

Calhoun 149297



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

1052105

Decision

Matter of: Ostrom Painting & Sandblasting, Inc.--
Entitlement to Costs

File: B-250827.2

Date: May 18, 1993

Michael P. Byrne, Esq., Lane & Waterman, for the protester.
John Pettit, Esq., Department of the Air Force, for the
agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

SUMMARY

Protester is entitled to recover the costs of filing and pursuing its protest where the agency failed to promptly and adequately investigate protest allegation until after the protester undertook the time and expense to file comments on the agency's report, and did not take corrective action until 79 working days after the protest was filed, despite having access, at the time the protest was filed, to the evidence which supported the validity of the protest.

DECISION

Ostrom Painting & Sandblasting, Inc. requests that we declare it entitled to reimbursement of the reasonable costs of filing and pursuing its protest against the award of a contract to EVCO National, Inc. under invitation for bids (IFB) No. F49642-92-BA114, issued by the Department of the Air Force for protective coatings maintenance services at Andrews Air Force Base, Maryland. Ostrom contends that the Air Force unduly delayed taking corrective action in response to the protest.

We conclude that Ostrom is entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees.

The solicitation was originally issued as IFB No. F49642-91-B0076 in March 1992, and contemplated a requirements type contract. At bid opening, Ostrom was the low bidder and EVCO was second-low; EVCO filed a protest in our Office claiming that Ostrom's bid was materially unbalanced. In the course of investigating EVCO's contention, the contracting officer discovered that the estimated quantities listed

in the IFB did not reflect the actual government requirements. As a result, on April 29 the contracting officer canceled the solicitation and EVCO withdrew its protest. The agency states that it corrected the estimated quantities to more realistically represent the government's requirements; on August 12, it issued the instant solicitation, which also contemplated a requirements type contract. At the September 11 bid opening, EVCO was the low bidder with a bid of \$3,448,700; Ostrom was second-low with a bid of \$3,525,518. After reviewing EVCO's bid, Ostrom expressed concern to the contracting officer that EVCO's bid was materially unbalanced, but was assured that, in light of the prior protest and Ostrom's concern, the low bid would be scrutinized for material unbalancing. The agency analyzed EVCO's bid and determined that it was not materially unbalanced; award then was made to EVCO.

On October 8, Ostrom filed a protest at our Office, contending that EVCO's bid was both mathematically and materially unbalanced. As Ostrom noted, a bid is materially unbalanced when there is a reasonable doubt that acceptance of a mathematically unbalanced bid--that is, a bid that contains understated prices for some items and overstated prices for other items--will result in the lowest overall cost to the government. OMSERV Corp., B-237691, Mar. 13, 1990, 90-1 CPD ¶ 271. In cases involving requirements contracts, as here, consideration of the materiality of unbalancing begins with a determination of the accuracy of the government's estimate of the anticipated quantities being priced; since an unbalanced bid will only become less advantageous than it appears if the government ultimately requires a greater quantity of the overpriced items and/or a lesser quantity of the underpriced items. Robertson & Penn, Inc., B-234082, Apr. 10, 1989, 89-1 CPD ¶ 365. Where bidders submit unbalanced bids and the estimated quantities are materially defective, such that it is not clear that award to the low bidder would result in the lowest cost to the government, the solicitation generally should be canceled and reissued. Edward B. Friel, Inc., et al., 55 Comp. Gen. 488 (1975), 75-2 CPD ¶ 333; Robertson & Penn, Inc., supra.

Here, according to Ostrom, the government estimates for various contract line items (CLIN) were overstated, resulting in a reasonable doubt that the award made to EVCO would result in the lowest overall cost to the government. Ostrom specifically argued in its protest that the estimate for CLIN 0004FC, one-coat finish painting of residential galvanized or non-ferrous surfaces, was overstated as compared to historical information contained in the IFB.

In accordance with 4 C.F.R. § 21.3(c) (1993), the Air Force submitted its report on the protest to our Office on November 13, 25 working days from receipt of Ostrom's

protest. The Air Force reported that it could not determine with any degree of certainty whether EVCO's bid was mathematically unbalanced, but that even if it were, it would have to be materially unbalanced to be nonresponsive. In this regard, the agency stated that the only factor that would point with any certainty to material unbalancing would be the accuracy of the government's estimated quantities. The agency provided a statement from the Base Civil Engineering staff concerning the methodology used to develop the estimated quantities; that statement reasserts the validity of the estimates. The agency reported that the contracting officer verified the historical usage rates from paid invoices on file in the contracting office, and, based on discussions with Civil Engineering personnel and an examination of their log books and planning documents, the contracting officer believed the estimated quantities were a reasonable and accurate depiction of the government's requirements. Consequently, the Air Force reported that EVCO's bid was not materially unbalanced and that Ostrom's protest should be denied.

