



Comptroller General  
of the United States

1132127

Washington, D.C. 20548

## Decision

**Matter of:** Cedar Valley Corporation

**File:** B-256556

**Date:** July 5, 1994

Albert B. Krachman, Esq., Bracewell & Patterson, for the protester.

Joseph G. Councill, Jr., Esq., Cornelius W. Purcell, Esq., and Beth Kelly, Esq., U.S. Army Corps of Engineers, for the agency.

Adam Vodraska, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

In a sealed bid procurement for construction services in which bidders were requested to propose their shortest practicable performance period and in which the basis for award was evaluated total cost, the agency's award to the highest priced, but lowest evaluated cost, bidder was not improper.

### DECISION

Cedar Valley Corporation protests the award of a contract to Kiewit Western Company by the U.S. Army Corps of Engineers, under invitation for bids (IFB) No. DACA45-94-B-0003, for runway construction services at Offutt Air Force Base, Nebraska. Cedar Valley asserts that Kiewit's proposed performance period was not "practicable," as required by the IFB; that award to Kiewit at a bid price \$736,000 higher than that of Cedar Valley's is prohibited by the Military Construction Codification Act, 10 U.S.C. § 2858 (1988), because the Corps is expending additional funds to expedite a military construction project; and that Kiewit's bid must be rejected because Kiewit failed to provide its bid bond surety's consent to its bid extension.

We deny the protest.

Issued November 1, 1993, by the Corps' Omaha District, the IFB solicited bids for the removal and replacement of airfield pavements and lighting at Offutt Air Force Base. Bidders were informed that the bids would be evaluated under the Corps' "evaluated total cost method" (ETCM). Under the

method, factors representing the potential for delays and changes in the course of the contract performance, as well as projected costs to the government involved in closing and moving the air base operations, would be added to the bidders' prices.

Each bidder was required to provide a single, lump-sum price for all the contract work. Along with its bid price, the bidder was required to state the shortest "practicable" performance period it would take to complete the entire contract. The IFB did not state a required or estimated performance period, but bidders were informed that, for the purposes of calculating their proposed performance period, they were to presume that notice-to-proceed would be issued on February 1, 1994, and that the contractor would have no access to the runway for any construction work until May 1.

Bidders were also warned that the Military Construction Codification Act prohibited the expenditure of appropriated funds to expedite a military construction project at additional cost to the government. Bidders were told therefore that they may not expedite the construction project, through "the use of overtime, double shifts, larger crews and the like . . . unless such measures [are] either required for normal construction efficiencies or offset by lowered overhead costs, more economical equipment rental costs, lower bonding costs, and other similar measures."

The evaluated cost total would be computed according to the IFB formula based upon the total bid prices, the bidders' offered performance periods, and the IFB's stated cost evaluation factors. While the amount of the contract would be fixed at the prices bid, the award was to be made to the responsive, responsible bidder whose evaluated cost total was the lowest.

Three bids, including Cedar Valley's and Kiewit's, were received at the December 15 bid opening. Cedar Valley's bid price of \$6,513,900 was lowest, while Kiewit's bid price of \$7,250,014 was the highest.<sup>2</sup> The bid prices, evaluated

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<sup>1</sup>The IFB informed bidders that they could perform necessary administrative tasks, such as procurement of materials and preparation and submission of shop drawings, during the period before May 1, but that no construction or site work would be permitted prior to this date.

<sup>2</sup>Bidders were to bid on any one, two, or all three of the construction schedules (the schedules involved different amounts of random slab removal and replacement), with award  
(continued...)

costs, and performance periods of the bidders and the government estimate are as follows:

	<u>Bid Price</u>	<u>ETCM</u>	<u>Performance Period</u>
Kiewit	\$7,250,014	\$ 9,157,544	170
Cedar Valley	\$6,513,900	\$ 9,515,855	270
Bidder A	\$6,550,000	\$10,025,980	310
Estimate	\$9,953,593	---	270

While Cedar Valley's bid price was approximately \$750,000 lower than Kiewit's, Kiewit's evaluated total costs were \$358,000 lower than Cedar Valley's. Kiewit's evaluated total cost was lower than Cedar Valley's because Kiewit had offered a performance schedule that was 100 calendar days shorter than Cedar Valley's or the government estimate.

Cedar Valley protested to the agency that Kiewit's proposed performance period was not practicable and that award to Kiewit, based upon its shorter performance period, constituted unlawful expediting at additional cost to the government in contravention of the Military Construction Codification Act. The Corps denied Cedar Valley's agency-level protest and made award to Kiewit on February 16. This protest to our Office followed.

