



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Southern Dredging Co., Inc.

File: B-229786.2

Date: July 7, 1988

DIGEST

1. Protest against maintenance dredging solicitation requirement that bids shall be based on an estimate for achieving a fixed depth set by the procuring activity, rather than on an estimate for a maximum allowable over-depth, is denied. The requirement reasonably was imposed in part to preclude unbalanced bidding by removing a bid element calculated at a fixed maximum for bid comparisons, but subject to significant variance by the contractor during performance, which affects the price actually paid by the government.
2. The procuring activity is under no legal obligation to eliminate risk entirely from a procurement and prospective bidders are expected to take added risks into account when preparing their bids.

DECISION

Southern Dredging Co., Inc., protests the specifications under invitation for bids (IFB) No. DACW21-88-B-0108, issued by the Army Corps of Engineers for maintenance dredging services. Southern alleges that the IFB specifications are defective because they do not include a provision for compensable overdepth dredging. We deny the protest.

The solicitation is for maintenance dredging of the East River in Brunswick Harbor, Georgia. The dredging is to be performed to specified depths (primarily to 31 feet) with no compensable overdepth allowable. Compensable overdepth dredging consists of an additional amount of compensated dredging allowed below the specified minimum depth, which reflects the fact that the dredging operation is not susceptible to precise performance. Thus, in this instance, under maintenance dredging procurements prior to 1985, the depth requirement was 30 feet with an allowable overdepth of 2 feet. Typically this resulted in an actual dredging depth

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of approximately 31 feet. Under the present solicitation, the depth of 31 feet is achieved, by requiring a depth of 30 feet plus "advance maintenance" of an additional foot. The primary difference is in the manner in which bid prices are calculated, and the relation of this calculation to the actual amount paid under the contract.

The bid schedule includes fixed lump sums for mobilization and demobilization of dredging equipment, and for water quality surveillance, plus a unit price per cubic yard for the material to be dredged from the channel to achieve a depth of 31 feet, the volume of which is estimated. Under the prior specifications with allowable overdepth, this estimate and the bid price calculations were based on dredging to the maximum allowable 32 feet depth, thus, including the entire overdepth estimate; but there was no requirement that the contractor actually dredge below 30 feet. The contract payment was based on the amount of material which was actually dredged. The present format requires dredging to a depth of 31 feet and calculates the dredging component of the price based on the estimated quantity of material which must be removed to achieve this 31 feet depth. Payment is still determined by the actual number of cubic yards which are removed (based on soundings taken before and after dredging), but there is no discretion on the part of the contractor and, therefore, the actual payment will be much closer to the estimate which is used for bid calculation purposes.

Under the present IFB, the Corps estimated the cubic yards of dredging to a depth of 31 feet to be 255,000. By the March 22, 1988, bid opening date, the Corps received three bids. The low bid of \$395,750, submitted by Atkinson Dredging Company, consisted of \$3,000 for water quality surveillance, \$125,000 for mobilization and demobilization, and \$1.05 per cubic yard for dredging, for an estimated dredging total of \$267,750. Southern submitted the next low bid of \$399,000, consisting of \$2,000 for water quality surveillance, \$295,000 for mobilization and demobilization, and \$0.40 per cubic yard for dredging, for an estimated dredging total of \$102,000.

Southern protests that the Corps should be required to rescind its allegedly unfair "no overdepth policy," which is reflected in the specifications. Our bid protest function does not encompass review of such policy decisions, rather we address only protest issues involving specific procurement actions, that is, whether an award or proposed award of a contract complies with statutory, regulatory or other legal requirements. Tek-Lite, Inc., B-227843.2, Oct. 2, 1987, 87-2 CPD ¶ 324; Mil-Craft Mfg., Inc., B-214015, May 7, 1984, 84-1 CPD ¶ 512. Therefore, we will not consider the

broad challenge to the Corps' "no overdepth policy." Instead, we will limit our consideration to the protester's specific allegation that by prohibiting compensable over-depth dredging in the present specifications, and instead requiring advance maintenance dredging, the Corps has misdefined its minimum needs.

The determination of the government's minimum needs and the best method of accommodating them is primarily the procuring agency's responsibility, since government procurement officials are the ones who are most familiar with the conditions under which supplies, equipment and services have been employed in the past and will be utilized in the future. Accordingly, our Office will not question an agency's determination of its minimum needs, unless there is a clear showing that the determination has no reasonable basis. Cardion Electronics, B-218566, Aug. 15, 1985, 85-2 CPD ¶ 172.

