



Comptroller General
of the United States

Washington, D.C. 20541

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Decision

Matter of: Alamo Contracting Enterprises, Inc.

File: B-249265.2

Date: November 20, 1992

Dorothy M. Daniels for the protester, Theodore M. Bailey, Esq., Law Office of Ronald J. Shaw, P.C., for Speedy Food Service, Inc., and Anthony Alvarez for Renaissant Development Corporation, interested parties. Herbert F. Kelley, Jr., Esq., and Bobby G. Henry, Jr., Esq., Department of the Army, for the agency. Jacqueline Maeder, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that low bid was improperly rejected as unbalanced is sustained where agency does not show that bid contained both understated prices for some items and overstated prices for others, and there is no reasonable doubt that award will result in the lowest overall cost to the government.

2. Under competitive section 8(a) acquisitions, where agency doubts bidder's ability to perform because of very low prices, negative preaward survey results or other reasons, the contracting officer should refer the matter to the Small Business Administration for its determination as to whether the bidder can perform.

DECISION

Alamo Contracting Enterprises, Inc. protests the rejection of its low bid under invitation for bids (IFB) No. DABT51-92-B-0005, issued by the Department of the Army for full food services and dining facility attendant services at various dining facilities at Fort Bliss, Texas. The

procurement was conducted competitively pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988 and Supp. III 1991).¹ The Army rejected Alamo's bid on the ground that its pricing pattern made the bid nonresponsive.

The record does not support the agency's conclusion that Alamo's pricing pattern made the bid nonresponsive, and we sustain the protest.

The solicitation was part of a government cost comparison² for food service for a base year and 4 option years. The IFB included by reference the clause set forth at FAR § 52.214-10, entitled "Contract Award-Sealed Bidding," which states in part that the government may accept other than the lowest bid and reject a bid as nonresponsive if the prices are materially unbalanced between line items or subline items.

The amended IFB bid schedule included 24 contract line items (CLINs); CLIN 0001 was for the phase-in of a new contractor, CLINs 0002 through 0016 were for 15 full-time dining facilities, while CLINs 0017 through 0024 were for eight temporary dining facilities on an as-needed basis.³

The schedule required separate bids on each dining hall (identified by building number) for the base year and each option year. Each line item had several subline items so that bidders could provide daily meal prices for a range of

¹Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) § 19.805 and 13 C.F.R. § 124.311 (1992) provide for and govern competitively awarded contracts set aside for section 8(a) qualified concerns. We review competitive 8(a) procurements to ensure that they conform to applicable federal procurement regulations. See Morrison Constr. Servs. Inc., 70 Comp. Gen. 139 (1990), 90-2 CPD ¶ 499; New Life Group, Inc., B-247080.2, May 22, 1992, 92-1 CPD ¶ 463.

²The cost comparison was to determine whether accomplishing the work under contract or by government performance is more economical. If government performance is determined to be more economical, the solicitation will be canceled and no contract will be awarded. It appears that performance under contract would be most economical.

³These temporary facilities are normally closed and are opened only as needed. These facilities may be opened for months at a time or may never open during the contract.

meal quantities. Typically, the bidder was required to provide daily meal prices for weekday and weekend/holiday service for four ranges of meals, including 0-300 meals, 301-600 meals, 601-900 meals, and 901-1,200 meals.¹ For the temporary dining facilities (CLINs 0017 through 0024), the bidder was required to provide a price for the daily operation of the facility for weekday and weekend/holiday service and was given one range of 0-800 meals.

At bid opening on June 1, 1992, seven bids were received, ranging from Alamo's low bid of \$16,838,141.47 to a high bid of \$35,499,372.40. The government estimate was \$26,773,377. The contracting officer was concerned about Alamo's low price given the work to be performed and the apparent disparity between it, the government estimate, and other bids. By letter dated June 1, the contracting officer asked Alamo for written confirmation of its bid; Alamo confirmed its bid prices by letter dated June 3.

The Army also requested a preaward survey of the firm and notified SBA of its concern regarding Alamo's bid. Prior to the completion of the preaward survey, by letter dated June 23, SBA informed the Army that six of the bidders, including Alamo, were "qualified" to participate under the competitive 8(a) solicitation. Subsequently, on June 26, the preaward survey report recommended that no award be made to Alamo because of its weak financial condition.

The results of the preaward survey, along with the Army's concern about Alamo's low prices, were brought to SBA's attention; the SBA did not respond.

The Army then further reviewed its concerns about the Alamo bid and, by letter dated June 30, notified Alamo that it had concluded the firm's bid to be nonresponsive, stating that "[o]verall, bid prices, as submitted, do not reflect the scope of work to be performed." By letter dated July 10, the Army further explained that it viewed the bid as nonresponsive because Alamo offered the same rate for food service regardless of the number of personnel to be fed, and because it suspected that Alamo had bid services for the temporary dining facilities on a per hour basis for a single staff member rather than on a daily operating basis.