Cedar Valley protests that Kiewit's proposed performance period was not "practicable" as required by the IFB. In this regard, Cedar Valley points out that under Kiewit's proposed performance period, and after subtracting the time unavailable for construction under the terms of the IFB, Kiewit would have approximately 80 calendar days to perform all the required construction, which is less than half of the construction time bid by Cedar Valley or contemplated by the government's estimate.<sup>3</sup> Cedar Valley argues that if Kiewit's bid price and evaluated costs were applied to a

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<sup>2</sup>(...continued)

based on the schedule considered most advantageous to the government. The IFB noted that schedule No. 1 would be considered first, and that if a bid with the lowest evaluated cost total contained a bid amount within the available funds and the performance period was acceptable, award would be made based on schedule No. 1. Because sufficient funds were available based on the amounts bid, the Corps only considered the bids received under schedule No. 1, and this is the only schedule relevant to the protest.

<sup>3</sup>The Corps concedes that, as evaluated, Kiewit's bid only provides for a construction period of approximately 80 days.

reasonable performance schedule, Kiewit's evaluated total cost would not be the lowest to the government, and thus award to Kiewit would contravene the Competition in Contracting Act of 1984 (CICA) that requires, in the case of sealed bidding, that award be made to the bidder submitting the lowest total cost to the government, considering only price and price-related factors. See 10 U.S.C. § 2305(b)(3) (1988).

The ETCM, as applied here, involves the application of price-related factors as contemplated by CICA and is not objectionable. See ACS Constr. Co., Inc. of Mississippi; ECI Constr., Inc.; C Constr. Co., Inc., B-250372.2; B-250372.3, Feb. 5, 1993, 93-1 CPD ¶ 106; Paulsen Constr. Co., B-231393, Sept. 13, 1988, 88-2 CPD ¶ 230, recon. denied, B-231393.2, Jan. 24, 1989, 89-1 CPD ¶ 63. Under this method, an agency may award to other than the actual low bidder where the award will otherwise result in the lowest total cost to the government.

We find that the Corps reasonably determined that the award to Kiewit would result in the lowest total cost to the government, as required by CICA and the IFB. As noted above, the IFB provided that bids would be evaluated under the ETCM to determine the lowest total cost to the government and that award would be made on this basis. Offerors were also informed that the government's liquidated damages were \$14,180 per day and that these liquidated damages would be applied against a bidder's proposed performance period in determining the evaluated total cost of a bid. Here, after application of the ETCM factors, particularly because of the ETCM's provision for considering the liquidated damages and Kiewit's 100-day shorter performance period, Kiewit's total evaluated costs are lower than Cedar Valley's.

Cedar Valley argues, nevertheless, that Kiewit's 170-day performance schedule is not realistic and Kiewit will be unable to perform the required construction services within its promised performance period. Cedar Valley argues that

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<sup>4</sup>Cedar Valley does not contend that the ETCM factors applied here are not price-related factors within the contemplation of CICA.

<sup>5</sup>The record shows that the liquidated damages figure consists of the government's estimated costs of closing the air base's operations during the runway construction, which were \$11,790 per day for rental of space at municipal airfields and for personnel expenses, and of its estimated costs of supervision and inspection, which were \$2,390 per day.

this determination was not based upon a detailed examination of Kiewit's available resources or ability to perform.

The record shows, however, that the Corps reasonably determined that Kiewit's proposed performance period was feasible and that Kiewit could successfully perform the contract within that period. Specifically, after the receipt of bids, the Corps' constructability review section reviewed Kiewit's bid to determine whether Kiewit's proposed performance schedule was practicable. At a hearing conducted at our Office on June 15-16, the Corps' chief engineer in the constructability review section testified as to how he determined that Kiewit's 170-day performance period was practicable.<sup>6</sup> He stated that he examined the solicitation's requirements and developed the linear requirements (construction phases and steps that must be taken sequentially) and a "logic" or "sequence" that would be required to perform the construction schedule. Hearing Transcript (Tr.), June 15, at 54-56. The chief engineer also consulted other engineers and discussed Kiewit's performance in 1984 of another runway replacement project of similar scope, in which Kiewit performed similar construction services within 60 days. June 15 Tr. at 57-60; June 16 Tr. at 42. As a result of this investigation, the chief engineer concluded that there was no reason that Kiewit could not perform the required services within its 170-day performance period; in other words, that Kiewit's performance period was possible. In addition, the Corps concluded, based upon its general knowledge of Kiewit--in particular Kiewit's performance of other contracts--and upon a 1983 pre-award survey of Kiewit, which the Corps updated

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<sup>6</sup>The hearing was conducted pursuant to 4 C.F.R. § 21.5 (1994) to receive testimony regarding the Corps' determination that Kiewit's proposed performance schedule was practicable and whether award to Kiewit violated the Military Construction Codification Act.

