

McAuliffe
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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ACC Construction Co., Inc.

File: B-250688

Date: February 16, 1993

John T. Flynn, Esq., and John E. Menechino, Jr., Esq., Smith, Currie & Hancock, for the protester.
Craig R. Schmauder, Esq., and Beth Kelly, Esq., Office of the Chief of Engineers, Department of the Army, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Apparent low bid was properly rejected where agency reasonably concluded that bid was grossly unbalanced and Federal Acquisition Regulation § 15.814(b) authorizes rejection of such a bid because its acceptance would be tantamount to allowing an advance payment.

DECISION

ACC Construction Co., Inc. protests the rejection of its bid as materially unbalanced under invitation for bids (IFB) No. DACA21-92-B-0057, issued by the United States Corps of Engineers, Savannah District, for interior and exterior improvements to 441 family housing units in Fort Benning, Georgia.

We deny the protest.

The IFB, issued on August 3, 1992, required bidders to submit prices for five base bid line items (Nos. 0001 thru 0005, regarding the renovation of family housing units) and one option line item (No. 0006, regarding miscellaneous painting requirements, which was composed of four sub-line items requiring individual prices). Line items 0001 thru 0004 each required improvements to the interiors of one of four different types of family housing units in Housing Area 6. Line item 0005, the subject of this bid protest, required carport construction and other related exterior site work in Housing Areas 6 and 9. (The IFB did not include any interior renovation work for Area 9.) Although quantity estimates were provided for the other line items, and bidders were required to provide single unit prices

based on those estimates, the IFB's bid schedule only provided a space for bidders to submit a lump-sum price for line item No. 0005 to include all of the carports and associated site work for the total 441 units of Housing Area 6 (291 carport spaces) and Area 9 (150 carport spaces). The work was to be completed within 540 days from the date the contractor received a notice to proceed. The IFB provided that the government would make monthly progress payments to the successful contractor based on the work accomplished.

Eleven bids were received in response to the IFB by the scheduled September 18 bid opening date. ACC submitted the apparent low total bid (base bid plus option) of \$6,226,000. The apparent next low bid, submitted by L.C. Gaskins Construction Co., was \$6,238,790. The total government estimate was \$8,289,132.04.

A comparison of the protester's prices to the government's unit price estimates, and the price range of the other 10 bids received, follows:

	<u>ACC's Unit Price</u>	<u>Government Unit Price Estimate</u>	<u>Range of Unit Prices of Other Bids</u>
Item 0001 (71 interior units)	\$4,000 ¹	\$19,291.68	\$11,731-\$20,666
Item 0002 (128 interior units)	\$4,000	\$22,454.91	\$14,875-\$20,611.50
Item 0003 (64 interior units)	\$4,000	\$19,139.77	\$11,759-\$21,695.87
Item 0004 (28 interior units)	\$4,000	\$26,269.95	\$18,157-\$24,786.57
Item 0005 (Carports & site work)	\$4,771,000 ² (\$10,818 per unit)	\$1,809,871 (\$4,104 per unit)	\$1,568,038-\$2,604,960 (\$3,556-\$5,911 per unit)

¹An estimated quantity of family housing units for interior renovation under the IFB was provided for each line item (Nos. 0001 thru 0004, each representing a different type of family housing unit).

²Since a unit price was not requested by the IFB for this line item, this amount reflects ACC's price for the construction of all 441 carports and associated site work in Housing Areas 6 and 9. (Unit prices listed above for line item No. 0005 were computed by GAO.)

On September 25, Gaskins filed an agency-level protest against any proposed award of a contract to ACC alleging that ACC's bid was materially unbalanced. Gaskins contended that since ACC's bid for item No. 0005 was grossly inflated (and the prices for item Nos. 0001 thru 0004 were unreasonably low), ACC's bid was grossly mathematically unbalanced. Gaskins stated that under ACC's pricing structure, the performance of the carport and site work of line item No. 0005 early in the contract, as contemplated by the IFB, would result in a prohibited advance payment to ACC.³ The contracting officer agreed, found ACC's bid materially unbalanced, and rejected the bid as nonresponsive. This protest followed.

ACC contends that the Corps improperly rejected its bid as materially unbalanced since it offered the lowest overall cost to the government. The protester also states that despite its higher price for item No. 0005, an advance payment is impossible under the IFB because item No. 0005 required the carport construction and site work for the 291 units of Area 6 to be performed concurrently with the assigned units' interior work. ACC further estimates that since the 150 carports and associated site work for Area 9 would take close to the full contract period to complete, the agency's progress and total payments would reflect the full value of the combination of services provided under the contract. The protester concludes that the agency has shown, at best, that there is only a possibility (versus a certainty) of an advance payment under ACC's pricing structure which does not constitute a proper basis for rejection of its bid as materially balanced.

The agency responds that completion of the carport construction and associated site work requirements early in the contract period is not prohibited by the IFB and that it is indeed probable that this exterior work (line item No. 0005) will be substantially completed prior to the completion of the interior work for the family housing units. Specifically, the agency reports that, based on its scheduling estimates, since all 150 carport spaces of Area 9 are independent of any interior work, these carports could reasonably be completed within 180 days, if not sooner. The agency states that this would cause the government to pay approximately \$1,622,140 (in progress payments based upon

³An advance payment occurs when a payment under a contract to provide services or deliver an article is more than the value of the services already provided or the article already delivered. F&E Erection Co., B-234927, June 19, 1989, 89-1 CPD ¶ 573, citing Edgewater Mach. & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 CPD ¶ 630; see Federal Acquisition Regulation § 15.814(b)(2) (FAC 90-7).

