



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: PACECO, Inc.
File: B-224303
Date: December 19, 1986

DIGEST

1. Assuming that the solicitation for a pier facility and associated technical data involved the construction of a "public work" under the Buy American Act, the supply of technical data of foreign origin would not violate the Act since the Act and implementing regulations only concern the use of domestic construction materials in the construction of a public work, and technical data are not construction materials.

2. There is no merit to the contention that a bid is materially unbalanced because prices for data items are higher than those of the other bidders where the work required to produce the data items will occur early during contract performance and the bidder's pricing structure therefore will not result in contract financing tantamount to an advance payment.

DECISION

PACECO, Inc. protests the award of a contract to Fairey Marine, Ltd. under invitation for bids (IFB) No. N62578-86-B-6029, issued by the Naval Facilities Engineering Command, Davisville, Rhode Island. We deny the protest.

The IFB, which was the second step of a two-step sealed bid procurement, sought firm, fixed prices for the design of a Cantilevered Elevated Causeway System (CANTELCAS), the construction of a 600-foot demonstration CANTELCAS, the supply of various hardware and technical data, and the provision of training and other support services. Basically, a CANTELCAS is a system of pontoons, pilings, and other components that can be assembled quickly by military forces to form a cargo-handling pier facility. Fairey Marine was the lowest bidder at \$19,467,445; PACECO was second low at \$21,267,905.

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Fairey Marine identified itself in its bid as a corporation under the laws of the United Kingdom and listed its address as Cowes Shipyard, Isle of Wight, England. In the section of the solicitation where bidders were required to identify items that do not qualify as domestic end products, Fairey Marine inserted the words "Technical Base Only" and listed the United Kingdom as the country of origin. PACECO contends that the term "Technical Base" encompasses many of the sub-items in contract line item number (CLIN) 4, which listed a number of reports, plans, drawings, and other technical data required to be supplied. According to PACECO, acceptance of Fairey Marine's bid will result in violations of the Buy American Act, 41 U.S.C. § 10b (1982), and the Federal Acquisition Regulation (FAR), 48 C.F.R. Subpart 25.2 (1985), both of which require the use of only domestic materials in the construction of any public work in the United States.

The agency argues that the provisions cited by PACECO are not relevant in this procurement because, it says, the procurement is for supplies, not for the construction of a public work. The agency says that under the Buy American provisions applicable to supplies, the bid from Fairey Marine may be accepted. Responding to the agency, PACECO has presented a number of theories in support of its contention that this is indeed a solicitation for the construction of a public work.

Even if the procurement does involve the construction of a public work, the regulations implementing the Buy American Act that PACECO claims was violated, FAR Subpart 25.2, apply only to "construction materials," which are "supplies brought to the construction site for incorporation into the building or work." FAR, 48 C.F.R. § 25.201. None of the subitems in solicitation CLIN 4, which concerns technical data, can be considered "construction materials." Thus, assuming Fairey Marine's bid could be read as indicating that the documents listed in CLIN 4 would be of foreign origin, there would be no violation of the Buy American provisions cited by the protester.

On the other hand, the items under CLIN 4 would be subject to the Buy American Act provisions applicable to supplies. 41 U.S.C. § 10a; FAR, 48 C.F.R. § 25.1. Assuming that Fairey Marine's bid certified that these items will be produced in the United Kingdom--a question that we need not decide--the Buy American provision would not apply because products from the United Kingdom are excepted from the Buy American Act's provisions under the Trade Agreements Act of 1979, 19 U.S.C. § 2501 et seq. (1982). See FAR, 48 C.F.R. § 25.402(a).

In any event, the solicitation contained at paragraphs K.23 and K.24 clauses which concern the application of the Buy American Act to a supply contract. Both clauses referred to "end items" and "supplies" and made no mention of construction or construction materials. It should have been clear from the face of the solicitation, therefore, that the agency did not consider the solicitation as being for construction for purposes of the Buy American Act. If the protester disagreed with the agency's classification of the project, it should have protested prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986).

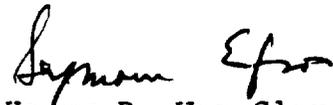
PACECO also contends that Fairey Marine's bid was materially unbalanced. The basis for this contention is that Fairey Marine's prices for a number of the engineering drawings required under CLIN 4 were considerably higher than those of the other bidders. PACECO argues that since much of the engineering work will precede the production work, Fairey Marine has front-loaded its bid in order that payments it receives for the engineering work can be used to finance production, thus allowing for a lower overall bid.

Material unbalancing can exist where acceptance of a significantly front-loaded bid would result in unauthorized contract financing tantamount to an advance payment. Riverport Industries, Inc., 64 Comp. Gen. 441 (1985), 85-1 CPD ¶ 364, aff'd on reconsideration, B-218656.2, July 31, 1985, 85-2 CPD ¶ 108. An advance payment is money paid to a contractor in advance of the performance of work. Id. In this case, while Fairey Marine's prices for some of the items in CLIN 4 appear high relative to the pricing of these items by the other bidders, most of the work required to produce the data items listed in CLIN 4 will be accomplished in the early stages of contract performance. During this time, the payments received by the contractor will be progress payments, which will be based on the cost of work actually performed. It does not appear, therefore, that Fairey Marine will receive payments in advance of work actually performed such that the advance payment theory of materially unbalanced bidding would apply.

Finally, PACECO complains that after it had filed its protest, the agency awarded a contract to Fairey Marine without first advising this Office in writing that urgent and compelling circumstances significantly affecting the interests of the government would not permit waiting for our decision. The head of the procurement activity determined that award of a contract notwithstanding the protest was

appropriate because this was an urgent requirement and because further delay would jeopardize the agency's logistics objectives. PACECO contends that the agency failed to satisfy the requirements of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c)(2)(B) (Supp. III 1985), by not providing us with a copy of its written determination until after award. We disagree. While we would expect that an agency routinely would provide us with a copy of such a determination as soon as it is available, notice of the determination by telephone prior to award, as occurred here, is sufficient to satisfy the statutory requirement. Simulators Limited, Inc.--Reconsideration, B-219804.2, Jan. 23, 1986, 86-1 CPD ¶ 76.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel