



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mid-South Dredging Co.

File: B-256219; B-256219.2

Date: May 25, 1994

S. Leo Arnold, Esq., Ashley, Ashley & Arnold, for the protester.

Roger L. Pentzien, for Pentzien, Inc., an interested party.

Bettye Y. Chionuma, Esq., James Daugherty, Esq., and Danielle M. Conway, Esq., Department of the Army, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that dredging solicitation improperly lacks quantity estimates and unreasonably requires bidders to submit unit prices which are then multiplied by an adjustment factor to determine actual payment for different dredging conditions is denied where the agency is unable to prepare a reliable estimate of the type of work to be encountered (but provides several years' worth of historical information), and where the protester fails to show any risk associated with the use of multipliers because the agency's numbers will adequately compensate bidders if, and when, they encounter more difficult dredging conditions.

2. Contention that solicitation provision requiring contractors to prepare their bids using equipment that will be able to navigate under certain fast-moving water conditions anticipates unsafe dredge operation is a matter beyond the General Accounting Office's bid protest jurisdiction.

DECISION

Mid-South Dredging Company protests the terms of invitation for bids (IFB) No. DACW03-94-B-0003, issued by the Army Corps of Engineers for station dredging of navigation miles 0 to 444.8 of the McClellan-Kerr Arkansas River Navigation System in Arkansas and Oklahoma. Mid-South contends that the IFB's pricing schedule fails to allow full and open competition on the various types of dredging required, and argues that the solicitation's requirement that the dredge operate under certain fast-moving water conditions is

overbroad and inconsistent with the safe operation of dredges.

We deny the protest.

This protest focuses on an attempt by the Corps of Engineers to change the pricing structure for dredging contracts for the McClellan-Kerr Navigation System, which is comprised of the Arkansas, White, and Verdigris rivers in the states of Arkansas and Oklahoma. Since the two main variables affecting the difficulty of dredging this river system are the length of the pipeline from the dredge to the disposal site and the height of the pipeline at the disposal site (as measured from the water's surface), called lift--and since longer pipeline lengths and greater lift reduce dredge efficiency and increase the cost of the work--past dredging solicitations for this river system estimated the number of stations that would fall within each of three categories of pipeline length and lift, described below. These solicitations permitted bidders to price each condition separately.

Over the past 9 years of awarding two contracts per year to dredge the McClellan-Kerr Navigation System, approximately 77 percent of the dredging involved pumping dredged material between 500 to 3,500 feet from the dredge to the disposal site, with between 0 and 25 feet of lift. The remaining dredging involved the following conditions: 16 percent of the effort involved pumping lengths between 3,500 and 6,000 feet with between 25 and 60 feet of lift; while 7 percent of the effort involved pumping lengths between 6,000 and 7,000 feet with between 60 and 90 feet of lift. However, dredging conditions requiring longer pipeline lengths and lifts did not occur every year. The need for pipeline lengths between 3,500 and 6,000 feet with between 25 and 60 feet of lift occurred in 7 of the last 9 years. The need for pipeline lengths between 6,000 and 7,000 feet with between 60 and 90 feet of lift occurred in 2 of the last 9 years.

The IFB here, issued on December 15, 1993, anticipates award of a fixed-price contract for station dredging of between 400 and 800 stations. The IFB defines a dredging station as 100 feet of advance up the river in a cut that averages 150 feet in width and 3 feet in depth. The pricing schedule requires bidders to enter a unit price per dredging station for the first 400 stations at line item 0002AA, and a unit price for stations in excess of 400 at line item 0002AB. However, the solicitation anticipates the application of multipliers to each bidder's unit price to determine actual payment based on the difficulty of the dredging work

encountered. Thus, the bidder's unit price will be multiplied by the number shown below, depending upon the actual pipeline length and lift required.