Alamo contends that the agency improperly rejected its low bid, arguing that its bid complies in all material respects to the solicitation and that its bid prices, as submitted, reflect the scope of work to be performed. Alamo argues

¹Two buildings had meal ranges of 0-500, 501-800, 801-1,200, and 1,201-1,600; one had meal ranges of 0-300, 301-600, 601-900, 901-1,200 and 1,201-1,500.

that "there was no requirement that varying prices be submitted for the different meal ranges. . . ." Rather, using the historical data provided in the solicitation, Alamo states that it reasonably based its bid on the average weekday meal count.

The Army states that rejection of Alamo's bid was proper because the bid was materially unbalanced, and because Alamo's prices for operating the temporary dining facilities do not correspond to the effort required. Concerning the alleged unbalancing, the agency states that while the bid schedule required bidders to provide prices for meals served in four ranges, Alamo, unlike the other bidders that increased their prices as the number of meals to be served increased, in most cases, bid the same price regardless of the number of meals to be served. For example, for building 1002, the bids on the four meal count ranges for weekday service were as follows:

	0-300	301-600	601-900	901-1,200
Alamo	\$1,036.26	\$1,036.26	\$1,036.26	\$1,036.26
Speedy	\$ 870.75	\$1,225.50	\$1,354.50	\$1,470.60
Ro-Hi	\$1,071.70	\$1,151.93	\$1,209.24	\$1,369.71
Renaissant	\$1,342.90	\$1,342.90	\$1,579.71	\$1,774.35
SCIMCO	\$1,229.72	\$1,697.68	\$2,110.00	\$2,419.02
Southway	\$1,712.70	\$2,722.32	\$3,731.94	\$4,741.56
Hernandez	\$1,282.15	\$1,467.43	\$1,666.67	\$1,744.77

According to the Army, because Alamo did not vary its prices as the bid schedule anticipated, the firm underbid the services for large numbers of personnel and overbid the services for small groups. Additionally, the agency states that Alamo's bid is materially unbalanced since the agency cannot determine, because of the inherent uncertainty of the estimated requirements, if Alamo's bid will result in the lowest price to the government.

Before a bid can be rejected as unbalanced, it must be found both mathematically and materially unbalanced. A bid is mathematically unbalanced where it is based on nominal prices for some of the items and enhanced prices for other items. OMSERV Corp., B-237691, Mar. 13, 1990, 90-1 CPD ¶ 271. A bid may not be found mathematically unbalanced absent evidence that it contains prices which are overstated. Oregon Iron Works, Inc., B-247845, May 27, 1992, 92-1 CPD ¶ 474. A mathematically unbalanced bid is considered materially unbalanced and cannot be accepted where there is a reasonable doubt that acceptance of the bid will result in the lowest overall cost to the government. Star Brite Constr. Co., Inc., B-244122, Aug. 20, 1991, 91-2 CPD ¶ 173.

Here, the agency has provided no analysis to support its conclusion that Alamo's bid contains overstated prices and is thus unbalanced. Indeed, the agency simply presumes that the bid is unbalanced because Alamo bid the same amount regardless of the number of meals to be served. Our review of the record, however, shows that while Alamo's bid appears to contain understated prices on the highest range of meals to be served, there is no evidence that Alamo's bid contains any corresponding overstated prices. For example, for building 2419, the bids for weekday meal service for the low meal count (0-300) and the high meal count (901-1,200) are as follows:

	0-300	901-1200
Alamo	\$405.17	\$437.36
Speedy	\$390.28	\$518.43
Ro-Hi	\$473.31	\$572.37
Renaissant	\$556.17	\$836.56
SCIMCO	\$425.06	\$939.04
Southway	\$614.40	\$744.54
Hernandez	\$607.36	\$724.16

Rather than being overstated, Alamo's bid on the 0-300 meal range is second low of the seven bids. Similarly, Alamo is the low bidder or second-low bidder for the 0-300 meal range for weekday meal service for all but three dining facilities. For these three, Alamo's bid is within the range of bids and is not overstated. For example, for building 4674, for the low meal count of 0-500, Alamo bid \$1,973.99. The other bids ranged from a low of \$1,221.89 to a high of \$2,107.30. Further, it does not appear that under any combination of possible ranges that any other bidder would have a lower total price than would Alamo.

Since the Army has failed to show, and we can find no evidence in the record, that Alamo's bid contained both overstated prices for some items and understated prices for others, we see no basis to conclude that Alamo's bid is mathematically unbalanced. Oregon Iron Works, Inc., supra. Further, the agency has failed to provide us with any explanation or calculation which shows how award to Alamo could result in other than the lowest overall cost to the government.

