



Comptroller General
of the United States

14169

Washington, D.C. 20548

Decision

Matter of: Blue Dot Energy Company

File: B-253390

Date: September 7, 1993

Timothy S. Kerr, Esq., Starfield & Payne, for the protester. Joseph M. Goldstein, Esq., Col. Scott L. Silliman, Lt. Col. Jack W. Smith, and Captain Paula J. Demuth, Department of the Air Force, for the agency. Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly canceled invitation for bids set aside for small disadvantaged businesses (SDB) in accordance with Defense Federal Acquisition Regulation Supplement implementing the SDB set-aside program where low bid exceeded the fair market price by more than 10 percent.

DECISION

Blue Dot Energy Company, a small disadvantaged business (SDB), protests the decision of the Department of the Air Force to cancel invitation for bids (IFB) No. F25600-93-B-0004, issued as a total SDB set-aside, and to resolicit the requirement on an unrestricted basis. The IFB sought bids to install central air conditioners and replace furnaces in 430 military family housing units at Offutt Air Force Base (AFB), Nebraska. Blue Dot, the low bidder, contends that the contracting officer's decision to reject its bid as unreasonably priced after determining that the bid exceeded the fair market price (FMP), and cancel the solicitation, was unreasonable because the agency's FMP was flawed and, thus, could not properly form the basis for canceling the IFB.

We deny the protest.

BACKGROUND

The IFB was issued on December 31, 1992, and contemplated the award of a fixed-price contract for the required work. The schedule required bidders to submit a price for removing and disposing of asbestos, contract line item number (CLIN) 0001; a price for all materials and labor required to

install the air conditioners and replace the furnaces in accordance with specifications attached to the IFB, CLIN 0002; and a total for both line items. Award was to be made to the responsible bidder offering the lowest total price for CLINs 0001 and 0002.

The agency received seven bids by the February 12, 1993, extended bid opening date, ranging from \$2,119,395 to \$3,182,000; Blue Dot's bid of \$2,283,100 was second low. Following bid opening, Blue Dot challenged the SDB status of the low bidder, Keweenaw-K Joint Venture, which the contracting officer forwarded to the Small Business Administration (SBA); SBA subsequently dismissed that challenge. By letter to the SBA dated April 19, however, the contracting officer challenged Keweenaw-K's size status,¹ and on April 21, Blue Dot reinstated its challenge to Keweenaw-K's SDB status. On May 6, SBA determined that Keweenaw-K was not a small business eligible for award; Blue Dot thus became the apparent low bidder under the IFB.

While SBA was considering the size and SDB status challenges against Keweenaw-K, the contracting officer noticed a marked disparity between the price of a recently awarded contract for similar work, described as phase I of a larger renovation project, and the prices bid under the IFB, phase II of the project. (The phase I contract was awarded just 5 months before bid opening under the IFB, and called for installation of air conditioners and replacement of furnaces in 608 military family housing units at Offutt AFB.) This disparity led the agency to reexamine the original FMP for phase II (\$3,467,836), which had been developed by the architectural and engineering firm that prepared the specifications for the project before bid opening under phase I. After this reexamination, the agency revised the FMP for phase II to \$1,597,450, based on an average unit price of \$3,715 for 430 units. Relying on Defense Federal Acquisition Regulation Supplement (DFARS) § 219.506(a), which prohibits the award of a contract under an SDB set-aside where the low SDB bid exceeds the FMP by more than 10 percent, the contracting officer, after determining that Blue Dot's price exceeded the FMP by approximately 43 percent, canceled the IFB and resolicited the requirement on an unrestricted basis.

¹The IFB was subject to standard industrial classification code 1711 (plumbing, heating and air conditioning), for which the allowable maximum annual receipts to be considered a small concern is \$7 million. See Federal Acquisition Regulation (FAR) § 19.102.

After reviewing the protester's comments on the agency report on the protest, the Air Force reconsidered its FMP determination. The agency states that rather than \$1,597,450, as previously calculated, the FMP should be adjusted upward to \$1,762,205, to account for various costs attributable to the differences between phases I and II not previously considered. Since Blue Dot's bid nevertheless exceeds the revised FMP by approximately 30 percent, the agency asserts, the DFARS prohibits award to Blue Dot under the IFB, rendering the cancellation proper.

