

17/12/86
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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: SMC Information Systems

File: B-224466

Date: October 31, 1986

DIGEST

1. Protest of agency's rejection of low bid under two-step sealed bid procurement as nonresponsive for entering notation of "NSP" for two labor categories is sustained, since "NSP" equates with zero dollars and evidences bidder's intent to be bound to furnish labor at no charge to the government.
2. A mathematically-unbalanced bid should not be rejected as nonresponsive if it is not also materially unbalanced, i.e., if there is no reasonable doubt that the bid represents the lowest ultimate cost to the government.
3. There is no prohibition against below cost bidding so long as the bidder is a responsible concern.

DECISION

SMC Information Systems (SMC) protests the rejection of its low bid and the award of a contract to the second low bidder, Orkand Corporation, under invitation for bids (IFB) No. N66032-85-B-0018, issued by the Department of the Navy. The Navy rejected SMC's bid on the ground that its pricing pattern made the bid nonresponsive. SMC maintains that its bid was responsive to all IFB requirements. We sustain the protest.

The IFB is the second step of a two-step, sealed bid procurement of a requirements-type contract for automatic data processing software support services. The services, including feasibility studies, system development, system maintenance, documentation, software conversion and training, are to be performed at military facilities and at contractor facilities on an indefinite delivery, indefinite quantity basis.

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The IFB set forth ten labor categories ranging from high skill/cost (program manager) to lower skill/cost (clerk typist) and required the bidding of rates for each on a fixed hourly basis with each labor rate carrying its own share of wages, overhead, general and administrative (G&A) expenses and profit. There was no other pricing under the contract (except for a fixed G&A rate for the limited use of calculating travel and per diem costs). The price evaluation took into account both the G&A rate and the total of the extended labor unit prices calculated by multiplying each labor category price by a corresponding estimate of hours.

The contract obligates the contractor to provide the Navy with two kinds of technical proficiency--one before the Navy issues a delivery order for software services and the other after--at the fixed labor rates offered under the IFB. First, after a requirement arises, but before the Navy issues an order, the contractor provides a written proposal: (1) analyzing the Navy's task request (which includes a government estimate of labor categories and labor hours per category required); (2) setting forth a technical approach; and (3) detailing the implementation of its recommended approach, including proposed labor categories, labor hours, scheduled completion date, and total cost. The contractor's proposal is the starting point for negotiation of each fixed-price delivery order. Second, after the Navy issues the delivery order, the contractor provides technical personnel capable of performing each deliverable specified in the order, in the labor mix agreed to during the negotiations. The Navy's cost depends on the fixed labor prices bid under this procurement and the labor mix negotiated by the Navy and the contractor for each deliverable.

If the Navy and the contractor disagree on the technical approach, including the labor mix to be used, the Navy may unilaterally set the delivery order price and order the work to proceed. Such a disagreement is designated a technical factual dispute, however, which the contractor can appeal under the contract's disputes clause.

The IFB contained several warnings concerning the structuring of bids. The IFB advised that "proposed prices for all line items must be fixed or finitely determinable for the entire contract life (date of award plus 36 months)" and that bidders must furnish discrete prices to remain constant for each 12-month period. The IFB also warned of the Navy's intention to prevent the practice of bidding prices in combinations to "create artificial boundaries which could result in unrealistically low evaluated costs while actual invoicing during contract performance would be significantly higher

than evaluated costs." Finally, the IFB stated that: "Offers that do not include fixed or determinable systems (items) life prices cannot be evaluated for the total systems life requirement and will be rejected." The IFB provided for award to the responsive responsible bidder whose bid represents the lowest evaluated overall contract life cost to the government.

