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M. Eaton
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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-191786 DATE: July 18, 1978

MATTER OF: Farrell Construction Company

DIGEST:

1. When contracting officer cannot determine, from pattern of pricing in bid as submitted, what price bidder intended for omitted item, price may not be supplied after opening.

2. Fact that bidder may not have received one page of amendment, and therefore omitted price for mandatory item, does not warrant acceptance of bid with omitted price.

3. Mistake in bid rules may be applied only when bid is responsive and otherwise for acceptance, not to correct price omission.

4. Procuring agency, under ASPR, has discretion to determine amount and kind of equipment which may be included in and paid for as mobilization and preparation cost. Arguments that Government may have to divert funds, pay interest on amounts due, or terminate before completion of contract are based on events which may or may not occur, and do not affect legality of proposed award.

5. Cost of special equipment acquired to perform major construction contract may be paid as incurred under mobilization and preparatory work clause without violating statute prohibiting advance payments. Moreover, Government's interests appear to be protected in case of termination for convenience.

Farrell Construction Company (Farrell) protests award to any other contractor under invitation for bids (IFB) No. DACW62-78-B-0050, issued by the Nashville, Tennessee, District of the Corps of Engineers (the Corps). The solicitation, issued on March 8, 1978, with an amended opening date of April 20, 1978, was for construction of the Divide Cut, Section 2, of the Tennessee-Tombigbee Waterway.

Farrell, low bidder at $29,032,950, failed to submit a Minority Business Enterprise Subcontracting Program Plan with its bid, as called for by the IFB. In addition, Farrell omitted a price for bid item No. 2E.3, covering construction of a pipe drainage structure at location S-25E. The Corps determined that the first was a minor informality which Farrell could cure by submitting its plan after bid opening, but that failure to price all items, as specifically required by the IFB, made the bid nonresponsive.

Farrell contests the latter determination, arguing that from its pattern of pricing, the Corps should have been able to determine and supply the intended price for the missing item. In addition, Farrell has protested possible award to Harbert Construction Corporation (Harbert) and M&B Contracting Company (M&B), second and third-low bidders at $29,199,994 and $29,963,466, respectively, on grounds that their bids are unreasonably unbalanced and award to either would be contrary to the best interests of the Government. Award has been delayed pending our decision on the protest.

The Corps report states that, as originally issued, the unit price schedule of the IFB listed 50 separate items on four pages, S-1 through S-4. Seven amendments, subsequently were issued. The first and only one relevant to this protest, dated March 24, 1978, listed revised pages which the Corps wished bidders to substitute for those in the original invitation. Two new items were added to page S-1, so that there was no room for what had been the last item on that page, item 2E.3; it therefore was transferred to the top of page S-2. Page S-2 was included in the revised pages sent to bidders; however, it was not marked with an amendment number, as were those which contained substantive changes.

Farrell's failure to price item 2E.3 stems from the fact that it did not use revised page S-2 in submitting its bid. Farrell has furnished our Office with affidavits stating that, following its usual procedure, it requested three sets of the invitation, one of which was disassembled and placed in a loose leaf binder. As amendments were received, Farrell states, the old pages were removed from the binder and the revised pages substituted. According to Farrell, neither the set of Amendment 0001 which it placed in the binder nor the other two sets of this amendment, which it received but did not disturb, contained revised page S-2.

Farrell states that it prepared estimates for bid item 2E.3, the pipe drainage structure at location S-25E, and for items 2E.4 and 2E.5, pipe drainage structures at locations S-30W and S-31W. However, because its working (take off) sheets were arranged by structure, not item number, Farrell used only structure numbers in transferring items from its working sheets to the price schedule. Thus, Farrell states, it was not aware during the process of filling out the schedule that item 2E.3 was missing.