The particular specification at issue here is section C of the IFB which provides that: "There is no allowable over-depth in this contract. The Contractor will receive no payment for material removed below the required depth." This section further states that: "Material taken from beyond the [established] limits . . . will be deducted from the total amount dredged as excessive dredging, for which payment will not be made." The crux of Southern Dredging's allegation is that this no allowable overdepth specification forces the contractor to assume greater risk in undertaking a dredging project than does an allowable overdepth specification. In particular, Southern Dredging alleges that the contractor will probably have to dredge well below the required depth, without compensation, in order to achieve the required depth. Accordingly, bidders will be forced to estimate this risk and build it into their prices. In addition, in order to attempt to achieve the 31 feet required depth, bidders may be required to dredge around rock, with a high cost or risk associated with this operation.

The Corps responds that, prior to 1985, maintenance dredging specifications included provision for compensation for up to 2 feet of overdepth. However, in a protest concerning one such solicitation, our Office determined that the bid evaluation based on this allowable overdepth specification was defective. T.L. James & Co., Inc., 64 Comp. Gen. 854 (1985), 85-2 CPD ¶ 296. In particular, in that decision we held that the specifications failed to assure a reasonable expectation that award to the lowest evaluated bidder would result in the lowest cost to the government in terms of actual performance. We found that the evaluation method which calculated all of the allowable overdepth as if it

would actually be performed incorporated more work than was expected to be performed and, therefore, did not obtain the benefits of full and free competition required by the procurement statutes. As noted in the decision, the specifications permitted bidders to load their costs into the mobilization and demobilization component and underprice the unit price for dredging where the estimated quantity for evaluation was calculated at the maximum allowable. Since, historically, a lesser quantity was actually dredged, and the contractor had discretion to vary the amount, our Office concluded that the specifications and evaluation were improper because they encouraged unbalanced bidding.

In response to this decision, the Corps instituted the no overdepth policy, which resulted in the present specifications. In essence, the new bidding format as it appears in these specifications encourages the bidders to price their bids more accurately. The evaluation format removes the bidder's ability to have its price calculated on the basis of an artificially low price for dredging, with the knowledge that the estimate reflects a 32 feet depth, when only 30 feet is required. Previously, the bidder retained the ability to dredge to a lesser depth, thereby receiving a higher price for the work actually performed than would other bidders whose evaluated prices were higher because they had not loaded the mobilization and demobilization component, but instead had bid higher, and more realistically, on the dredging unit cost component. That potential was precisely our reason for objecting to the specification format as encouraging unbalanced bidding in T.L. James, & Co., Inc., 64 Comp. Gen. 854, supra.

The Corps intended purpose under the present format is to require bidders to provide more accurate pricing by preventing the ability, previously available under the compensable overdepth format, to manipulate the bidding and vary the actual amount which would be paid under the contract. This is in accord with our decision since it permits the Corps to assure that award based on the bid which is evaluated low will, in fact, result in the lowest cost to the government.

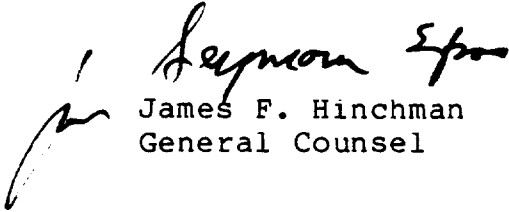
As noted above, the essence of the protester's objection is that by making the specifications more precise, the government has imposed a greater risk on the contractor. However, the imposition of such business risk is legally permissible. While a procuring agency must provide sufficiently detailed specifications to permit competition on a common basis, there is no requirement that the specifications must eliminate all performance uncertainties and risk. Hero, Inc., 63 Comp. Gen. 17 (1983), 83-2 CPD ¶ 667; A.J. Fowler Corp., B-227955, Nov. 13, 1987, 87-2 CPD ¶ 482.

Rather, bidders are expected to exercise business judgment in preparing their bids.

The Corps also states that the current specifications provide the contractor with an incentive to improve the accuracy of its operation and upgrade its equipment, and permit more exact budget planning by the Corps. Southern Dredging has not rebutted either of these bases for the specifications. In our view, the Corps has provided a reasonable basis for the specifications, and while Southern characterizes the specifications as unfair and arbitrary, all that it has really shown is that the bidder has been required to assume certain business risks which it did not have to assume under prior maintenance dredging solicitations, but which it is free to factor into its bid. We note that the Corps states that last year's contract for maintenance dredging of this harbor, which was let under an IFB which used the present specification format, was performed without difficulty by the contractor.

Accordingly, we find that Southern Dredging has not shown that the no compensable overdepth specification is unreasonable.

The protest is denied.



James F. Hinchman
General Counsel