To the extent the Army is concerned that Alamo's failure to vary its prices based upon the different ranges may have an adverse impact on Alamo's ability to perform satisfactorily, this is really no more than a concern that some of Alamo's prices are so low that they are unrealistic and may be below cost--i.e., that these prices do not reflect Alamo's actual cost of performance. The submission of a below cost bid is not improper, however, and the government cannot withhold

award merely because a responsive bid is below cost. Oregon Iron Works, Inc., supra.

Next, the Army argues that Alamo's bid is nonresponsive because the firm submitted a single bid price of \$11.31 per hour to provide all services, except dishwashing, for operating the temporary dining facilities (CLINs 0017 through 0024). The bid schedule requested a price per hour to operate these facilities, based on a normal operating time of 4 hours per day. The Army believes Alamo misunderstood the bid schedule since it calculates that the total hourly wage for a single food sanitation specialist is \$10.53 and Alamo bid only \$11.31. According to the Army, "it appears that Alamo bid the requirement based upon the cost for a single employee, rather than the cost of operating the entire dining facility. . . ." The agency states that the "facilities require, as a minimum, two personnel."⁵

Alamo did acknowledge in its comments on the agency protest report that it had bid CLINs 0017 through 0024 on the basis of the hourly rate for one staff member rather than on the basis of its total hourly cost of operating the facility. Alamo argues, however, that it is still the low bidder and that its bid "does respond to the level of effort required by the solicitation."

To be responsive, a bid must represent an unequivocal offer to provide the exact thing called for in the IFB such that acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions. Collins Siding Co., B-245732.2, May 12, 1992, 92-1 CPD ¶ 439. Only where a bidder provides information with its bid that reduces, limits, or modifies a solicitation requirement may the bid be rejected as nonresponsive. Id. Whether the bid is responsive and therefore eligible for award must be determined from the contents of the bid itself at bid opening, without reference to extraneous aids or explanations submitted after bid opening. See Adrian Supply Co.--Recon., B-239681.2, Jan. 29, 1991, 91-1 CPD ¶ 79.

Here, Alamo did not take exception to any of the IFB specifications in its bid--which we find unambiguously provide for a bid rate to operate the facility--nor did the firm include any documents with its bid or with its bid verification indicating an intent to reserve the right to deviate from the IFB's specifications or which would indicate that the firm misunderstood the bidding schedule. Consequently, Alamo's bid, at bid opening, did reflect an

⁵One food sanitation specialist and one supervisor are required by the solicitation.

unequivocal offer to provide the exact service called for in the IFB and thus Alamo clearly bound itself to meet all the requirements of the solicitation. See Collins Siding Co., supra. At this time, however, given Alamo's comments responding to the agency's report on the protest, it appears that the firm made a mistake in pricing its bid for CLINs 0017 through 0024. The questions of whether this bid is correctable or, if not, whether Alamo could or would waive its mistake and perform at its bid price (i.e., operate the facility for the rate it bid) were not addressed by the parties because Alamo's mistake only recently became apparent. As discussed above, we conclude that Alamo's bid was responsive and was improperly rejected for that reason. The questions regarding Alamo's evident mistake should now be addressed by the agency.

The protest is sustained.

While it is clear that Alamo's bid was not unbalanced, there are two matters which the agency must consider. First, the question of Alamo's mistake in pricing CLINs 0017 through 0024 must be resolved. Second, we think that the agency had legitimate concerns regarding Alamo's ability to perform at its low prices. As far as we can determine from the record, the agency chose to reject Alamo's bid as nonresponsive rather than to refer the question of Alamo's responsibility to SBA as provided for under FAR § 19.809. That regulation requires the contracting agency to refer the question of whether an 8(a) contractor is "competent and responsible" to perform an 8(a) contract to SBA for consideration whenever the contracting officer learns of information prior to award that raises substantial doubt as to the 8(a) firm's ability to perform the contract. We think that doubt was raised here, where Alamo bid very low prices and the preaward survey report recommended no award to the firm because of financial considerations. Accordingly, if Alamo is eligible for award after resolution of the mistake issue, we recommend that the question of Alamo's responsibility be referred to SBA pursuant to FAR § 19.809. If SBA responds with a positive certification the contract should be awarded to that firm. See New Life Group, Inc., B-247080.2, May 22, 1992, 92-1 CPD ¶ 463; Collins Siding Co., supra. If SBA does not so certify, the Army should consider awarding the contract to the next bidder in line for award.

In any event, since the protest is sustained, Alamo is entitled to the costs of filing and pursuing the protest. Bid Protest Regulations 4 C.F.R. § 21.6(d) (1992).

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for Comptroller General
of the United States