The Corps, in determining that this inadvertent omission made Farrell's bid nonresponsive, applied the general rule set forth in 52 Comp. Gen. 604 (1973), which states that a bid is regarded as nonresponsive on its face for failure to include a price on every item as required by the IFB. Farrell, on the other hand, asserts that an exception to the rule, also set forth in that case, should apply. The exception states:

> "Even though a bidder fails to submit a price for an item in a bid, that omission can be corrected if the bid, as submitted, indicates not only the probability of error but also the exact nature of the error and the amount intended. B-151332, June 27, 1963. The rationale for this

> exception is that where the consistency of the pricing pattern in the bidding documents establishes both the existence of the error and the bid actually intended, to hold that the bid is nonresponsive would be to convert what appears to be an obvious clerical error of omission to a matter of nonresponsiveness. B-157429, August 19, 1965."

Farrell has argued that use of the original page S-2 and omission of item 2E.3 clearly demonstrates the existence of an error, and that the amount of its intended bid for item 2E.3, $28,000, is established by its pricing pattern for items 2E.4 and 2E.5, for which it bid $28,000 each. Farrell argues that the pipe drainage structures represented by these three items vary only in minimal ways, such as size or length of culvert pipe, and that materials allocated to each are practically identical. In an attempt to confirm its pricing pattern, Farrell has submitted its work sheets for the three pipe drainage structures. Farrell argues that the other bids also show a pattern of pricing, since all but one include identical prices for items 2E.3 and 2E.4. Moreover, the Government estimates for items 2E.3 and 2E.5 are the same, Farrell points out.

Farrell alternatively argues that the omission should be handled as a mistake in bid, which could be corrected under Armed Services Procurement Regulation (ASPR) 2-406.3(2) upon a showing of clear and convincing evidence as to the mistake and Farrell's intended price. As still another alternative, Farrell suggests that the omission has only a trivial effect on price, quality, or quantity, since $28,000 is only 0.096 percent of the total bid price, and therefore may be waived under ASPR 2-405. If this alternative is accepted by our Office, Farrell states, it will undertake the contract on the basis that its bid price includes item 2E.3.

The Corps does not accept Farrell's pattern of pricing argument, stating to apply the exception, bids must be on identical items. Each pipe drainage structure here, the Corps states, requires structural excavation, back filling, dewatering, placement of bedding material, pipe culvert, and concrete, and reinforcement at a specific location. Although the structure at location S-25E is similar to those at locations S-30W and S-31W, the Corps argues, the solicitation clearly intended that each be separately priced.

In addition, the Corps has examined Farrell's work sheets for bid items 2E.6 and 2E.8, also pipe drainage structures, and found that while Farrell showed identical requirements for the construction work (except for a variation in the quantity of sand), Farrell bid $28,000 for one and $63,000 for the other. "What factors entered into Farrell's judgment to make such a price differential cannot be determined with any certainty from the bid documents," the Corps states.

Harbert and M&B, in comments to our Office, generally support the Corps' conclusion that Farrell has not shown a pattern of pricing which would clearly indicate its intended price for item 2E.3. Harbert suggests that Farrell may have inadvertently omitted another price in the bid schedule, argues that Farrell had a duty to use reasonable care in assembling its bid, and has submitted its own work sheets and supplier quotations as evidence of the differences between the three pipe drainage structures in question.

Although a great deal of extraneous evidence has been introduced into the record, our cases require that both the error and Farrell's intended price be established from the bid itself if the very limited pattern of pricing exception is to be applied.

Both 52 Comp. Gen. 604, supra and Con-Chen Enterprises, B-187795, October 12, 1977, 77-2 CPD 284, for example, have applied the "bid pattern" exception and allowed correction of pricing omissions in option quantities. Neither case dealt with a situation where the entire option quantity or quantities were omitted. In Con-Chen Enterprises, supra the bidder omitted the price for the first of two option years while in 52 Comp. Gen. 604, supra the bidder omitted a price for the third of four option quantities. In both cases the intent to bid on option quantities was clear from the face of the bid as prices were inserted for the last option year and the final option quantity, respectively. Also in each instance the amount of the omitted price was made absolutely plain by the prices bid on the other portions of the option quantities.

In the instant case, no options are involved, and no reasonably clear bidding pattern for the regular quantities can be established. In large-scale drawings furnished to bidders, the pipe drainage structures represented by the latter items were shown together; however, a separate profile was provided for the pipe drainage structure at location S-25E, which Farrell omitted. The drawings indicate that elevations and pipe and headwall dimensions of the three structures, while similar, are not identical. The contracting officer could not determine, from Farrell's bid as submitted, whether Farrell regarded these variations as significant. (Farrell later stated that it added $4,000 to its estimated direct costs for each item to cover overhead, bond, and profit, then rounded off its bid prices on all three items to $28,000 each.)

