



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Jasper Painting Service, Inc.

File: B-251092

Date: March 4, 1993

Karl Dix, Jr., Esq., Smith, Currie & Hancock, for the protester.

John W. Oxendine, Esq., Oxendine & Associates, for AEC Corporation, an interested party.

Lester Edelman, Esq., and Nikki Koulizakis, Esq., Department of the Army, for the agency.

Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that offer must be rejected as unbalanced and front-loaded is denied where offer does not include any significantly enhanced pricing and price for mobilization and demobilization did not constitute an advance payment.

2. Allegation that more than 50 percent of awardee's cost of contract performance incurred for personnel will be expended for subcontractor employees is dismissed, since it concerns a matter of responsibility; General Accounting Office will not review a contracting agency's affirmative responsibility determination absent a showing of fraud or bad faith or that definitive responsibility criteria in the solicitation were not met.

DECISION

Jasper Painting Service, Inc. protests the award of a contract to AEC Corporation under solicitation No. DACW17-93-A-0003, issued by the Army Corps of Engineers for debris removal services. Jasper contends that AEC's offer was materially unbalanced and so front-loaded by its price for mobilization/demobilization that award to it results in an improper advance payment.

We deny the protest in part and dismiss it in part.

This competitive section 8(a) solicitation was issued under the Small Business Act, 15 U.S.C. § 637(a) (Supp. III 1991), originally as an invitation for bids (IFB) on October 3, 1992, for removal of debris (trees, brush, etc.) generated by Hurricane Andrew, at the Bill Baggs Cape Florida State Recreation Area, Key Biscayne, Florida. The successful contractor was to supply all labor, plant equipment, machines, and tools necessary to remove the debris. "Removal" consisted of loading burnable/chippable debris; hauling that debris to a designated location on site; and chipping/burning and spreading/stockpiling the debris in accordance with the solicitation and the direction of the contracting officer's representative.

Five firms submitted bids by the October 6 bid opening date. The Corps found all bids to be unreasonably high, canceled the IFB, and converted the procurement to a negotiated one. Six firms, including AEC and Jasper, submitted offers by the October 10 closing date.

The basic work under the converted solicitation was divided into seven contract line items (CLIN): (CLIN 000) mobilization/demobilization; (CLINs 001-005) Phases I through V, representing clean up of various sections of the recreation area; and (CLIN 006) chipping and stockpiling/spreading woody debris from Dade County.¹ Each CLIN called for a unit and extended price and all but CLIN 006 represented a firm, fixed price. CLIN 006 was based on an estimated quantity of 250,000 cubic yards of debris.

Jasper's primary complaint concerns AEC's price for CLIN 000. AEC's price for this CLIN was \$436,000 while Jasper's price was \$180,000.² Other prices for CLIN 000 ranged from \$97,822 to \$209,000 and the government estimate was \$150,800. While its price for CLIN 000 was highest, AEC submitted the low aggregate offer of \$3,359,500. Jasper submitted the next low aggregate offer of \$4,159,873. The government estimate for CLINs 000-006 was \$5,278,400. No negotiations were conducted and award was based on price and price-related factors.

On October 16, the Corps awarded a contract to AEC for CLINs 000-006. After receiving notice of award, Jasper filed this

¹The solicitation also required offers for 18 optional line items representing alternative performance requirements for CLINs 000-006.

²According to the solicitation, up to 60 percent of this price was to be paid as mobilization costs at the time mobilization was completed. The remaining 40 percent was to be paid when demobilization was completed.

protest. A stay of performance was issued, but was subsequently overridden based upon the agency's finding of urgent and compelling circumstances significantly affecting the interests of the United States. Contract performance has been completed.

Jasper argues that AEC's offer should have been rejected because it is both unbalanced and front-loaded such that an award to AEC would result in an improper advance payment. Jasper's position is that AEC's \$436,000 price for CLIN 000 far exceeds the value of mobilization and demobilization.³

Before an offer can be rejected as unbalanced, it must be found both mathematically and materially unbalanced. An offer 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 mathematically unbalanced offer is considered materially unbalanced and cannot be accepted where there is a reasonable doubt that acceptance of the offer will result in the lowest overall cost to the government. Star Brite Constr. Co., B-244122, Aug. 20, 1991, 91-2 CPD ¶ 173. From our review of the record, we find AEC's offer was neither mathematically nor materially unbalanced.

