for rejecting Applicators' bid as nonresponsive. Accordingly, remedial action in the form of a termination for the convenience of the government of LII's contract and award to Applicators of the remainder of the contract appears appropriate.

for Milton J. Socolar
Comptroller General
of the United States