

K44-203



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Courtney Contracting Corp.

**File:** B-242945

**Date:** June 24, 1991

Thomas M. Zwilling, Esq., Strassburger, McKenna, Gutnick & Potter, for the protester.  
Alton E. Woods, Esq., and Justin P. Patterson, Esq.,  
Department of the Interior, for the agency.  
Jennifer Westfall-McGrail, Esq., and Christine S. Melody,  
Esq., Office of the General Counsel, GAO, participated in the  
preparation of the decision.

### DIGEST

1. Protester is an interested party to protest price limitations in an invitation for bids despite fact that it did not submit a bid where relief that it seeks is the opportunity to compete under a revised solicitation.
2. Imposition of price limitations on lump sum work items is reasonable where, due to unreliability of government estimates of work to be performed, the opportunity exists for bidders submitting mathematically unbalanced bids to recover substantial sums under lump sum items while performing minimal work under unit price items.

### DECISION

Courtney Contracting Corp. protests the terms of invitation for bids (IFB) No. EF68-IFB91-13663, issued by the Department of the Interior, Office of Surface Mining, for abatement of a mine gas and drainage problem at the Barnett mine, an abandoned coal mine located in Washington County, Pennsylvania. Courtney objects to the inclusion of price limitations, expressed in terms of percentages of the total bid, on certain work items.

We deny the protest.

Work under the IFB, which the agency issued on January 30, 1991, was to include construction of drainage structures and subdrains; backfill of a mine entry and installation of a mine vent, if necessary; and site revegetation and restoration. The solicitation requested unit and extended prices<sup>1/</sup> for estimated quantities of work units for certain line items and subitems (e.g., piping for subdrain and mine vent construction, concrete backfill, and concrete and asphalt paving) and lump sum prices for others (e.g., mobilization and demobilization). The IFB established a maximum bid amount, expressed as a percentage of the total bid, for each of the lump sum items as follows: for mobilization, utility relocations, and revegetation, prices were not to exceed 10 percent of the total amount bid; and for demobilization, site preparation, surface vent equipment, and landscape amenities, prices were not to exceed 5 percent of the total amount bid.

The agency explains that it included caps on the IFB's lump sum items to prevent bidders from submitting mathematically unbalanced bids (i.e., bids containing nominal prices for some work items and enhanced prices for others). According to the agency, solicitations, such as the one here, for construction in support of the Abandoned Mine Lands emergency mission, are susceptible to unbalanced bidding since they require excavation of mine spoil material or injection of grout material into abandoned underground coal mines and it is difficult for the agency to determine with accuracy the actual area that will need to be excavated or filled with grout. Thus, it is difficult for the agency to estimate quantities for bid items such as backfill material, rock, and grout, and it is not unusual for actual quantities to deviate greatly from the government's estimates. Where a contractor has submitted a mathematically unbalanced bid, with very low prices for one or more unit priced items and excessively high prices for one or more lump sum items, and actual quantities turn out to be

---

<sup>1/</sup> The IFB advised bidders that unit prices would be used for payment purposes and that extended prices would be used to evaluate bids.

significantly lower than estimated quantities, the contractor may recover a significant portion of its evaluated bid price while performing only minimal work. The agency cites the following two contracts awarded to Courtney as examples of situations in which this has occurred:

Contract EF68-CT90-13321 - Nico Fibers Shaft

<u>Item</u>	<u>Gov't Est. Qty.</u>	<u>Gov't Est. Price</u>	<u>Courtney Price</u>	<u>Actual Qty.</u>
Mobilization	Lump Sum	\$3,000	\$ 2,000.00	Lump Sum
Demobilization	Lump Sum	3,000	18,957.00	Lump Sum
No. 1 Stone	3,160/TN	15/TN	.50/TN	720.35/TN
Grout	40/CY	150/CY	50.00/CY	34.00/CY

Contract EF68-CT90-13344 - Wyano Subsidence

<u>Item</u>	<u>Gov't Est. Qty.</u>	<u>Gov't Est. Price</u>	<u>Courtney Price</u>	<u>Actual Qty.</u>
Mobilization	Lump Sum	\$1,200.00	\$ 2,378.00	Lump Sum
Demobilization	Lump Sum	500.00	10,000.00	Lump Sum
Access Road	Lump Sum	800.00	1.00	Lump Sum
Course Stone	1,845/TN	12.00/TN	1.00/TN	701.57/TN
Geo. Fabric	1,700/SF	.50/SF	.01/SF	2,250.00/SF
Top Soil	140/TN	16.00/TN	1.00/TN	42.00/TN
Restoration	Lump Sum	1,000.00	9,008.00	Lump Sum

Despite the pendency of this protest, the agency proceeded with bid opening on February 15, 1991. Six bidders responded to the IFB; Courtney was not among them. William Orton Excavating submitted the low bid of \$33,700. On February 21, the head of the contracting activity determined in writing that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for our decision and awarded to Orton. Performance has now been completed.

