



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cottrell Engineering Corporation

File: B-252891; B-252891.2

Date: August 2, 1993

Terence Murphy, Esq., and James H. Shoemaker, Jr., Esq., Kaufman & Canoles, for the protester.
Carole C. Todd, C & G Excavating, Inc., an interested party.
Lester Edelman, Esq., Department of the Army, for the agency.

Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where the apparent low bid is not unreasonably overstated and the proposed awardee's price for mobilization and demobilization does not constitute an advance payment, the bid need not be rejected as unbalanced and front-loaded.

DECISION

Cottrell Engineering Corporation protests the proposed award of a contract to C & G Excavating, Inc. under invitation for bids (IFB) No. DACW61-93-B-0036, issued by the United States Army Corps of Engineers for maintenance dredging in Delaware at Roosevelt Inlet and at the entrance channels of the Mispillion River and the Murderkill River. Cottrell argues that C & G's bid is unbalanced and so front-loaded based on its price for mobilization and demobilization that an award to C & G will result in an improper advance payment.

We deny the protest.

The IFB, issued as a total small business set-aside on February 19, 1993, provided for the award of a firm, fixed-price contract containing estimated quantities for dredging and disposal operations. The IFB schedule contained the following four contract line items (CLIN) and estimated quantities: CLIN 0001--mobilization and demobilization (1 job); CLIN 0002--removal and satisfactory disposal of material--Mispillion River (15,491 cubic yards for a contract project depth of 6 feet); CLIN 0003--removal and

satisfactory disposal of material--Roosevelt Inlet (30,368 cubic yards for a contract project depth of 10 feet); and CLIN 0004--removal and satisfactory disposal of material--Murderkill River (37,286 cubic yards for a contract project depth of 7 feet).

The estimated quantities for CLINs 0002 through 0004 were based on data from previous dredging projects at the three sites. For CLINs 0002 through 0004, the IFB contained a breakdown of the total estimated quantities of material to be removed within specified limits to reach the respective contract project depth at each site and included overdepth, the material allowed to be removed 1 foot below the required contract project depth because dredging is incapable of precise performance. Firms were required to enter on the schedule a unit price and an extended price for each CLIN, and a total bid price for CLINs 0001 through 0004. The contractor will be paid for the cubic yards of material actually removed, up to the maximum estimated quantities for each site as shown on the schedule, subject to a variation in estimated quantities clause in the IFB if the actual quantity of material required to satisfy contract performance varies more than 15 percent above or below the stated estimated quantities. Upon completion of the work, the government, at its expense, will take soundings or sweepings of the project sites to ensure that the required contract project depths have been obtained. The IFB requires that the contractor remove additional material should the soundings or sweepings show that the required contract project depths have not been obtained.

Four firms submitted bids by the March 23 bid opening time. C & G was the apparent low bidder and Cottrell was the apparent second low bidder. For CLIN 0001, mobilization and demobilization, C & G submitted a price of \$450,861 and Cottrell submitted a price of \$294,150. The government estimate for CLIN 0001 was \$250,250. The IFB states that 60 percent of the price for CLIN 0001 will be paid upon completion of the contractor's mobilization at the project site and the remaining 40 percent will be paid upon completion of demobilization.¹ For CLINs 0001 through

¹The IFB further states that the contracting officer may require the contractor to furnish cost data to justify its mobilization and demobilization costs if the contracting officer believes that 60 percent and 40 percent of the contractor's price for mobilization and demobilization does not bear a reasonable relation to the cost of the work. The IFB states that the failure of the contractor to satisfactorily justify its price will result in the

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0004, C & G's total bid price was \$594,635 and Cottrell's total bid price was \$634,464. The government estimate for CLINs 0001 through 0004 was \$806,696. Pending our decision, the agency proposes to award the contract to C & G, the low, responsive and responsible bidder.

Cottrell argues that C & G's bid should be rejected as nonresponsive because it is unbalanced and front-loaded such that an award to C & G will result in an improper advance payment. Cottrell primarily believes that C & G's price of \$450,861 for CLIN 0001 far exceeds the value of mobilization and demobilization.

