Comptroller General
of the United States

Washington, D.C. 20548

359125

Decision

Matter of: Baxter Healthcare Corporation; Abbott Laboratories--Reconsideration

File: B-253455.3; B-253455.4

Date: May 10, 1994

Justin D. Simon, Esq., Dickstein, Shapiro & Morin, for Baxter Healthcare Corporation; and Robert T. Ebert, Esq., Crowell & Moring, for Abbott Laboratories, the protesters.
Paul F. Khoury, Esq., and David A. Vogel, Esq., Wiley, Rein & Fielding, for McGaw, Inc., an interested party.
William E. Thomas, Jr., Esq., Leonard J. Malamud, Esq., and Maura C. Brown, Esq., Department of Veterans Affairs, for the agency.
Daniel I. Gordon, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A protester is an interested party to challenge the responsiveness of an awardee's bid despite the protester having been suspended at the time of award where the protester was not suspended until after bid opening and its suspension was lifted prior to the filing of the protest.

2. Protest alleging material unbalancing is denied where the awardee's bid cannot be materially unbalanced, since it was effectively the only eligible bid at the time of award.

DECISION

Baxter Healthcare Corporation protests the award of a contract to McGaw, Inc. under invitation for bids (IFB) No. M5-1-94, issued by the Department of Veterans Affairs (VA). Abbott Laboratories requests that we reconsider our January 6, 1994, dismissal of its protest of the same award. Baxter and Abbott both contend that the awardee's bid should have been rejected as materially unbalanced.

We deny Baxter's protest and affirm our dismissal of Abbott's protest.

The VA issued the IFB on March 5, 1993. As amended, the IFB sought bids for a requirements contract to provide 167 different intravenous solutions and related products for

the VA and the Department of Defense. The IFB anticipated award of a 1-year contract with four 1-year options. Award was to be made to the responsible bidder offering the lowest aggregate price for the base year and 4 option years.

The IFB incorporated by reference Federal Acquisition Regulation (FAR) § 52.214-10, which states, in relevant part, as follows:

> "The Government may reject a bid as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment."

At bid opening on May 27, there were bids from McGaw, Baxter, and Abbott Laboratories. Baxter's and Abbott's bids contained virtually level pricing for the base period and option years. For McGaw, the prices for all but nine line items (for which prices remained stable) dropped 5 percent between the base period and the first option year; 8 percent between the first and second option years; 11 percent between the second and third option years; and 14.5 percent between the third and fourth option years.

On June 10, Baxter filed a protest with the contracting officer, alleging that McGaw's bid should be rejected as materially unbalanced. Because McGaw's cumulative price would fall below Baxter's only in the last option year, Baxter argued that there was reasonable doubt that McGaw's bid would represent the low cost to the government. On July 23, the contracting officer granted Baxter's protest, which led McGaw to file its own protest, denying that its bid was unbalanced, with the contracting officer.

On August 12, the VA suspended Baxter, for reasons unrelated to this procurement, from competing for or being awarded contracts with any agency within the executive branch of the federal government. On the basis of that suspension, the contracting officer advised Baxter on August 16 that she had determined that Baxter was not a responsible contractor and its bid was therefore excluded from consideration for award under the IFB. Negotiations between Baxter and the VA regarding the lifting of the suspension continued through the autumn.

In September, the contracting officer rejected Abbott's prices as unreasonably high. She also confirmed her earlier finding that McGaw's bid was materially unbalanced, and she therefore denied McGaw's protest. McGaw then appealed this decision to the Deputy Assistant Secretary for Acquisition and Materiel Management. In November, VA auditors visited a McGaw facility to review cost and pricing data related to McGaw's bid. That review led the Deputy Assistant Secretary, and eventually the contracting officer, to determine that McGaw's bid was not mathematically or materially unbalanced.

On December 21, in light of that determination, the contracting officer awarded the contract to McGaw. At the time of award, which the agency states occurred at 10:15 a.m. Central Standard Time (CST), the contracting officer apparently did not know that the Deputy Assistant Secretary was about to sign an agreement lifting Baxter's suspension. That agreement, which had been finalized during the course of the preceding weeks, was signed by the Deputy Assistant Secretary on December 21 at 12:30 p.m. CST. Baxter then protested to our Office, raising the same unbalanced bidding allegation that had been considered in the agency-level protests.

The VA argues that Baxter is not an interested party for the purpose of filing and pursuing a protest with our Office because its suspension had not been lifted at the time that award was made to McGaw. We disagree. An interested party for the purpose of filing a protest is an actual or prospective bidder whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. 4 C.F.R. § 21.0(a) (1993). A company whose suspension was lifted after award but prior to the filing of its protest may be an interested party for the purpose of filing a protest. Tracor Applied Sciences, Inc., B-221230.2 et al., Feb. 24, 1986, 86-1 CPD ¶ 189. In this regard, the critical fact here is that the result of sustaining the protest against the award to McGaw would be that Baxter would apparently be in line for award. Accordingly, we conclude that Baxter is an interested party and we therefore deny the agency's request that the protest be dismissed.

In order for a bid to be rejected as impermissibly unbalanced, there must be a finding both that the bid is mathematically unbalanced and that the unbalancing is material. FAR § 15.814. Material unbalancing necessarily involves at least one other bid, because the key question in material unbalancing is whether there is a reasonable doubt that the unbalanced bid--rather than a competing bid--will ultimately represent the lower cost to the government. Id. Where there is no eligible competing bid

with prices lower than the awardee's for any period of performance, there can be no material unbalancing, since there is no doubt that the awardee's pricing structure represents the low cost to the government, even if it is assumed to be mathematically unbalanced, regardless of whether some, all, or none of the options are exercised. See Litton Sys., Inc., B-239123.3, Oct. 10, 1990, 90-2 CPD ¶ 276.

Baxter contends that its bid should be considered in assessing the unbalancing in McGaw's bid. We disagree. At the time of award on the morning of December 21, Baxter was still properly considered nonresponsible since it was suspended at that time, and its bid was therefore not eligible for award.[1] Accordingly, Baxter's bid was not relevant to an assessment of the materiality of any mathematical unbalancing in McGaw's bid.

At the time of award, then, the only bids of responsible bidders were McGaw's and Abbott's; Abbott's prices, however, had been rejected as unreasonably high. Effectively, therefore, there was no eligible bid other than McGaw's, and there was thus no bid which might cost the government less than McGaw's. For that reason, the agency's determination that McGaw's bid was not materially unbalanced is not objectionable.[2] We therefore deny Baxter's protest.

It was because Abbott's bid prices are higher than McGaw's for every period of performance that we dismissed Abbott's protest. Abbott cannot show material unbalancing, since there is no doubt that the awardee's pricing structure, even

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[1]While Baxter disputes both the time of award and the date on which the suspension was lifted, our review of the record supports the agency's position that award was made during the morning of December 21 and that the VA did not sign the agreement lifting the suspension until that afternoon.

[2]Baxter and Abbott also contend that McGaw's bid was materially unbalanced because it was "so unbalanced as to be tantamount to allowing an advance payment." FAR § 15.814. It is true that a bid may be rejected on this basis, notwithstanding the absence of doubt about its representing the lowest overall cost to the government. However, a bid may be unacceptable for this reason only where it is grossly front-loaded. See, e.g., Edgewater Mach. & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 CPD ¶ 630 (first article unit prices approximately 400 times higher than production unit prices). The mathematical unbalancing in McGaw's bid, where base year prices were 44 percent higher than prices for the final option year, was not of sufficient magnitude to constitute gross front-loading.

if it is assumed to be mathematically unbalanced, will cost the government less than Abbott's under all reasonably foreseeable circumstances. Because McGaw's bid prices were lower than Abbott's for every period of performance, Abbott cannot plausibly show any reason to doubt that McGaw's bid would result in a lower overall cost to the government than Abbott's.[3] Accordingly, Abbott has not stated a valid basis of protest, even if, as it claims in its request for reconsideration, its initial protest should be interpreted as asserting that McGaw's prices are overstated in relation to McGaw's costs. We therefore affirm the dismissal of Abbott's protest.

Robert P. Murphy
Acting General Counsel

[3]Furthermore, Abbott is not an interested party to argue that a third company's bid might be lower than McGaw's if not all the options are exercised. Hampton Roads Leasing, Inc., B-250645.2, Feb. 1, 1993, 93-1 CPD ¶ 486.