

144605 Perry



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Valley Construction Company, Inc.

File: B-243811

Date: August 7, 1991

Karl Dix, Jr., Esq., Smith, Currie & Hancock, for the protester.
Paul LaForge for LaForge and Budd Construction Company, Inc., an interested party.
Lester Edelman, Esq., Department of the Army, for the agency.
Anne B. Perry, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Since the minimum bid acceptance period is a non-waivable, material solicitation requirement, a bidder's insertion of "30" in the space provided to designate the number of calendar days in the offered bid acceptance period requires that the bid be rejected as nonresponsive where the solicitation required a minimum bid acceptance period of 60 days.
2. Contracting officer's determination concerning price reasonableness is a matter of administrative discretion which will not be questioned unless there is a showing that the determination itself is unreasonable, or that it is based on bad faith or fraud. The fact that a nonresponsive, low bid is very close to the government estimate does not render the other bids unreasonable.

DECISION

Valley Construction Company, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DACW54-91-B-0018 issued by the Department of the Army for assorted construction work in recreation areas located in Chatham and Wake Counties, North Carolina. Valley's bid was rejected as nonresponsive because the solicitation required a minimum bid acceptance period of 60 days and Valley inserted the figure "30" in the space provided for the offered

acceptance period. Valley contends that this nonconformance should be waived since it is in the government's best interest and, alternatively, that the IFB should be canceled and resolicited since all other bids are unreasonably high.

We deny the protest.

The IFB provided bidders with the option of submitting bids for the work in Wake County, Bid Items 1-63, or Chatham County, Bid Items 64-136, or for both projects. Accordingly, the solicitation provided for the evaluation and possible award of multiple contracts. Item 13D of the IFB provided that "Offers providing less than 60 calendar days for Government acceptance after the date offers are due will not be considered and will be rejected." Pursuant to this requirement the IFB contained the following clause:

"The offeror agrees to perform the work required at the prices specified below in strict accordance with the terms of this solicitation, if this offer is accepted by the Government in writing within _____ calendar days after the date offers are due. (Insert any number greater than the minimum requirement stated in Item 13D. Failure to insert any number means the offeror accepts the minimum in Item 13 D.) (Emphasis added.)

Six bids were received by the April 17, 1991, amended bid opening date. The results of the bid opening were as follows:

<u>Offeror</u>	<u>Items 1-63</u>	<u>Items 64-136</u>	<u>Items 1-136</u>
Valley	No bid	No bid	\$5,270,940.70
Crowder Constr.	\$3,078,212.50	\$3,164,824	\$6,243,036.50
Sanford Grading Co.	No bid	\$2,928,225.85	No bid
Laforge & Budd Constr.	\$3,163,000	\$3,267,000	\$6,430,000
HMG, Inc.	\$3,697,653	\$3,008,032	\$6,705,685
LDA Inc.	\$3,699,477.50	No bid	No bid
Revised Gov't Estimate	\$2,659,201	\$2,443,293	\$5,102,494

Valley was the apparent low bidder, but since it had inserted a "30" in the space provided for the offered acceptance period, its bid was determined to be nonresponsive and was rejected. The second low bidder, Crowder, withdrew its bid pursuant to the mistake-in-bid rules, and Sanford's bid was rejected as nonresponsive for failure to submit a completed Procurement Integrity Certificate. As a result, Laforge was the low, responsive and responsible bidder for Items 1-63 and HMG was the low, responsive and responsible bidder for Items 64-136.

After bid opening, Valley submitted a letter to the agency "confirming" its bid and "correcting" its minimum bid acceptance period to 60 days. Valley stated that the inserted "30" was merely an inadvertent mistake and requested that the contracting officer waive this "minor informality." Thereafter, Valley protested to the General Accounting Office (GAO), alleging that the agency must waive the 30-day bid acceptance period as a minor informality or cancel and resolicit the solicitation since all bids, other than its own, are unreasonably high.

Valley argues that the agency should waive Valley's failure to provide the required minimum bid acceptance period because it was only a clerical mistake and no other bidder would be prejudiced since the agency could have awarded the contract within 30 days. In addition, Valley argues that the substantial savings represented by its bid warrants the waiver. Alternatively, Valley argues that no other bidder is eligible for award since all of their bids are unreasonable. Therefore, Valley argues that if its "minor informality" cannot be waived, the IFB should be canceled and resolicited.

