



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

1147311

Decision

Matter of: MKB Constructors, J.V.

File: B-255278

Date: January 31, 1994

James F. Nagle, Esq., Oles, Morrison & Rinker, for the protester.

Lester Edelman, Esq., and Phillip E. Santerre, Esq., Department of the Army, for the agency.

Richard P. Burkard, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the awardee's proposal was materially unbalanced is untimely when filed after bid opening where protester's allegation is based upon alleged inaccuracies in the government work estimate which the protester knew of prior to bid opening.

DECISION

MKB Constructors, J.V. protests the award of a contract to Alaska Petroleum under invitation for bids (IFB) No. DACA85-93-B-0049, issued by the Department of the Army, Corps of Engineers for excavation and construction services at Galena Airport, Alaska. MKB contends that the awardee's bid should have been rejected because it was materially unbalanced.

We dismiss the protest as untimely.

The IFB contained three line items. Line items 1 and 2 requested lump sum prices for the work described therein, while line item 3 requested prices to "[h]aul, stockpile and replace contaminated soil" based upon two quantity estimates. Under subitem 3(a) bidders were to insert unit and total prices for 100 cubic yards of soil, and under subitem 3(b) bidders were to insert unit and total prices for "all over 100" cubic yards of soil.¹ The estimated

¹The total price, according to the IFB, was merely an extension of the unit price based upon the government estimate provided in the IFB. The IFB provided, in this regard, that "[i]n case of variation between the unit price

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quantity for subitem 3(a) was 100 cubic yards and for subitem 3(b) 400 cubic yards. The IFB also provided that, with respect to line item 3, payment would be based on the contract unit price and the actual number of cubic yards of soil separated, stockpiled, and replaced.

The protester states that after reviewing the specifications and drawings attached to the IFB, the firm concluded that the amount of contaminated soil to be excavated under line item 3 was not 500 cubic yards, but approximately 6,472 cubic yards. On September 23, 1 day before bid opening, MKB telephoned the agency's project manager to inform him of this discrepancy. The agency, however, declined to amend the solicitation or postpone the bid opening and "advised MKB to bid the job as the solicitation states." The agency received three bids, including Alaska Petroleum's low bid and MKB's second low bid. On September 30, the agency awarded the contract to Alaska Petroleum.

MKB alleges that Alaska Petroleum's bid was mathematically and materially unbalanced. It argues that agencies are required to provide realistic estimated total quantities in solicitations. MKB states that the "accuracy of the solicitation estimates is critical" and argues that the estimates contained in the IFB here were faulty and unsupported. Moreover, the protester asserts that Alaska Petroleum structured its bid to take advantage of the faulty estimates by submitting an inflated price for line item 3. MKB contends that although Alaska Petroleum's overall bid was approximately \$283,000 lower than MKB's, when Alaska Petroleum's unit price for the excavation of the contaminated soils over 100 cubic yards is multiplied by the amount of excavation which must actually take place, the awardee's bid is over \$3,000,000 higher.

While the agency defends the accuracy of the IFB's estimates, it also argues that the protest is untimely since MKB believed the government estimate to be inaccurate before bid opening but did not file a protest at that time. The agency cites a decision of our office involving similar facts to support its argument that the protest is untimely. Allstate Van & Storage, Inc., B-247463, May 22, 1992, 92-1 CPD ¶ 465. In that case, we found a protest that an awardee's offer was unbalanced was untimely where, as here, the protester knew of the alleged inaccuracies in the solicitation's quantity estimate but did not protest the matter with either the contracting agency or our Office until after the award of the contract to a competing firm.

¹(...continued)
and the extension, the unit price will be considered to be the bid."

Id. Accordingly, the agency concludes that the protest should be dismissed as untimely. We agree.

While an offer that is mathematically and materially unbalanced may not be accepted for award, Duramed Homecare, 71 Comp. Gen. 193 (1992), 92-1 CPD ¶ 126, the protester itself recognizes that here, the "essential question" is whether the agency's estimates are sufficiently accurate to permit a determination that the awardee's bid will result in the lowest cost to the government. In other words, the key to the determination of whether MKB's bid is unbalanced is the validity of the estimate of the quantity of soil contained in subitem 3(b) of the IFB, since the bid price and award decision were based on that estimate (multiplied by the unit price bid). Unless the estimate is inaccurate, Alaska Petroleum's low bid is not impermissibly unbalanced. See District Moving & Storage, Inc., et al., B-240321 et al., Nov. 7, 1990, 90-2 CPD ¶ 373.

Although MKB clearly believed that the government's estimate contained in the IFB was severely flawed prior to bid opening, it did not protest the matter to the Army or our Office until after the submission of bids and contract award. Our Bid Protest Regulations require that protests based upon alleged improprieties apparent on the face of a solicitation be filed prior to the time set for bid opening. 4 C.F.R. § 21.2(a)(1) (1993). This requirement is intended to provide parties with a fair opportunity to present their cases and to enable the contracting agency to take effective corrective action when it is most practicable and where circumstances warrant. Allstate Van & Storage, Inc., supra. Since the protester knew of the alleged defect in the government's estimate in the IFB, its argument that the awardee's proposal was materially unbalanced due to the defective estimate is untimely.

We are not persuaded by MKB's argument that its basis of protest is the agency's acceptance of a materially unbalanced bid and not merely the allegedly defective government estimate. As stated, our Office recently addressed this issue in Allstate Van & Storage, Inc., supra, which the agency relied upon in its administrative report. MKB's comments on the report did not address that decision, which in our view, is controlling here. In Allstate Van & Storage, Inc., we pointed out that our Office generally will only consider allegations of defective solicitation estimates in the context of material unbalancing cases where there is no clear evidence that a protester was on notice of the alleged defect in the solicitation. Here, as stated, MKB knew of the alleged defect in the estimate prior to bid opening.

Finally, the protester argues that it acted properly by orally bringing the matter to the attention of the agency's project manager prior to bid opening and by following his advice. We see no reason why the protester could not have filed a formal protest at that time, particularly given the magnitude of the perceived discrepancy in the estimate and the agency's apparent unwillingness to consider the protester's views. To the extent that the protester suggests that following the agency's advice preserved its rights to have a subsequently filed protest considered by our Office, MKB's reliance on erroneous advice does not excuse its untimely filing. Thresholds Unlimited, Inc.--Recon., B-248817.3, Aug. 12, 1992, 92-2 CPD ¶ 102. In sum, notwithstanding the agency's advice, the appropriate time to file any objections to the IRB estimate was prior to bid opening.

The protest is dismissed.



John Van Schaik
Acting Assistant General Counsel