<u>Pipeline Length</u> <u>(in feet)</u>	<u>LIFT</u>		
	<u>0-25 Ft.</u>	<u>25-60 Ft.</u>	<u>60-90 Ft.</u>
500 to 3,500	1.00	1.12	1.24
3,500 to 6,000	1.13	1.25	1.37
6,000 to 7,000	1.21	1.33	1.45

In addition to the new payment schedule, the Corps of Engineers also decided that it would no longer need to award two dredging contracts annually, but could instead maintain the navigability of this river system by awarding only one contract each year. Since the McClellan-Kerr system includes approximately 500 miles of rivers--and thus the contractor could be required to move its dredge substantial distances between dredging sites--the Corps decided to impose a contractual requirement setting forth the river conditions under which bidders' dredges would be required to operate. After written exchanges and meetings with dredging industry representatives, including Mid-South, this clause, as amended, states:

"The Contractor is to be able to move the dredge and attendant plant to the next assigned location in river flows up to 100,000 cfs [cubic feet per second] on the Arkansas River portion of the navigation system, N.M. [nautical mile] 19.0 to N.M. 395.0, in river flows up to 15,000 cfs on the Verdigris River portion of the navigation system, N.M. 395.0 to N.M. 444.8, and in current velocities of 10 feet per second on the White River portion of the navigation system, N.M. 0.0 to N.M. 9.8."¹

After the Corps refused to make further changes to the clause above, or to change the payment table, Mid-South filed this protest challenging the terms of the solicitation.

¹The clause defines river flows as the "mean daily flow within the reach in question as determined by the Little Rock District Reservoir Control Section." Current velocities are defined as "the surface velocity acting on the specific piece of equipment in question as measured with a current meter by Government survey. . . ."

THE PAYMENT TABLE

Mid-South argues that the payment table incorporated into this IFB precludes full and open competition because there are no quantity estimates for the various dredging conditions. Mid-South also argues that the payment table favors bidders with smaller dredges, and claims that the multipliers used in the payment table are irrational.

While the Corps acknowledges that its solicitation does not include estimates for the different dredging conditions, it states that its solicitation instead includes a firm estimate of the number of stations to be dredged--i.e., 400. Thus, according to the Corps, since the number of stations to be dredged is firm--and since offerors have the opportunity to submit a different price for the stations dredged in excess of that number--the Corps has met any requirement to include an estimate of the dredging work. In addition, the Corps contends that it cannot prepare a reliable estimate for the quantities of higher lift and longer line work. According to the Corps, its payment table eliminates the need for such estimates by linking the price for the more difficult work to each bidder's price for the easiest work. In the Corps's view, the solicitation's structure thus reduces the risk of unbalanced bidding.²

As a preliminary matter, we note that the Corps has often attempted to use solicitation pricing structures to address problems--usually problems with changed conditions and faulty estimates--arising from the unpredictable nature of

²The Corps explains that although it can provide historical information about differing dredging conditions, it cannot estimate in any given year whether certain dredging conditions will occur. Thus, while the Corps can show that for the 7 of 9 previous years none of the most difficult dredging work was encountered, since 1988 its dredging solicitations nonetheless have included an estimate for such work. According to the Corps, bidders were able to use this information to "game" their pricing. For example, if the solicitation included work that was unlikely to occur, but which was nonetheless factored into the price competition, bidders could submit relatively higher prices for the easier (and most likely encountered) dredging work, and relatively lower prices for the more difficult (and less likely encountered) work. While this strategy might result in a lower blended price in order to prevail in a competition, the Corps ran the risk of paying a premium if all of the work fell into the easiest (and most likely encountered) category.

dredging work. See Southern Dredging Co., Inc., B-229786.2, July 7, 1988, 88-2 CPD ¶ 17; Gibson & Cushman Dredging Corp., B-194902, Feb. 12, 1980, 80-1 CPD ¶ 122. Since the determination of the government's minimum needs and the best method of accommodating them is primarily the responsibility of the procuring agency, and since the agency's procurement officials are the ones most familiar with the conditions under which the services have been provided in the past, our Office will not question an agency's determination of its minimum needs--or the best method to meet them--unless there is a clear showing that the determination has no reasonable basis. Id.