ACC's inflated price for line item No. 0005) for the Area 9 work (approximately 34 percent of the line item No. 0005 requirement), which is close to the government estimate of \$1,809,871 for all 441 carports in both Housing Areas 6 and 9 (i.e., the full contract requirement of line item No. 0005). The agency reports that based upon ACC's bidding structure (i.e., its high carport construction and site work price), the protester would clearly be motivated to complete that work early in the contract period and that this is permissible under the IFB.

A bid which is materially unbalanced must be rejected as nonresponsive. The Ryan Co., B-238932, June 13, 1990, 90-1 CPD ¶ 557; Howell Constr., Inc., 66 Comp. Gen. 413 (1987), 87-1 CPD ¶ 455. A bid is materially unbalanced if the bid is based on nominal prices for some items and enhanced prices for other items (i.e., it is mathematically unbalanced) and there is a reasonable doubt that an award based on the bid will result in the lowest cost to the government. This form of material unbalancing does not appear to be the case here.

The Federal Acquisition Regulation (FAR) § 15.814(b)(2) (FAC 90-7) also calls for rejection of a bid if it is mathematically unbalanced, and if the bid is grossly unbalanced such that its acceptance would be tantamount to allowing an advance payment, even if the bid represents the lowest cost to the government. This FAR provision is based on two concerns. First, where during performance the bidder will receive progress payments based on inflated prices for bid items for which it will receive payment early in the performance of the contract, there is a legitimate concern that the bidder has received an improper competitive advantage. By accepting such a grossly unbalanced bid, the bidder is afforded an advantage not enjoyed by its competitors for the award--the use of interest-free money. Second, by receiving early payments which exceed the value of work performed, the contractor will have a reduced incentive to properly complete the work.

We agree with the agency that the ACC bid was grossly unbalanced and properly rejected. The record shows that ACC's bid of \$4,771,000 for line item No. 0005 (the construction of 441 carports and related site work) was grossly inflated--the other bids were close to the government estimate of \$1,809,871--and that ACC's bid of \$4,000 per unit for the interior work would not, as the agency found, even cover the material costs for that work (compared to the other bids and corresponding government estimates which were between almost three and six times that amount). ACC has offered no explanation for these gross differences in the bid prices. Our review of the record, including the terms of the IFB, shows that it is reasonably

probable that all of the carport construction and associated site work can be performed, and that at least a substantial amount of that work will be performed, before the completion of the contract's interior unit renovations. For Housing Area 6, contrary to the protester's view, the IFB does not provide for construction of each carport concurrent with each unit's interior renovation, since multiple carports are to be constructed upon the assignment of an associated single unit. Thus, for Housing Area 6, more carports will be completed prior to the renovation of unit interiors. Moreover, all Housing Area 9 carports are to be constructed independent of the IFB's interior renovation requirements.


Here, as in F&E Erection Co., the solicitation requires bidders to submit individual prices for separate line items and this breakdown is incorporated into the contract. Under the progress payment contract provision at FAR § 52.232-5, incorporated into the solicitation, the contractor will receive progress payments based on the amount it bid for the particular line item. Since ACC's bid price for carports under line item No. 0005 is far in excess of the value of the work to be performed under that requirement, the progress payments based on this line item will not reflect the value of the work performed.

Due to the gross unbalancing of the protester's bid, we think the agency properly rejected ACC's bid under FAR

'As to ACC's contention that it would be impossible for the agency not to assign fully vacated buildings to the contractor (so that the interior work and exterior carport work can be accomplished simultaneously) because it is uneconomical not to do so and because certain required work--e.g., moving utility poles to new locations--would inconvenience any remaining tenants in a building, we note that the IFB informed bidders that less than full buildings could be turned over to the contractor. Since the agency did not know at the time of the IFB's issuance, and still does not know, when tenants will actually vacate all of the units, we cannot agree with the protester's allegation of "impossibility." In response to the protester's alternate allegation that contracting personnel at the Corps recently told ACC that three buildings were currently empty and would be immediately assigned to the contractor for interior renovation in Housing Area 6, which the agency refutes, the Corps states that at the time of issuance of the IFB and the rejection of ACC's bid, it had no such information or expectation that other than individual units would be assigned as they were vacated. We agree that the number and location of current vacancies is not material to a determination of the propriety of the agency's rejection of ACC's bid months earlier under varying vacancy conditions.

§ 15.814(b)(2). Here, under the solicitation's terms, which allow and anticipate substantial completion of the carport and site work requirements independent of the total interior renovation requirements, award to ACC would result in early inflated progress payments. Award based on ACC's bidding structure grants ACC the use of interest-free money, a competitive advantage not enjoyed by other bidders who submitted bids which more reasonably reflected the cost of each line item. We also think the agency has a legitimate concern that an award on the basis of ACC's grossly unbalanced bid, which contains significantly below cost line item prices for the interior work, poses an unacceptable risk in performance since it provides a disincentive to the protester to promptly and properly complete that work.

The protest is denied.


for James F. Hinchman
General Counsel