Under step one of the procurement, six technically acceptable proposals were submitted. The same six bidders responded to the second step request for prices, with SMC and Orkand submitting the two lowest bids of \$3,334,320 and \$5,738,670, respectively. SMC's low bid included the notation "NSP" (although not defined in the bid, a term commonly used to mean "not separately priced"), in lieu of numerical prices, for the two highest skilled, on-site, labor categories (program manager and group manager), and the Navy, in calculating total evaluated price, multiplied the estimated hours for these categories by zero dollars. SMC was the only bidder submitting a bid with "NSP" pricing; the second low bidder, Orkand, bid \$50 and \$20 for its two highest skilled, on-site, labor categories. The Navy then decided to reject SMC's bid on the grounds that "NSP" bidding of the two labor categories was nonresponsive to the IFB requirement for discrete prices, and that SMC's prices were so unbalanced, or 'skewed,' that they violated the IFB warning regarding unrealistically low prices. The Navy awarded the contract to Orkand.

Bid Responsiveness

SMC contends that its bidding of "NSP" for the two highest skilled positions did not violate the IFB requirement for fixed hourly rates. SMC notes that the IFB contains no express prohibition against "NSP" bidding, and states that it viewed the requirement that the rate for each labor category include wages, overhead, G&A expense, and profit not as prohibiting "NSP" bidding but, rather, as a standard provision meaning only that the listed cost elements may not be broken out for recovery elsewhere under the contract as separate cost items. SMC explains that it purposely bid below cost in these categories to preserve other legitimate corporate interests (e.g., retention of an experienced work force).

To be considered responsive, a bid must constitute an unequivocal offer to perform the exact thing called for in the solicitation such that acceptance of the bid will bind the contractor in accordance with the material terms and conditions of the solicitation. Mobile Drilling Co., Inc., B-216989, Feb. 14, 1985, 85-1 C.P.D. ¶ 199.

We believe SMC's bid meets this standard. SMC's step one proposal was found acceptable and its bid did not take exception to any of the solicitation requirements. While the failure to include a price for an item evidences a bidder's intent not to be bound to perform the item and thus generally renders a bid nonresponsive, Makoor Products Mfg. Co., B-222154, Mar. 13, 1986, 86-1 C.P.D. ¶ 255, this was not the situation here. We have specifically held that a bid should not be rejected as nonresponsive merely because a bidder uses the notation "NSP" instead of numerical prices, since "NSP" clearly equates with a zero dollar price and indicates the bidder's affirmative intent to obligate itself to provide the required item at no charge to the government. AUL Instruments, Inc., B-220228, Sept. 27, 1985, 85-2 C.P.D. ¶ 351. Thus, SMC's bidding of "NSP" for two labor categories did not render its bid nonresponsive.

The Navy apparently is concerned that the absence of reasonable prices in the program manager and group manager categories may lead the contractor to try minimizing the hours bid under these categories during task order negotiations. The duties assigned these personnel under the solicitation, however, appear to be integral to most individual tasks, and thus not readily subject to such a tactic. The program manager, for example, "shall be available to manage contract performance and shall not serve in any other capacity under this contract." Similarly, the group manager is responsible for interfacing with the contracting officer's technical representative "to ensure problem resolution and customer satisfaction for individual delivery orders."

To the extent the Navy is concerned that the failure to provide prices for the two categories may have an adverse impact on SMC's ability to perform satisfactorily, this really is no more than a concern that SMC's overall price is too low. In this regard, however, even had SMC priced these two labor categories the same as Orkand--which presumably would have alleviated the Navy's concern over the "NSP" prices--SMC's evaluated price would increase only \$420,000 (\$50 x 2,000 estimated hours plus \$20 x 16,000 hours), leaving SMC's total price approximately \$2 million lower than Orkand's.

Unbalancing

Regarding the unbalancing, or skewing, of SMC's bid, the Navy's concern appears directed at the fact that several of SMC's labor rates--including the two rates bid "NSP"--are so low that they are unrealistic.