<sup>7</sup>Cedar Valley argues that we should not give any weight to the testimony about Kiewit's successful performance of the 1984 runway project because it is not reflected in the procurement's contemporaneous documentation or referred to in the agency's report on the protest. We disagree. While we accord greater weight to contemporaneous documentation than statements and explanations made in response to a protest, see DynCorp, 71 Comp. Gen. 129 (1991), 91-2 CPD ¶ 575, here there is no evidence that contradicts the testimony that Kiewit was able to perform the 1984 runway project in 60 days and the record shows that the Corps reasonably considered Kiewit's performance of similar construction work in determining that Kiewit's proposed performance period here was practicable.

with a recent Dun & Bradstreet financial report, that Kiewit had the necessary resources and financial capability to perform the contract as bid. We find nothing unreasonable with the Corps' determination.

Moreover, under the evaluated total cost factors stated in the IFB, the Corps was reasonably assured that award to Kiewit would result in the lowest total cost to the government despite Cedar Valley's \$736,000 lower bid price. Specifically, Cedar Valley's lower bid price is more than offset by the savings to the government resulting from Kiewit's shorter performance period. For every day that construction prevents airfield operations at Offutt Air Force Base the government incurs \$11,795 in rental costs for lease space at municipal airfields and in personnel expenses. Because Kiewit's promised performance period is 100 days shorter than Cedar Valley's, the government will save approximately \$440,000 with Kiewit's rather than Cedar Valley's performance. Even if Kiewit exceeds its promised 170-day performance schedule, its payment of liquidated damages will protect the government from incurring additional costs, because Kiewit's contract price will be reduced by the amount of the liquidated damages.

Cedar Valley also protests that award to Kiewit at an additional \$736,000 (than that offered by Cedar Valley) for Kiewit's shorter performance period constitutes expediting in violation of the Military Construction Codification Act, 10 U.S.C. § 2858. This act prohibits the expenditure of additional funds appropriated for military construction to expedite a construction project.

The Corps responds that, within the meaning of the act, expediting only occurs when the government accelerates an established performance period and that expediting does not occur merely because a bidder has proposed a shorter performance period than other bidders. In the Corps' view, bidders under the ETCM propose their own performance period, and the government is, by definition, not involved in abbreviating contract performance. Thus, the Corps argues that since the government has issued no directive to Kiewit requiring it to accelerate or abbreviate its performance period, the act is inapplicable.

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<sup>8</sup>The Corps states that although the IFB warned bidders of the act's prohibition, it is nonetheless inapplicable to the award of ETCM procurements. In this regard, the act's warning has since been removed from the Corps' ETCM solicitations. Cedar Valley does not contend that it was misled by the inclusion of the act's warning in the IFB.

The Corps' long-standing interpretation is that the provision prohibiting expediting at additional cost does not apply where bidders, as opposed to the government, propose their own, varying practicable performance schedules. In this regard, we note that 10 U.S.C. § 2858 only prohibits the Corps from establishing an expedited completion date. In the absence of contrary authority, and none has been cited to us, we find reasonable the Corps position that the prohibition against expediting is inapplicable to performance periods proposed under the ETCM.

Cedar Valley finally protests that Kiewit's bid should have been rejected because its bid bond expired. Specifically, Cedar Valley argues that although Kiewit extended its bid on February 10, Kiewit did not provide an extension of its bid bond from its surety, and thus its bid lapsed prior to the Corps's February 16 award to Kiewit.

We disagree. The bid bond required by the IFB is executed on standard form 24, see FAR § 53.301.24, which contains the following clause:

"Each Surety executing this instrument agrees that its obligation is not impaired by any extension(s) of the time for acceptance of the bid that the Principal may grant to the Government. Notice to the surety(ies) of extension(s) are waived. However, waiver of the notice applies only to extensions aggregating not more than sixty (60) calendar days in addition to the period originally allowed for acceptance of the bid."

Since the bid bond on its face bound bidders' sureties for up to an additional 60 days if their bids were extended, and Kiewit's bid was extended for 30 days from February 10, there was no need for Kiewit to obtain a separate extension of its bid bond directly from its surety. See U.S. Dept. of Agriculture and Lloyd H. Kessler, Inc., B-229506, B-229506.2, 70 Fed. Cl. 21, 1987, 87-2 CPD ¶ 614.

The protest is denied.

/s/ Robert H. Hunter  
for Robert P. Murphy  
Acting General Counsel