We have expressly rejected the same arguments concerning bid acceptance periods in numerous prior cases. See, e.g., Paragon Investment Corp., B-241715, Jan. 30, 1991, 91-1 CPD ¶ 95; IMCO General Constr., Inc., B-224108, Dec. 19, 1986, 86-2 CPD ¶ 687. A nonconforming entry in the bid acceptance period clause cannot be waived after bid opening as a minor informality since an IFB requirement that a bid remain available for acceptance by the government for a prescribed period of time is a material solicitation requirement. Taylor Lumber & Treating, Inc., B-229715, Dec. 23, 1987, 87-2 CPD ¶ 625. The fact that a bid would provide savings to the government is not a basis for waiving such a defect since the public interest in maintaining the integrity of the competitive bidding process outweighs any monetary benefit to be gained from waiving material bidding deficiencies. Id.

Valley argues, in the alternative, that all other bids received were at unreasonable prices, and therefore, a cogent and compelling reason exists to cancel and resolicit the IFB. The sole basis for the protester's position that only its bid is reasonable is the closeness of its bid and government estimate. Essentially, Valley is arguing since its bid is within 3 percent of the initial government estimate, then all other bids higher than that must be unreasonable. We disagree.

A determination concerning price reasonableness is a matter of administrative discretion involving the exercise of business judgment, which our Office will not question unless that determination is unreasonable or there is a showing of bad faith or fraud. Coastal Industr. Inc., B-230226, May 3, 1988, 88-1 CPD ¶ 431. In this connection, a determination concerning price reasonableness may be based upon a comparison with such factors as government estimates, past procurement history, current market conditions, or any other relevant factors, including those which have been revealed by the competition received. Federal Acquisition Regulations § 15.407-2; Porter-Cable Corp., B-227401, June 19, 1987, 87-1 CPD ¶ 618.

Here, the agency based its determination of price reasonableness on a comparison of all bids received and the government estimate, as well as an item-by-item analysis of the low, responsive bids. The contracting officer initially noted that the government estimate did not include profit and had, in fact, slightly underestimated the current cost of some specific items. The agency then examined all of the bids received which revealed that besides Valley's bid, all of the other bids fell within a very narrow range. The agency determined that this pricing pattern reflected a competitive bidding environment which fostered bids at fair market value. The agency also considered that because the economic environment for construction is very weak, each job is highly contested, which encourages reasonable prices.

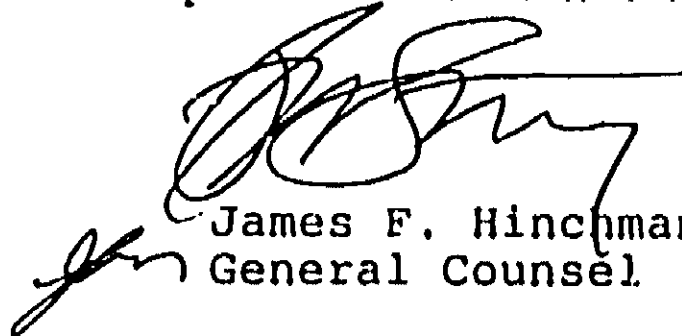
The cost evaluator also compared the government estimate with the bids received and noted that approximately \$150,000 of the difference was the result of an erroneous underestimation of the purchase and installation price of certain mulch toilets. The evaluator also noted that the items for which there were significant differences between the government estimate and the bids were in lump-sum items or unit prices which included many cost elements. The case evaluator's memorandum states that while no error could be identified in the government estimate for these items, there are judgmental factors which form the basis for these cost elements, which vary by the individual preparing the estimate. These judgmental factors include such things as assumptions on subsurface conditions

and work crew efficiencies. The cost evaluator concluded that "(m)ost of the difference between the government estimate and the average bid prices is probably from the different judgment among the A-E [Architect-Engineer] Contractor personnel who produced the pricing data for the government estimate and the bidders and the discrepancies cannot be attributed to error or unreasonableness on the part of any of the parties."

Based on the cost evaluator's findings and the contracting officer's own review which demonstrated that multiple awards to LaForge and HMG would not exceed the statutory cost limitation of 25 percent above the government estimate, see 33 U.S.C. § 624 (1988), the contracting officer properly concluded that award under this solicitation could be made at a reasonable price.

Valley's argument that the closeness of its price to the government estimate demonstrates that all other prices must be unreasonable is unpersuasive in view of the manner in which the agency made its cost reasonableness determination. The fact that a next low bid may be much higher than the lower bid does not by itself demonstrate price unreasonableness. See Tayloe Assocs., B-216110, June 3, 1985, 85-1 CPD ¶ 625. Here, the agency determination of price reasonableness was appropriately based on a combination of relevant factors, not merely a comparison of the low bid received and the government estimate.

The protest is denied.


James F. Hinchman
General Counsel