Two findings must be made before a bid may be rejected due to unbalancing. First, the bid must be mathematically unbalanced, a determination that involves a mathematical evaluation of whether each element of the bid carries its proportionate share of the total cost of the work plus profit, or whether the bid instead is structured on the basis of nominal prices for some work and overstated prices for other work. Second, the bid must be materially unbalanced: there must be a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the government. USA Pro Company, Inc., B-220976, Feb. 13, 1986, 86-1 C.P.D. ¶ 159. Even if it is assumed that SMC's bid is mathematically unbalanced due to the "NSP" bidding and somewhat skewed prices for other labor categories (a clerk typist cost \$6 per hour while a senior research analyst cost \$5 per hour), we fail to see how the bid can be termed materially unbalanced.

Consideration of the materiality of unbalancing begins with a determination of the accuracy of the IFB's estimate of the anticipated quantity of work; a bidder intending to benefit from an unbalanced bid will quote high prices on items it believes will be required in larger quantities than those used for bid evaluation, and/or low prices for items that will be used in lesser quantities. See Edward B. Friel, Inc., et al., 55 Comp. Gen. 488 at 493 (1975), 75-2 C.P.D. - ¶ 333 at 7.

The accuracy of the government's estimated hours here has not been questioned. We recognize that, due to the contractor's input into the negotiations for each task order, the stated estimates necessarily are somewhat uncertain. It is not apparent, however, and the Navy has not explained, how any inherent uncertainty in the estimates would render SMC's ultimate cost less certain than Orkand's or any other offeror's cost. As far as we can determine, SMC's evaluated cost is as accurate an indicator of the ultimate cost to the government as the other offerors' evaluated costs. Under these circumstances, we find no reasonable doubt as to whether acceptance of SMC's bid will result in the lowest ultimate cost to the government.

Price Reasonableness

Irrespective of the unbalancing concern, whether SMC's low prices otherwise are grounds for rejection of its bid turns on a determination of SMC's responsibility, not the bid's responsiveness. If SMC is found capable of performing the contract at the prices bid, its bid cannot be rejected based merely on its low prices. It is well-established that the

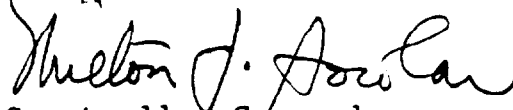
submission of a below-cost bid is not illegal and provides no basis for challenging the award of a firm, fixed-rate contract to a responsible contractor, since such a contract is not subject to adjustment based on the contractor's cost of performance and places no obligation on the contracting agency to pay more than the rate at which contract award is made. See ORI, Inc., B-215775, Mar. 4, 1985, 85-1 C.P.D. ¶ 266.

As one of its arguments, the Navy indicates that it rejected SMC's bid based on its unreasonably low prices, i.e., its "NSP" items. However, the procurement regulations applicable to the rejection of unreasonably-priced bids, Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.404-2(f) (1985), applies only to the government's rejection of excessively high bids, and not to the rejection of excessively low ones. See North American Laboratories of Ohio, Inc., 58 Comp. Gen. 724 (1979), 79-2 C.P.D. ¶ 106. The concept of price reasonableness thus does not apply here.

To the extent the Navy is concerned with the realism of SMC's bid prices, cost realism is a concept under which the contracting agency may examine whether a contractor's costs are too low and thus understate the probable cost to the government. Such an analysis is relevant, however, only in a cost-type contract situation, where the proposed costs do not provide a sound basis for determining the most advantageous proposal, since the government is required, within certain limits, to pay the contractor's actual, allowable and allocable costs. See Emerald Maintenance, Inc., B-221353, Apr. 1, 1986, 86-1 C.P.D. ¶ 308. A cost realism analysis serves no purpose where, as here, fixed prices are bid.

We conclude that SMC's bid was improperly rejected as nonresponsive. Although SMC failed to bid in the precise manner requested by the solicitation, there is no doubt that the firm has committed itself to perform the exact work required at fixed labor rates. Therefore, by separate letter of today, we are recommending to the Secretary of the Navy that the present contract with Orkand be terminated for the convenience of the government and that an award be made to SMC, if SMC is found to be responsible and such an award otherwise would be appropriate.

The protest is sustained.

for 
Comptroller General
of the United States