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. Jasper Painting Serv., Inc., B-251092, Mar. 4, 1993, 93-1 CPD ¶ 204. 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. Id. Based on our review of the record, we conclude that C & G's bid is neither mathematically nor materially unbalanced.

Because start-up costs properly may be factored into a bid, a relatively front-loaded price does not automatically establish that a bid is unbalanced. However, the start-up costs may not carry a disproportionate share of the total contract price. Id. Here, the agency requested firms to price mobilization and demobilization under CLIN 0001 instead of spreading these costs over all CLINs.² As stated above, only 60 percent of CLIN 0001 is payable early

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contracting officer's determination of the actual costs for mobilization and demobilization, a determination which is not appealable, and payment of the remainder in the final payment under the contract.

²Underlying Cottrell's protest is its concern that lump-sum pricing of mobilization and demobilization encourages unbalanced bidding and that payment of demobilization costs under this contract may duplicate mobilization costs under another contract. To the extent Cottrell protests the wisdom of lump-sum pricing of mobilization and demobilization and the manner in which a contractor is reimbursed for demobilization under the terms of this IFB, its protest concerns an alleged solicitation impropriety which was not timely raised prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1993).

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 C & G's price for CLIN 0001 is higher than Cottrell's price and the government estimate,³ the record shows that this price was neither "enhanced" nor carried a disproportionate share of the contract price.

The IFB states that the contractor is required to begin actual dredging within 15 calendar days of receiving the notice to proceed and to complete the entire project, including all dredging and disposal operations, no later than 90 calendar days after receiving the notice to proceed. Accordingly, all necessary equipment is required to be at the entrance channel of the Mispillion River, the first site to be dredged, within 15 calendar days. As defined in the IFB, a firm's mobilization costs could include all costs for operations accomplished prior to commencement of the actual dredging operations, including the transfer of the dredge, attendant plant, and equipment to the site; initial pipe installation; and other incidentals (for example, insurance, labor costs, overhead, and bonds). In calculating the government estimate, the agency used 200 miles as the generic basis for computing mobilization costs. The government estimate did not reflect a firm's unique mobilization requirements. For example, C & G's dredge is located in New Hampshire and will be transported in the Atlantic Ocean approximately 450 miles to Delaware. C & G has pipeline in New Hampshire which will be trucked to Delaware and an additional amount of pipeline in Maryland which will be towed approximately 210 miles to Delaware. Additionally, C & G will incur higher insurance costs than reflected in the government estimate because its dredge will be transported in the ocean from New Hampshire to Delaware. Because of C & G's uniquely higher mobilization costs, the agency adjusted the government estimate and determined that C & G's price for mobilization is not unreasonably overstated.

Although Cottrell challenges the realism of C & G's price for mobilization by asserting that C & G has failed to substantiate this price by submitting invoices, its argument is misplaced. As stated above, the government estimate was generic and did not take into consideration each firm's unique mobilization requirements. Specifically, a firm like C & G which will transport its dredge and other equipment a

³Cottrell's comparison of C & G's price for CLIN 0001 with its own price for CLIN 0001 and the government estimate does not by itself establish that C & G's price for CLIN 0001 is enhanced or that C & G's bid is unbalanced. See, e.g., David Boland, Inc., B-244817, Oct. 29, 1991, 91-2 CPD ¶ 397.

distance significantly in excess of 200 miles, the generic basis for the government estimate, could reasonably be expected to incur higher mobilization costs than those projected in the government estimate. Moreover, there was no requirement in the IFB that firms submit invoices to substantiate their pre-performance price for mobilization. Unlike Jasper Painting Serv., Inc., supra, where contract performance was completed and invoices were available for the agency to monitor the contractor's actual mobilization costs, in this case, there has been no contract performance and invoices obviously are not available.

Since we have no basis to question the agency's position that C & G's price for mobilization is not unreasonably overstated given C & G's unique mobilization requirements, we conclude that C & G's bid is not mathematically unbalanced. Since C & G's bid is not mathematically unbalanced, it cannot be rejected as unbalanced. Id. We also point out that there are no plausible circumstances in which an award to C & G will not result in the lowest overall cost to the government. Cottrell does not challenge the accuracy of the agency's estimated quantities for dredging, CLINs 0002 through 0004. The agency states that the estimated quantities are historically accurate based on data from previous dredging projects at the project sites. In this regard, the agency states it has no basis to believe that less than the estimated quantities will be dredged in light of the fact that in the past, approximately 103 percent of the estimated quantities have actually been dredged. Therefore, even if C & G's price for mobilization is enhanced and its apparent low bid is mathematically unbalanced, because the IFB's estimated quantities are reasonably accurate representations of the agency's anticipated actual dredging needs, C & G's bid is not materially unbalanced as there is no reasonable basis for viewing the bid as representing other than the lowest cost to the government.⁴ See, e.g., Earth Eng'g and Sciences,

⁴The record shows that in 1991, C & G dredged the Murderkill River and the agency determined C & G's performance to be satisfactory. Contrary to Cottrell's assertion, C & G's past performance, if it is even relevant here in determining whether C & G's bid will result in the lowest overall cost to the government, suggests that C & G will satisfactorily perform this contract. To the extent Cottrell speculates that C & G cannot perform the contract at the dredging prices bid, this allegation concerns the agency's affirmative determination of C & G's responsibility, a matter which we will not review since there has been no showing of possible fraud or bad faith or that definitive responsibility criteria have been misapplied. 4 C.F.R.

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Inc., B-248219, July 30, 1992, 92-2 CPD ¶ 72; Duramed Homecare, 71 Comp. Gen. 193 (1992), 92-1 CPD ¶ 126.

Cottrell also argues that C & G's bid should be rejected because it allows an improper advance payment. Federal Acquisition Regulation (FAR) § 15.814(b)(2) 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 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.

As explained above, in this case, we do not believe C & G's bid is mathematically unbalanced because C & G's price for mobilization appears to be reasonably related to C & G's actual costs for mobilization 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 bid mathematically unbalanced, acceptance of the bid cannot be considered to constitute the allowance of an advance payment as proscribed by FAR § 15.814(b)(2).⁵

⁴(...continued)

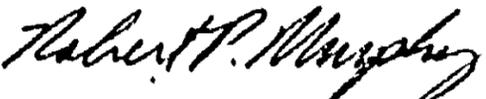
§ 21.3(m)(5); Omega One Co., B-251316.2; B-251316.3, Mar. 22, 1993, 93-1 CPD ¶ 254. To the extent Cottrell speculates that C & G will not properly perform the dredging portion of the contract, this allegation concerning C & G's actual performance involves a matter of contract administration which is within the jurisdiction of the contracting agency and for review by a cognizant board of contract appeals and the United States Claims Court, not our Office. 4 C.F.R. § 21.3(m)(1); Specialty Plastics Prods., Inc., B-237545, Feb. 26, 1990, 90-1 CPD ¶ 228.

⁵The IFB also included a provision designed to minimize the risk of any advance payment. The provision, Defense Federal Acquisition Regulation Supplement § 252.236-7004, provides that the contracting officer may require the contractor to furnish cost data to justify the mobilization and

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Finally, Cottrell argues that C & G's bid should be rejected as nonresponsive based on various representations in its bid. The agency responded to Cottrell's allegation in the agency report. In its comments to the agency report, Cottrell specifically "decline[d] to submit comments" on this matter. Where, as here, an agency specifically addresses an issue raised by a protester in its protest and the protester fails to rebut the agency's response, we consider the protester to have abandoned the issue. Mitchell Constr. Co., Inc., B-245884; B-245884.2, Jan. 17, 1992, 92-1 CPD ¶ 92; Electronic Sys. USA, Inc., B-246110, Feb. 14, 1992, 92-1 CPD ¶ 190. Therefore, we deem this matter abandoned and we will not address it.

The protest is denied.


for James F. Hinchman
General Counsel

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demobilization portion of the bid if the contracting officer believes that the lump-sum price for this line item does not bear a reasonable relation to the cost of the work. If the contractor cannot justify its price, the contracting officer can limit payment of mobilization and demobilization to actual costs and postpone payment of the remainder until final payment under the contract.