Ostrom filed comments on December 4 and again challenged the accuracy of the government's estimated quantities. Specifically, Ostrom stated that, as to CLIN 0004FC, the IFB proposed that the contractor paint 900,000 square feet of this type of surface each year for the base year and all 4 option years. Ostrom explained that this would amount to a total of 4.5 million square feet of painting in the area covered; Ostrom queried whether this amount of total space even existed, based on the master plan of the base. Ostrom also stated that the estimated quantity for CLIN 0004FC was inconsistent with the estimated quantities for other CLINs.

On January 21, 1993, our Office asked the agency to provide us with additional information concerning the IFB's estimated quantities. Among other things, we asked for a more detailed explanation of the distinctions between the estimates found in the original IFB and the current one; the historical information that served as a basis for the estimated quantities; and an explanation of the base's 5-year painting cycle.

On February 4, after 79 working days had passed from the date the protest was filed with our Office, and more than 2-1/2 months after it filed its report, the Air Force informed us of its decision to terminate EVCO's contract for the convenience of the government and to cancel the solicitation. This decision was the result of further review in response to our January 21 request for additional information concerning the estimated quantities. The review confirmed that the solicitation contained "gross and misleading information to bidders on estimated quantities of work to be performed." Specifically, all quantities in the residential

galvanized or non-ferrous category, which included CLIN 0004FC,¹ were grossly overestimated by a factor of 10. The agency stated that while historical data indicated an annual requirement of approximately 160,000 square feet, the IFB requirements were for more than 1,700,000 square feet; this error alone accounted for more than 15 percent of the low bidder's total first year cost. The agency explained that while the quantities were intended to include hangar painting for only the base year, this requirement was included in each of the 4 option years as well; further, hangar painting should not be in the residential category. After receipt of this information from the agency, on February 22 we dismissed Ostrom's protest as academic.

Ostrom contends that it is entitled to recover the costs of filing and pursuing the protest under section 21.6(e) of our Bid Protest Regulations. Under that provision, we may declare a protester entitled to costs, including reasonable attorneys' fees, where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. The Air Force submitted no comments in response to Ostrom's request for costs.

In our view, the Air Force's corrective action was at least in part in response to Ostrom's clearly meretorious protest. Ostrom's protest specifically questioned the accuracy of the estimated quantities, in particular CLIN 0004FC, and the agency's corrective action was taken specifically because those estimated quantities, including CLIN 0004FC, were inaccurate. The determinative question, then, is whether the corrective action was prompt under the circumstances. In deciding this question, we will review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. See David Weisberg--Entitlement to Costs, 71 Comp. Gen. 498 (1992), 92-2 CPD ¶ 91; Locus Sys., Inc.--Entitlement to Costs, 71 Comp. Gen. 243 (1992), 92-1 CPD ¶ 177. As explained below, we find that the Air Force unduly delayed taking corrective action.

¹The CLINs in the residential galvanized or non-ferrous category were:

CLINs 0004FB, FC, FD, FE (Base Year)
CLINs 0032FB, FC, FD, FE (Option Year 1)
CLINs 0060FB, FC, FD, FE (Option Year 2)
CLINs 0088FB, FC, FD, FE (Option Year 3)
CLINs 0116FB, FC, FD, FE (Option Year 4)

In view of the agency's strong confirmation of its estimates and how they were derived in its response to the protest, we do not believe that the Air Force adequately investigated the merits of Ostrom's protest allegations on this issue when the protest was first filed. The agency has not explained how it determined the estimated quantities to be accurate based on its initial review, while much later recognizing that they were "grossly overestimated" based on a second review. The additional information requested in our letter of January 21 raised no new issues concerning the estimated quantities; rather, it requested more detailed information on those figures. Further, Ostrom's comments clearly contended that the estimated quantities for CLIN 0004FC were overstated, yet the agency waited an additional 2-1/2 months, until February 4, to take corrective action; this was 11 working days before a decision from our Office was due. Had the Air Force promptly undertaken an adequate investigation before filing its report on the protest, the merits of Ostrom's contention would have been clear at the outset. See Carl Zeiss, Inc.--Entitlement to Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274.

Under the circumstances, we find that the agency's failure to promptly and adequately inquire into this protest allegation until after Ostrom undertook the time and expense of filing comments on the protest, and until 79 working days after the protest was initially filed, frustrated the intent of the Competition in Contracting Act of 1984, 31 U.S.C. § 3554 et seq. (1988), by impeding the economic and expeditious resolution of the protest. See David Weisberg, supra. This is precisely the type of agency inaction and delay that section 21.6(e) was intended to address, and thus warrants the payment of protest costs to Ostrom. Id.

Accordingly, we find that Ostrom is entitled to recover the costs of filing and pursuing the protest, including reasonable attorneys' fees. Ostrom should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the agency within 60 working days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).



Acting Comptroller General
of the United States