



Decision

Matter of: Indeck Power Equipment Company

File: B-259151.2

Date: April 3, 1995

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DIGEST

Protest that awardee's unrealistically low bid for certain line items limited the firm's liability under the liquidated damages provisions, and thereby afforded awardee an unfair competitive advantage, is without merit since: (1) the solicitation did not prohibit bidding in this manner, and (2) in any case, the solicitation did in fact contain provision that would make the awardee fully liable for the cost of satisfactory performance.

DECISION

Indeck Power Equipment Company protests the award of a contract to Nationwide Boiler, Inc. under invitation for bids (IFB) No. N68931-94-B-E335, issued by the Department of the Navy for the rental and operation of a steam plant at the Naval Air Station in Jacksonville, Florida. Indeck alleges that Nationwide gained an unfair competitive advantage by bidding unreasonably low prices for certain line items, and that its bid thus should have been rejected.

We deny the protest.

The IFB contemplated the award of a fixed-price contract for a base with 4 option years. The IFB contained two contract line items (CLIN) for recurring work to be performed in each of the five performance periods: (1) certification of the boilers, and (2) steam plant rental, operation, manning, maintenance and repair. The IFB also contained the following three "nonrecurring" CLINs: CLIN 1--Delivery, CLIN 2--setup, and CLIN 4--teardown/removal.

The Navy received three bids by the October 25, 1994, bid opening date. Nationwide submitted the lowest bid of \$5,206,200, while Indeck submitted the next low bid of \$5,486,071. By letter dated November 1, the agency advised Nationwide that its bid was "considerably low" on CLINs 1, 2, and 3¹ and requested that the firm verify its bid. For example, for CLIN 2, setup, the government estimate was \$187,000; Indeck's bid was \$436,920; and Nationwide's bid was \$1,000. Nationwide confirmed its bid, stating that "it is typical for our service contracts to spread equipment rental, freight, start-up, and/or installation costs over the contracted period." The agency awarded Nationwide the contract on November 4.

Indeck alleges that by submitting nominal prices for CLINs 1 and 2, and comparatively low prices for CLINs 3 and 4, the awardee has structured its bid so as to eliminate "monetary liability for nonperformance" of work contemplated by the IFB. The protester notes in this regard that the IFB contained a clause under which the contractor "could face 100 percent penalty deductions" from its contract prices for deficient performance. The protester contends that by submitting unrealistically low prices for these CLINs, Nationwide has avoided monetary risk for bad performance and left the agency "with very little by way of enforcement penalties." The protester concludes that Nationwide has manipulated its bidding structure to gain an unfair competitive advantage, and that its bid thus should be rejected.

This argument is without merit. Nothing in the deduction clause or elsewhere in the IFB prohibited structuring bids in the way Nationwide did here. As the inclusion of "unrealistically" low prices under some line items also does not violate any statute or regulation, Nationwide's preparing its bid in this manner does not provide a basis for rejecting it. In this regard, we have recognized that a bidder, for various reasons in its business judgment, may decide to submit a below-cost bid, and there generally is no basis for objecting to the submission or acceptance of such a bid. Diemaster Tool, Inc., B-238877, Apr. 5, 1990, 90-1 CPD ¶ 375. In fact, however, Nationwide's explanation actually suggests that its bid for items 1 to 4 is low, not due to a below-cost strategy, but because Nationwide has

¹CLIN 3 sought a price for the initial certification of the boilers.

spread the cost of the line items in question over the life of the contract.²

In any case, we do not agree that Nationwide's low prices for CLINs 1 to 4 shield it from monetary liability, such that it obtained an unfair advantage over Indeck. As the Navy points out, the IFB incorporated Federal Acquisition Regulation (FAR) clause 52.246-4, Inspection of Services--Fixed Price, into the contract. This clause provides, among other things, that if services do not conform with contract requirements and cannot be corrected by reperformance, the agency may "reduce the contract price to reflect the reduced value of the services provided." In other words, the deductions from Nationwide's payment under the contract would not be limited to the line items covering the nonconforming work; thus, the bidding of low prices for these items would not affect the government's ability to make appropriate deductions.

Further, the deduction clause itself provides that in the event of nonperformance or unsatisfactory performance, rather than deducting payment, the agency may, at its option, have the services performed by "Government personnel or other means." In that event, the agency "will reduce the contract payment by the amount paid to any Government personnel . . . or the actual costs of other means that accomplish the services," and "will assess an additional twenty percent (20%) in liquidated damages to compensate the Government for administrative costs and other expenses incurred by the Government to obtain satisfactory completion of the services." Finally, nothing in the IFB would preclude the agency from terminating Nationwide's contract for default and, among other things, repurchasing the services against the contractor's account. FAR § 49.402-6. Since these remedies are clearly available irrespective of a contractor's bid price for a particular line item, Nationwide's bid neither reduces that firm's risk in the

²Nationwide's bid also is not improperly unbalanced as a result of this structuring. To be rejected as unbalanced, a bid must be both mathematically and materially unbalanced. A bid is mathematically unbalanced only where it contains understated prices for some items and overstated prices for others. Hampton Rds. Leasing, Inc., B-250645.2, Feb. 1, 1993, 93-1 CPD ¶ 486. Indeck does not allege, and there is no indication, that Nationwide's bid contained overstated prices for any line items; consequently, it is not mathematically unbalanced (and thus cannot be materially unbalanced).

event of nonperformance, nor impairs the agency's ability to enforce the terms of the contract. Nationwide therefore has gained no unfair competitive advantage.³

The protest is denied.

Michael A. Jodden
for Robert P. Murphy
General Counsel

³Indeck also alleges that Nationwide's bid contained a mistake. Our Office will not consider a protest that a lower-priced bid was mistaken and should not have been accepted, since it is solely the responsibility of the contracting parties to assert rights and bring forth the necessary evidence to resolve mistake questions. W.M. Schlosser Co., Inc., B-254968, Oct. 1, 1993, 93-2 CPD ¶ 201.