With respect to Mid-South's contention that the solicitation here must include estimates of the number of stations for which each dredging condition will be encountered, we disagree. As the Corps contends, the solicitation contains a firm estimate of the number of stations to be dredged, and defines the amount of dredging included in a station--i.e., 100 feet of advance up the river in a cut 150 feet wide and 3 feet deep. Beyond stating the number of stations, the Corps explains that it is unable to provide meaningful estimates of the type of dredging that will be encountered in any given year, and has attempted to design a fair method of compensating bidders for the more difficult dredging work if, and when, it is encountered.³ In such circumstances, our Office has concluded that an agency may properly draft a solicitation that does not include estimates for the various types of work involved. Bean Dredging Corp., B-239952, Oct. 12, 1990, 90-2 CPD ¶ 286.

In our view, there is little difference between the solicitation here and the one reviewed by our Office in Bean Dredging Corp., supra, where we concluded that an agency could properly solicit for offers to dredge 580 stations without including estimates for the quantities of material to be dredged. As in Bean, the Corps has included a minimum number of 400 stations in its solicitation. If fewer than 400 stations require dredging, the Corps would be required to treat the situation as a variation in its stated minimum quantity.⁴ As was also the case in Bean, the Corps has provided potential bidders with

³Even while arguing that the solicitation must include estimates of various dredging conditions, Mid-South admits in its comments on the agency report that "[t]he plain truth is that the mix of the various conditions of dredging performed in any given year remains unpredictable."

⁴See IFB §§ F.1, F.3, and the estimated quantities clause set forth at the end of the pricing schedule added by amendment No. 0003.

information describing the agency's historical experience with its dredging effort--a significant portion of which occurred with Mid-South as the contractor--but has concluded that the estimates are not sufficiently reliable to be included in the solicitation.⁵

While Mid-South contends that the solicitation's lack of estimates places too much risk on the contractor, Mid-South admits that the pricing scheme will not cause bidders to lose money on the more difficult work. Mid-South's arguments, in fact, suggest that the table prepared by the agency will protect bidders from risk of financial loss because the table is overly generous with respect to compensating contractors for the more difficult work.

Mid-South's complaint instead arises from the fact that the table does not permit Mid-South to bid competitively on the more difficult work, for which Mid-South contends it is uniquely able to offer a competitive price. The simple answer to that concern is that even if Mid-South's 20-inch dredge is more efficient at performing the more difficult work that has historically been a minority of the effort in dredging this river system, the agency is not required to structure its procurement to accommodate Mid-South's larger equipment.⁶ See Custom Envt'l Serv., Inc., 70 Comp. Gen. 184 (1991), 91-1 CPD ¶ 38 (protest denied where protester admitted that an agency's estimates were generally

⁵Mid-South contends that the unreliability of the historical information here is an aspect of this procurement that distinguishes it from Bean. Our review indicates that the differences between the two procurements are not as significant as Mid-South suggests. While we characterized the historical information in Bean as "relatively consistent," the Corps expressly disclaimed any warranty with respect to the accuracy of the historical information and stated that the information could not provide a basis for a claim against the agency. Thus, in Bean as in this case, although the historical information was a useful general reference point, it was not reliable enough to be used as the basis for estimates in the solicitations.

⁶Mid-South, in support of its contention that the work here is unpredictable, noted that in 1988 the most difficult work comprised approximately 40 percent of the dredging effort. In our view, Mid-South's argument about this anomalous year supports our conclusion that the agency has reasonably attempted to structure a price competition for the majority of its dredging work, while preserving a mechanism for fully compensating contractors for the unpredictable minority of the work.

reasonable, but did not reflect the capabilities and costs related to a larger, more capital intensive firm).