Accordingly, we do not believe that Farrell's bid contains sufficient evidence of a bidding pattern to invoke the very limited exception to the rule requiring bids on all necessary items. See Ainslie Corporation, B-190878, May 4, 1978, 78-1 CPD 340; B-178[illegible]9, July 23, 1973.

As for Farrell's failure to receive revised page S-2, in a similar case in which a bidder attempted after opening to supply a price for a mandatory item on which it had not bid, due to failure to receive an amendment on time, we stated that while the Government should make every effort to see that bidders received timely copies of IFB's and amendments, the fact that there was a failure to do so in a particular case did not warrant the acceptance of a bid after the time fixed for opening. We stated that acceptance of a bid which is not responsive to the solicitation as amended would prejudice the rights of the Government and other bidders, who were entirely responsive, and the contracting officer would not be legally authorized to accept such a bid. 40 Comp. Gen. 126 (1960).

In the instant case, although Farrell may not have received revised page S-2, it seems to us that Farrell should have been aware of the omission. Farrell acknowledged receipt of amendment 0001, and by a careful checking of the list of revised pages therein, should have been able to determine that one was missing.

Farrell's alternative argument, that the mistake in bid procedures should be used here, also is covered in 52 Comp. Gen. 604, supra. We stated that to allow a bidder to correct a price omission after alleging mistake would generally grant an option to explain, after opening, whether it intended to perform or not perform the work for which the price was omitted. To extend this option would in effect be granting the bidder an opportunity to submit a new bid. Therefore, an allegation of mistake may be considered only where a bid is responsive and otherwise for acceptance. See also Bayshore Systems Corporation, 56 Comp. Gen. 83 (1976), 76-2 CPD 395.

Nor may the omission be waived as a minor informality under ASPR 2-405. Drawings and specifications for the pipe drainage structure at location S-25E were in such finite detail that the item should, we believe,

be regarded as material, even though it represents only a small fraction of the contract price. See General Engineering and Machine Works, Inc., B-190379, January 5, 1978, 78-1 CPD 9. Farrell's subsequent offer not to charge for the omitted item does not make the bid responsive. Garamond Pridemark Press, B-182664, February 21, 1975, 75-1 CPD 106. In view of the foregoing, we do not need to reach the issue of Farrell's failure to submit a minority subcontracting plan.

Since Farrell's bid is nonresponsive, we must consider Farrell's protest of award to either the second or third-low bidders on grounds that their bids are unbalanced. Farrell alleges that Harbert and M&B have bid unreasonably high prices for two categories of work, (1) mobilization and preparation and (2) clearing and grubbing. (It appears that Farrell regards Harbert's bid for mobilization and M&B's bid for clearing and grubbing as unbalanced). The prices in question are as follows:

Bid Item	Govt. Estimate	Farrell	Harbert	M & B
Mob & Prep	$1,060,000	$ 650,000	$6,000,000	$2,000,000
C & G	288,000	2,376,400	2,086,945	4,200,000
Total	$1,348.000	$3,026.400	$8,086.945	$6,200.000

Harbert contests the timeliness of this basis of protest; however, the Corps states that the matter was raised with it in a timely fashion. The Corps report to our Office, which recommended denial of Farrell's protest, therefore may be considered adverse agency action, and Farrell's protest is timely under 4 C.F.R. 20.2 (1977). In any event, the Corps has asked that we rule on the matter.

Farrell argues that award to Harbert or M&B would not be in the best interest of the Government, since these costs will be paid at the "front end" of the

contract. The effect, Farrell argues, is that either bidder will be financing its performance with Government money, rather than with its own. Farrell contends that the bids should be rejected because the Government might have to divert funds from other sources to maintain liquidity of the project and might incur additional costs if, due to exhaustion of funds, interest has to be paid on amounts due. Moreover, Farrell argues, because 20 percent of Harbert's price is for mobilization, if the contract should be terminated before completion, the Government will have purchased a huge fleet of equipment for the contractor.