Courtney objects to the price limitations imposed on the IFB's lump sum items. The protester contends that the Federal Acquisition Regulation (FAR) does not authorize the imposition of such caps and that the effect of the caps in other recent solicitations has been to reduce competition by experienced contractors. Courtney maintains that by placing price limitations on the lump sum items, the agency is forcing bidders to allocate a portion of their costs for such items to

the unit priced items, and that where estimated quantities of unit priced items then substantially exceed actual quantities (which, according to the protester, is likely to occur since the estimates that the agency has included in the solicitation are the maximum amounts that it anticipates will be needed), the contractor will be unable to make a reasonable profit on the job and may in fact be prevented from recovering its costs. The protester further argues that expressing the maximum allowable amounts for the various lump sum line items as percentages of the total bid amounts is arbitrary since there is no consistent relationship between the costs of these items and overall bid prices.<sup>2/</sup>

As a preliminary matter, the agency argues that Courtney is not an interested party to maintain the protest since it did not submit a bid in response to the IFB and thus would not be in line for award if its protest were sustained. The agency contends that Courtney's protest should therefore be dismissed. Whether a protester is an interested party is determined by the nature of the issues raised and the direct or indirect benefit or relief sought. Deere & Co., B-212203, Oct. 12, 1983, 83-2 CPD ¶ 456. Where, as here, the protester challenges the terms of a solicitation and the remedy sought is the opportunity to compete under a revised solicitation, it

---

<sup>2/</sup> Courtney also notes that the percentage caps on two of the items (site preparation and utility relocations) appear on the bid schedule, but not in the IFB's technical specifications. The protester contends that caps, which appear on the bid schedule only, should not be considered as part of the solicitation.

We disagree. The IFB incorporated by reference FAR § 52.214-9, which provides that:

"Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications."

Thus, to the extent that it can be argued that the bid schedule (which includes the caps) is inconsistent with the technical specifications (which do not), it is the bid schedule which controls.

is an interested party to protest the terms of the solicitation despite the fact that it did not submit a bid or offer under the challenged solicitation. See Newport News Shipbuilding and Dry Dock Co., B-221888, July 2, 1986, 86-2 CPD ¶ 23.


With regard to the merits of Courtney's protest, the agency contends that although the FAR does not specifically authorize percentage limits on lump sum items, it does provide the contracting officer with wide latitude to exercise business judgment in establishing measures to safeguard the interests of the United States in its contractual relationships. FAR § 1.602-2. Here, the agency maintains, the imposition of percentage limitations on lump sum items was necessary to protect the interests of the government by preventing the submission of unbalanced bids. The agency also disputes the protester's contention that the caps have resulted in reduced competition. According to the agency, the average number of bidders responding to its solicitations has not decreased since it began including percentage limitations on lump sum items.

With regard to the protester's argument that the imposition of caps on an IFB's lump sum items will force bidders to allocate a portion of their costs for those items to the unit priced items, thereby placing the contractor at risk of not recovering the full cost of performance if actual quantities of the unit priced items do not approach estimated quantities, the fact that a provision imposes substantial risk on bidders--including the risk that payments under the contract will not cover the costs of performance--does not, by itself, make the provision improper. S.P.I.R.I.T Specialist Unlimited, Inc., B-237114.2, Mar. 8, 1990, 90-1 CPD ¶ 257. Risk is inherent in any contract, and bidders must use their professional expertise and business judgment to assess the risk's magnitude and possible cost in computing their bids. Custom Envtl. Serv., Inc., B-241052, Jan. 15, 1991, 70 Comp. Gen. \_\_\_, 91-1 CPD ¶ 38. At the same time, however, the Competition in Contracting Act of 1984 (CICA) requires that solicitations permit full and open competition and contain restrictive provisions only to the extent necessary to satisfy the needs of the agency. 41 U.S.C. §§ 253a(a)(1), (2) (1988); Four Star Maintenance Corp., B-240413, Nov. 2, 1990, 91-1 CPD ¶ 70. Thus, under CICA, agencies may impose risks on contractors only to the extent necessary to reasonably limit the burdens on the government. Id.

Here, due to the nature of work to be performed, the government's estimates of the unit priced work may prove inaccurate, with estimated quantities exceeding actual

quantities; the opportunity thus exists for bidders to submit bids containing prices for lump sum items which are excessive relative to the value of the lump sum work to be performed, and thereby to realize a windfall by recovering a substantial portion of their bid prices while performing minimal work under unit priced items. We think that the imposition of price limitations on the IFR's lump sum items is a reasonable response by the agency to the potential problem of unbalanced bidding in such cases.

The protest is denied.

  
for James F. Hinchman  
General Counsel