As to Mid-South's challenge to the numbers used in the agency's table of multipliers, we point out that first there is no bar to agencies using generalized predetermined cost estimates for portions of solicited work. See Laidlaw Envt'l Servs. (GS), Inc., B-245587; B-245587.2, Jan. 16, 1992, 92-1 CPD ¶ 82, recon. denied, B-245587.4, June 12, 1992, 92-1 CPD ¶ 513. As we stated in Laidlaw, such an approach is an appropriate response to situations where an agency is attempting to counter perceived attempts to submit unbalanced bids. Id. Also, even though the agency admits that it calculated the numbers in its table assuming the use of an 18-inch dredge, Mid-South has not shown that the Corps was in any way attempting to structure the solicitation to put Mid-South at a disadvantage. In this regard, we note that Mid-South's own dredge was only recently modified to increase its capacity from 18 to 20 inches, and the Corps's estimate appears to have been calculated based on its experience with the size of dredges that performed this work in the past. Further, as stated above, Mid-South does not argue that the numbers used preclude it from participating, or expose it to a risk of loss, but only that the numbers fail to reflect the savings that Mid-South could offer the Corps on the more difficult work with its larger dredge.

Mid-South also argues that in several instances the multiplier chosen for the payment table is not appropriate for the dredging condition represented. In response to this claim, the Corps produced extensive support for its calculations wherein the Corps's technical expert concurred in at least two of the protesters's criticisms of the agency's calculations. We have reviewed these materials, including the protester's detailed reply, and conclude that the protester has not shown that the table as a whole is unreasonable. Most of the differences between the Corps and Mid-South are matters of disagreement on the interpretation of technical data, and even where the Corps concedes that a certain approach may be less than optimal--for example, the Corps's technical expert concedes that the protester's expert has "a valid concern [as] to why the payment factors increase more with lift (less equivalent pipe length) than with actual pipe length"--the table treats all offerors equally. Accordingly, since the multipliers are applied equally to each bidder's price, we fail to see how relatively minor flaws in one or two areas of the table harm Mid-South vis-a-vis other bidders.

MOVEMENT OF DREDGES UNDER CERTAIN WATER CONDITIONS

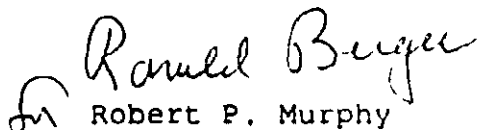
Mid-South argues that the clause setting forth the requirement that dredges be able to move under certain fast-moving water conditions is overbroad and inconsistent with the safe operation of dredges. With respect to this contention, Mid-South does not allege that the requirement overstates the agency's minimum needs, or somehow hinders competition, but instead argues that the clause will subject dredge operators to agency demands that dredges be moved to new dredging locations under conditions which, in Mid-South's view, are unsafe.

In response, the Corps explains that it drafted this provision to address the fact that it has moved from awarding two contracts each year to one contract annually. Thus, the Corps contends that it needs to ensure that bidders will offer to perform this contract using equipment of sufficient size and weight to permit operation under fast-moving water conditions, or, in the alternative, to ensure that bidders will be prepared to supplement their equipment with towboats to assure safe movement.

To the extent that Mid-South is arguing that the clause requires the use of equipment larger than necessary to meet the agency's minimum needs, it has not provided sufficient information to allow our Office to reach such a conclusion. On the other hand, to the extent that it is arguing that the clause will require that dredge operators navigate under unsafe conditions--which is clearly the main thrust of the protester's submissions--it raises a matter outside our bid protest jurisdiction under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551 et seq. (1988), which

authorizes us to consider whether the statutory requirements for full and open competition are met in awarding federal contracts.⁷

The protest is denied.


Robert P. Murphy
Acting General Counsel

⁷Although we recognize that the Corps may have valid reasons for specifying the river conditions under which dredges must operate--and we recognize further that this clause may be necessary to inform less skilled bidders with lighter dredging equipment about the conditions under which this work must be performed--the Corps acknowledged during the course of this protest that under certain river conditions movement of a dredge in water flows lower than those set forth in the challenged clause would be unwise. We assume that on matters of safety the Corps will consider carefully the concerns of dredging equipment operators as performance under the contract proceeds.