Because start-up costs properly may be factored into an offer, a relatively front-loaded price does not automatically establish that an offer is unbalanced. However, the start-up costs may not carry a disproportionate share of the total contract price. See Westbrook Indus., Inc., 71 Comp. Gen. 139 (1992), 92-1 CPD ¶ 30. Here, the Corps requested offerors to price mobilization/demobilization under CLIN 000 instead of spreading these costs over all CLINs. As noted above, only 60 percent of this CLIN is payable early on for mobilization costs. The remaining 40 percent, for demobilization costs, is not a front-loaded cost since it is not payable until contract performance is completed. While AEC's price for CLIN 000 was higher than that of the other offerors and the

³Jasper also argued that the Corps failed to provide preaward notice to allow Jasper to file a timely size protest with the Small Business Administration. The Corps responded in its report that since this was a competitive 8(a) procurement, and the eligibility of an 8(a) firm may not be challenged or protested by a competitor, the agency was not required to provide any preaward notice. See Federal Acquisition Regulation (FAR) § 19.805-2(e). In its comments to the agency report, Jasper provided no response to the Corps's explanation. Accordingly, this protest ground was abandoned. See Reach All, Inc., B-229772, Mar. 15, 1988, 88-1 CPD ¶ 267.

government estimate, the record establishes that this price was neither "enhanced" nor carried a disproportionate share of the contract price.

Mobilization was to be accomplished within 48 hours of receiving the notice to proceed. It entailed clearing and debris removal from the designated area (approximately 1 acre) and establishment of Corps and contractor offices (including water, electricity, and sewage). Work on other CLINs was to begin immediately thereafter. Accordingly, all necessary equipment was to be on site within 48 hours. While the other Florida contractors submitting offers apparently had all their heavy equipment within the state, virtually all of AEC's heavy equipment was in North Carolina and Alabama. Delivery charges for the equipment alone totaled more than \$38,000. Other mobilization costs would include the cost of bonds, labor, and other expenses to prepare and set up the offices, overhead, and profit.

Although Jasper challenges the realism of AEC's price for mobilization, it provides nothing more than speculation in support of its argument. AEC had uniquely high mobilization costs and, in fact, the Corps ensured that AEC did not receive any extra funds. In accordance with the solicitation, the Corps monitored the invoices submitted by AEC, which invoices established the actual mobilization costs of just over \$250,000 that the Corps paid. This figure is consistent with AEC's price for mobilization under CLIN 000.

In view of the mobilization requirements and AEC's circumstances, we find that AEC's price was not mathematically unbalanced. Since AEC's offer is not mathematically unbalanced, it cannot be rejected as unbalanced. See ONSERV Corp., supra. We also note that there are no plausible circumstances here in which award to AEC would not result in the lowest overall cost to the government.

The protester separately argues that the offer should be rejected because it allows an improper advance payment. The Federal Acquisition Regulation (FAR) § 15.814(b)(2) (EAC 90-7) calls for rejection of an offer if it is mathematically unbalanced, and if the offer is grossly unbalanced such that its acceptance would be tantamount to allowing an advance payment, even if the offer represents the lowest cost to the government. This FAR provision is based on two concerns. First, where during performance the offeror will receive progress payments based on inflated prices for items for which it will receive payment early in the performance of the contract, there is a legitimate concern that the offeror has received an improper competitive advantage. By accepting such a grossly

unbalanced offer, the offeror 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.

As explained above, here we do not find AEC's offer to be mathematically unbalanced because the mobilization price is reasonably related to AEC's actual costs and, thus, is not enhanced. Accordingly, the same conclusion must be reached with respect to the question of a possible advance payment as was reached with respect to the question of material unbalancing. That is, as there is no basis to find the offer mathematically unbalanced, acceptance of the offer cannot be considered to constitute the allowance of an advance payment as proscribed by FAR § 15.814(b)(2).

The protester also alleges that AEC intended to perform the contract using subcontractor employees for more than 50 percent of the labor in violation of FAR § 52.219-14, included in the solicitation as clause I.64. This clause, entitled, "Limitations on Subcontracting," provides in pertinent part that the contractor agrees that at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the contractor. By signing its offer, AEC agreed to comply with this provision. Whether AEC was able to perform the contract in accordance with the terms of the solicitation is a matter of responsibility which we will not review absent a showing that the determination was made fraudulently or in bad faith or that definitive responsibility criteria were not met. Murdaugh Constr. Co., Inc., B-245133, Aug. 14, 1991, 91-2 CPD ¶ 150.

Jasper argues that the determination was made in bad faith because the contracting officer failed to investigate AEC's compliance. As evidence, Jasper observes that at the prework meeting, two subcontractor employees signed the attendance list as representing AEC and that AEC's subcontractor would furnish all heavy equipment for use on this contract. These allegations do not provide any evidence of bad faith on the part of the contracting officer. The minutes of the prework meeting state that AEC would perform 56 percent of the work while its subcontractor would perform the other 44 percent. Further, the two subcontractor employees who attended the meeting merely signed the attendance sheet under the preprinted heading of "representing." Inasmuch as they attended on behalf of the prime contractor, we find nothing significant in their identification of the prime contractor in that column. Under these circumstances, there is no basis for our Office to question the Corps's affirmative determination of responsibility.

Further, whether the contractor in fact complied with the subcontracting provision during performance is a matter of contract administration which is the primary responsibility of the agency and not for consideration by our Office. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1) (1992); Murdaugh Constr. Co., Inc., supra.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel