



## Decision

**Matter of:** Wescott Electric Company

**File:** B-417448

**Date:** May 8, 2019

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James P. Wescott for the protester.

Joseph M. Kanfer, Esq., Woolford Kanfer Law, PC, for Cedar Electric, Inc., the intervenor.

David W. Altieri, Esq., and Donald C. Mobly, Esq., Department of Veterans Affairs, for the agency.

Louis A. Chiarella, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Alleged mistake in the pricing of alternate deductive items does not provide valid basis to challenge the bid for the base item, which offers to perform the entire project called for under a solicitation providing for award of the base item if funds are available and it is determined that the funds are available.

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### DECISION

Wescott Electric Company, of Glen Riddle, Pennsylvania, protests the award of a contract to Cedar Electric, Inc., of Lititz, Pennsylvania, under invitation for bids (IFB) No. 36C24419B0004, issued by the Department of Veterans Affairs (VA) for electrical services at the Coatesville VA Medical Center (CVAMC), Coatesville, Pennsylvania. Wescott contends that Cedar's bid was incorrect and unbalanced, and should therefore have been rejected by the contracting agency.

We dismiss the protest because, as filed with our Office, it fails to provide a valid basis for challenging the agency's action.

### BACKGROUND

The IFB was issued on December 4, 2018, as a service-disabled veteran-owned small business set-aside, pursuant to the procedures of Federal Acquisition Regulation (FAR) part 14 (Sealed Bidding), and contemplated the award of a fixed-price contract to correct various electrical deficiencies at the CVAMC. VA Dismissal Request, exh. 2,

IFB at 1. In general terms, the contractor was to provide all labor, supplies, and equipment necessary to perform the tasks set forth in the solicitation’s statement of work (SOW). Id. The IFB also established that contract award would “be made to the responsive, responsible bidder . . . whose bid constitutes the lowest price to the Government.” Id.

Relevant to the protest here, the IFB contained a “bid schedule” table as follows:

BID SCHEDULE – Bidders shall provide a price for each item to be considered for award.

Bid Items and Description	Amount
<b>BID ITEM #1:</b> BID ITEM #1 SHALL INCLUDE ALL WORK INDICATED ON THE CONSTRUCTION DRAWINGS AND AS DESCRIBED IN THE CONSTRUCTION SPECIFICATIONS.	\$
<b>BID ITEM #2:</b> THIS BID ITEM SHALL INCLUDE ALL OF THE WORK DESCRIBED IN BID ITEM #1, EXCEPT THE WORK IDENTIFIED AS DEDUCT-ALTERNATE No. 1, SPECIFICATION SECTION 26 05 74, CAMPUS WIDE POWER SYSTEM STUDY.	\$ ( )
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<b>BID ITEM #7:</b> THIS BID TIME SHALL INCLUDE ALL OF THE WORK DESCRIBED IN BID ITEMS #1, EXCEPT THE WORK RELATED TO BUILDING[S] 15, 16, 58, 69 AND 70.	\$ ( )

Award Statement: The bid deducts outlined in the bid schedule above are listed in order of preference. In the event the base bid exceeds the available funding, the government may accept and award one or more deduct items.

Id. at 3.

As summarized by the contracting officer, bid item No. 1 represented all the work set forth in the SOW, and bid items Nos. 2-7 each removed portions of the work requirements, in descending order of preference. Agency Dismissal Request, exh. 1, Contracting Officer’s Statement (COS) at 1; exh. 4, Agency-Level Protest Decision at 1.

Seven bidders, including Cedar and Wescott, submitted bids by the January 22, 2019, bid opening date. The agency conducted a public bid opening at which time bidders’ prices were read aloud. No dispute exists that Cedar submitted the lowest price for bid

item No. 1 in the amount of \$1,158,898, and Wescott submitted the second-lowest price for bid item No. 1 in the amount of \$1,213,000. Abstract of Bids at 1-2.

Wescott was present at the bid opening and recorded what it heard each bidder's prices to be, including those of Cedar (e.g., bid item No. 3: \$2,300, bid item No. 4: \$12,990). Wescott Second Reply to Agency Dismissal Request, exh. 1, Wescott Notes of Bid Opening. In fact, Cedar's prices for bid items Nos. 2-7 were expressed as negative amounts (e.g., bid item No. 3: "\$ (2,300)"; bid item No. 4: "\$ (12,990)"). Agency Dismissal Request, exh. 4, Agency-Level Protest Decision at 2. Insofar as bid items Nos. 2-7 each represented alternate deductive items, the agency interpreted Cedar's pricing here as deductions from its price for bid item No. 1.<sup>1</sup> Id.; Abstract of Bids at 1.

On March 7, the contracting officer made award to Cedar based on bid item No. 1, after finding both that Cedar was the lowest responsive, responsible bidder and that sufficient funding was available for performance of the entire SOW.<sup>2</sup> COS at 1. On March 14, Wescott filed an agency-level protest, alleging that Cedar had submitted erroneous and unbalanced prices for bid items Nos. 3-7.<sup>3</sup> Protest, exh. 1, Agency-Level Protest at 1.

On March 25, the VA denied Wescott's protest. As a preliminary matter, the agency found that Cedar--by providing price deductions for bid items Nos. 2-7 rather than deducted prices--had "completed the fill-in blocks of the Bid Schedule as they were intended and [in accordance with] the instructions contained in the solicitation." Agency Dismissal Request, exh. 4, Agency Protest Decision at 2. Additionally, the contracting officer found that any error in how Cedar had reflected its prices for bid items Nos. 2-7 was both a minor informality (which could be waived in accordance with section 14.405 of the FAR) and irrelevant to contract award, which was based solely on bid item No. 1.<sup>4</sup> Id. This protest followed.

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<sup>1</sup> The record reflects that at least one other bidder also expressed its prices for bid items Nos. 2-7 as deductions from bid item No. 1. See Wescott Second Reply to Agency Dismissal Request, exh. 1, Wescott Notes of Bid Opening.

<sup>2</sup> The contracting officer also states that in making his decision, he "never considered" the prices for bid items Nos. 2-7 because award could be made for bid item No. 1 for the entire scope of work based on available funding. COS at 1.

<sup>3</sup> Wescott's notes recorded Cedar's price for bid item No. 2 as a different amount than what was reflected in the Abstract of Bids. Compare Wescott Second Reply to Agency Dismissal Request, exh. 1, Wescott Notes of Bid Opening, with Abstract of Bids at 1. In any event, Wescott raises no challenge to Cedar's price for this particular bid item in its protest before us.

<sup>4</sup> See, e.g., JOCH Constr. Co., B-410980, B-410980.2, Apr. 7, 2015, 2015 CPD ¶ 126 at 4 (finding that a bidder's submission of prices for work to be deleted rather than prices for the work remaining after the deletion, was properly waived by the agency as a minor informality in accordance with FAR § 14.405).

## DISCUSSION

Wescott again protests that Cedar's prices for bid items Nos. 3-7 were incorrect and unbalanced, and that Cedar's entire bid should therefore have been rejected by the VA. Protest at 1. Wescott also argues that even if the awardee's pricing intent was known, Cedar misinterpreted the solicitation bid form and such misinterpretation was not a minor clerical error. Id. at 2.

The VA contends the protest should be dismissed insofar as Wescott: (1) does not dispute that Cedar's price was the lowest for bid item No. 1; (2) accepts that contract award was to be (and was in fact) based on bid item No. 1, if sufficient funds were available; and (3) raises no challenge to Cedar's price for bid item No. 1. Agency Dismissal Request at 4. Even if the protester's assertions are accepted as true, the agency argues, they fail to provide a valid basis to challenge the award here. Id. We agree.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Here, while Wescott alleges that Cedar's prices for various bid items were "erroneous and incorrect" (e.g., a price of \$2,300, rather than a deduction of \$2,300, for bid item No. 3) Protest at 1, the gravamen of Wescott's protest is that Cedar's prices are "too low." However, a protester's claim that a bidder has submitted an unrealistically low price--or even that the price is below the cost of performance--is not a valid basis for protest. Zimmerman Plumbing & Heating Co., B-211879, June 24, 1983, 83-2 CPD ¶ 16 at 1-2 (finding the practice of below-cost bidding is not illegal and the Government cannot withhold an award merely because the low bid is below cost). A bidder, in its business judgment, properly may decide to submit a price that is extremely low. Brewer-Taylor Assocs., B-277845, Oct. 30, 1997, 97-2 CPD ¶ 124 at 4.

Likewise, Wescott's assertion that Cedar's prices are unbalanced also fails to state a valid basis of protest. First, the protester fails to establish that the IFB required the VA to evaluate whether bidders' prices were unbalanced (and, therefore, fails to establish what the agency violated by not conducting such a review). Further, unbalanced pricing exists where the prices of one or more bid items are significantly overstated, despite an acceptable total evaluated price (typically achieved through underpricing of one or more other line items). Legacy Mgmt. Solutions, LLC, B-299981.2, B-299981.4, Oct. 10,

2007, 2007 CPD ¶ 197 at 5; Triple H Servs., B-298248, B-298248.2, Aug. 1, 2006, 2006 CPD ¶ 115 at 2; see FAR § 15.404-1(g)(1). Here, while Wescott alleges that various Cedar prices are understated, Wescott has not demonstrated, or even alleged, that any of Cedar's prices were overstated. Low prices are not per se improper and do not, by themselves, establish (or create the risk inherent in) unbalanced pricing. Diversified Capital, Inc., B-293105.4, B-293105.8, Nov. 12, 2004, 2004 CPD ¶ 242 at 2 n.1; Islandwide Landscaping, Inc., B-293018, Dec. 24, 2003, 2004 CPD ¶ 9 at 3.

More importantly, the record is clear that: (1) Cedar's price was the lowest for bid item No. 1; (2) contract award was to be (and was in fact) based on bid item No. 1 if sufficient funds were available; and (3) Wescott raises no challenges to Cedar's price for bid item No. 1 (i.e., no interpretation of Cedar's price for the base bid was required in order for the VA to make award). Accordingly, Wescott has failed to show how any alleged defect in Cedar's pricing of bid items Nos. 3-7 affected the validity of the agency's award decision, which was based entirely on bid item No. 1. See JOCH Constr. Co., supra, at 4 n.3. In sum, even if the protester's assertions are accepted as true, they fail to provide a valid basis to challenge the award here.

The protest is dismissed.

Thomas H. Armstrong  
General Counsel