Blue Dot's protest challenging the agency's decision to cancel the IFB is based on its contention that the FMP developed for phase II is defective and thus cannot be relied upon to determine whether award to Blue Dot will result in a price not exceeding the FMP by more than 10 percent. In response, the agency maintains that the revised FMP is reasonable and is supported by a comparison with the award price for phase I.² The contracting officer states that except for the number of housing units and varying types of equipment involved, the specifications for phases I and II are the same. The contracting officer adds that although the phase I contract was ultimately competed on an unrestricted basis, the awardee was a small business.

The protester argues that there are significant differences between phases I and II, particularly with respect to the scope of work required under phase II, which were not accounted for in the agency's revised FMP determination. Blue Dot argues that without taking into consideration those distinctions in the scope of work, the agency cannot rely on a simple comparison with the average unit price under the phase I contract to conclude that the agency's revised FMP for phase II is reasonable. Blue Dot maintains that the agency should instead rely on the estimate initially developed for phase II of the project of \$3,467,836. Since its bid is well below that figure, Blue Dot argues, the agency should have made award to the firm under the IFB.

DISCUSSION

The Department of Defense (DOD) established the SDB preference program primarily under authority of section 1207 of the National Defense Authorization Act of 1987, 10 U.S.C. § 2301 note (1988). The Act left to DOD's discretion the promulgation of regulations and procedures necessary to achieve the Act's stated objectives of awarding 5 percent of

²The award price for the phase I contract is \$1,856,980, or an average unit price of \$3,054. As noted above, the revised FMP for phase II is \$1,762,205, or an average unit price of \$4,098.

the dollar value of DOD's contracts to SDB concerns. G&D Foods, Inc., B-233511 et al., Feb. 7, 1989, 89-1 CPD ¶ 125. Under the regulations implementing the Act, the entire amount of an individual acquisition is required to be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns; (2) award will be made at a price not exceeding the FMP by more than 10 percent; and (3) scientific and/or technical talent consistent with the demands of the acquisition will be offered. DFARS § 219.502-2-70(a) (previously DFARS § 219.502-72(a)); Kato Corp., 69 Comp. Gen. 374 (1990), 90-1 CPD ¶ 354.³

When a solicitation is issued as an SDB set-aside, contracting officers are specifically directed to withdraw the set-aside where the expectation listed in DFARS § 219.502-2-70(a) is not realized. Specifically, a contract may not be awarded under an SDB set-aside where the low SDB bid exceeds the FMP by more than 10 percent; in such cases, the contracting officer is directed to initiate a withdrawal of the set-aside. See DFARS § 219.506(a); Superior Eng'g and Elecs. Co., Inc., B-231772, Aug. 31, 1988, 88-2 CPD ¶ 197, aff'd, B-231772.2, Oct. 3, 1988, 88-2 CPD ¶ 307. Based on the record before us, we find that the contracting officer properly determined that Blue Dot's low bid exceeded the FMP by more than 10 percent, requiring withdrawal of the SDB set-aside. Since all other higher-priced bids received were submitted by SDB concerns, the agency's decision to cancel the IFB and resolicit the requirement on an unrestricted basis is unobjectionable.

Agency's FMP determination

The original government estimate (\$3,467,836) was developed for the procurement by the architectural and engineering firm that prepared the specifications for the project prior to bid opening for phase I. Copies of the spreadsheets completed by that firm are included in the record. For each different type of equipment called for by the IFB,⁴ the

³Under this program, DOD contracts directly with the SDB concerns rather than subcontracting through SBA under the program established under section 8(a) of the Small Business Act. See DFARS § 219.201. Both the DOD and SBA programs use an estimated FMP as a benchmark of price reasonableness. See FAR §§ 19.806, 19.807.

⁴Phase II calls for various quantities of 20 different types of equipment, for a total of 430 units to be installed or replaced. Of that total, 20 units are categorized as "updraft" units, while the remaining units are "downdraft."

spreadsheets list material and labor involved in the installation or replacement of that equipment type, divided into 16 general divisions or categories of work involved (e.g., site work/demolition, concrete work, mechanical, electrical, etc.), corresponding to the work described in the specifications. Each category is further subdivided into line items representing specific tasks or equipment required. For example, division 2, site work/demolition, lists among other items, removing the existing furnace; removing fibrous insulation material; removing and returning grill; removing thermostat; and removing smoke detector. For each line item, the spreadsheets show quantities involved, and estimated costs for materials and labor. For each type of equipment, the spreadsheets show subtotal prices for architectural, mechanical, electrical items, overhead adjustments, and a grand total price.

As a basis for its revised FMP, the agency reviewed the figures in the original spreadsheets provided by the architectural firm. The record shows that for each type of equipment, the agency's engineer revised those original figures by annotating the estimated costs shown for each line item. The engineer states that the revised figures reflect adjustments to labor costs based on an anticipated learning curve resulting from repetitive work and that material costs were adjusted to reflect volume discounts not considered previously. He based the adjustments on his 27 years of experience as both a private contractor and as a government engineer.

For example, during a telephone conference held between the parties, the engineer pointed out that for one type of equipment (A2D1-1, of which there are 17 units involved), under division 2, "remove supply registers," the original estimate lists \$6 as the unit labor cost, for a total of \$102 for that line item (17 units x \$6). According to the engineer, those original figures apparently assume that task requires approximately 20 minutes to complete. The engineer explained, however, that the line item involves a relatively simple task--removing a screw--generally requiring no more than 5 minutes to perform for each unit. Assuming a \$20 hourly wage rate, the engineer asserts, a more reasonable price, rounded to the nearest dollar, is \$2/unit, for a total of \$34 for the 17 units. The engineer has provided us with several other examples illustrating how he made similar adjustments for all line items which he considered unreasonably priced.

Based on the engineer's estimates, the agency calculated average unit prices of \$2,058 for the 20 "updraft" units and \$4,000 for the 410 "downdraft" units, and a weighted average unit price of \$3,903. The contracting officer then multiplied that figure by the total number of housing units

(\$3,903 x 430) to arrive at a total of \$1,678,290. That figure then was adjusted upwards by 5 percent to account for reduced completion time per unit and for increased construction costs, to derive a total revised FMP of \$1,762,205.

The protester takes issue with the engineer's revised estimates. Blue Dot argues that the 50 to 80 percent discounts for labor and materials the engineer applied to the original estimate developed by the architectural and engineering firm are unreasonable. For instance, the protester maintains that the engineer's reductions to the unit price for concrete based on volume discounts fails to consider the additional costs attributable to the time necessary for transporting, hand-mixing, and pouring the concrete at each site. The protester also maintains that the engineer's methodology fails to consider potential obstacles that laborers will be forced to overcome before starting a particular job, such as occupied housing units. Such circumstances, the protester argues, will affect the work schedule and job sequence, and require that the contractor take additional protective measures, all of which increase unit costs, but which the engineer failed to consider in his calculations.

Nothing in the record supports the protester's assumptions that the original estimate developed by the architectural and engineering firm, from which the agency's engineer discounted labor and material prices, reflects a reasonable FMP. The spreadsheets do not show how the original prices were derived; there is no narrative explaining the architect's rationale for those figures; and they were developed prior to bid opening for the phase I competition, precluding the architects from analyzing those prices before developing the estimates for phase II. As such, there is no reason to assume that the original estimates are based on reliable, accurate, and current information. See Logics, Inc., B-237412, Feb. 13, 1990, 90-1 CPD ¶ 189. The agency has offered a reasonable explanation of why it considered the original government estimate to be flawed, and thus could not have relied on that figure as its FMP. See Government Contracting Resources, B-243915, Aug. 15, 1991, 91-2 CPD ¶ 153.

The protester's argument that the engineer failed to consider unexpected obstacles such as tenants in occupied units is also without merit. It is undisputed that the work that will potentially be most disruptive under the IFB involves replacing "downdraft" furnaces with "updraft" furnaces. The agency states, however, that all of those housing units will be unoccupied, thus eliminating any unanticipated "obstacles" due to occupancy. Moreover, the record shows that the engineer added 5 percent to the total price for all units to account for unanticipated contingencies. The protester has

not shown that such upward adjustment to the engineer's estimates is unreasonable.

CONCLUSION

Our Office will not question an agency's FMP determination unless it is not reasonably based or there is a showing that agency officials engaged in bad faith. Cherokee Enters., Inc., B-228330, Dec. 4, 1987, 87-2 CPD ¶ 552. Here, the protester does not allege, and there is no evidence in the record, that agency officials engaged in bad faith, and in our view, the agency's FMP is reasonably based. Since the contracting officer reasonably determined that Blue Dot's low bid exceeded the FMP by more than 10 percent, we see nothing improper in the cancellation of the IFB and withdrawal of the requirement from the SDB set-aside program. See DFARS § 219.506; Sach Sinha & Assocs., Inc., B-236911, Jan. 12, 1990, 90-1 CPD ¶ 50.

The protest is denied.


for James F. Hinchman
General Counsel