The Corps responds that there is no unbalancing because, if excavation costs are added to those cited by Farrell, there is virtually no difference between the prices of the three lowest bidders. Farrell takes issue with this, arguing that excavation costs will be paid over the entire term of the contract. The Corps also indicates that no funding problems are anticipated.

Harbert argues that the solicitation permits the cost of equipment, less its estimated salvage value at the end of the contract, to be included in mobilization and preparation and to be paid as documented. Harbert states that it confirmed this interpretation with the Nashville District office of the Corps both before and after submitting its bid. Harbert explains that because the project must be completed in three successive, six-month construction seasons, it plans to work on a 6-day, double 10-hour shift basis. Since major equipment therefore will have between 6,000 and 8,000 hours of service, Harbert states, it decided to mobilize with new equipment. Harbert estimated the difference between the purchase price for this equipment and its value at the end of the contract would be $6,352,000; preparation costs were estimated at an additional $623,000; Harbert states that it therefore bid $6 million for mobilization and preparation. Harbert argues that Farrell actually is protesting that the mobilization and preparation payment clause is an undesirable contract provision.

In analyzing unbalanced bids, our Office generally has considered whether each bid item carries its share of the cost of the work and the contractor's profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. We then attempt to determine whether award to a bidder submitting such a bid will result in the lowest ultimate cost to the Government. See Chrysler Corporation, B-182754, February 18, 1975, 75-1 CPD 100.

In the case of Harbert's bid, we believe the issue is not whether it is unbalanced, but whether the cost of equipment to be used in performing the contract properly may be included in and paid for as mobilization and preparation.

Section 1B of the solicitation covers Mobilization and Preparatory Work; it contains the standard clause set forth in ASPR 7-603.37. This clause, ASPR states, is to be used "in major construction contracts requiring major or special items of plant and equipment *** which are considered to be in excess of the type, kind, and quantity presumed to be normal equipment of a contractor qualified to undertake the work." The head of the procuring activity must approve its insertion in contracts containing a separate bid item for mobilization and preparatory work. The clause, as Harbert and the Corps have indicated, permits payment of the contractor's actual expenses for plant, equipment and material if the contracting officer finds them suitable and necessary for efficient prosecution of the contract. Payments may not exceed the cost to the contractor, less estimated salvage value upon completion of the contract, as determined by the contracting officer.

The decision as to the amount and kind of equipment necessary for successful construction of the Divide Cut on the Tennessee-Tombigbee Waterway is, we believe, one of the type which ASPR has committed to the unique

discretion of the procuring agency. Harbert has in effect asserted that the equipment which it intends to purchase for this contract is in excess of that which it normally possesses. The Corps has not at any time disputed this.

Farrell, in its letter of June 15, 1978, concedes that the mobilization estimate and plan of Harbert "falls within the boundaries of the mobilization payment clause." Arguments that the Government may have to divert funds, pay interest on amounts due, or terminate before completion of the contract are based on events which may or may not occur, and we do not find that the possibility of these events affects the legality of the proposed award.

M&B also argues that Harbert's bid is unbalanced, while its own is not. M&B contends that payment under the mobilization and preparatory work clause of the contract violates the prohibition against advance payments of 31 U.S.C. 529, citing General Telephone Company of California, 57 Comp. Gen. 89 (1977), 77-2 CPD 376. Farrell has argued that if, following payment of mobilization costs which include the purchase of special equipment, the contract were terminated for the convenience of the Government, the Government would have bought the contractor a huge fleet of equipment.

We disagree. In the General Telephone case, a bid on a contract to provide telephone services for a Veterans Administration hospital was rejected because it required the agency to pay, at the time of installation, a basic charge for special equipment which was being leased for the 10-year term of the contract. The contractor's capital outlay for that equipment, we held, could not be recovered before the services were rendered.

Under the facts in that case, however, the basic charge was payable whether or not service continued for the duration of the lease. The Government acquired no legal or equitable interest in the equipment to be installed, could not demand that it be relocated to another location if service were terminated at the installed location, and had no interest in its residual value. We found that under these circumstances, a

substantial portion of the basic charge would not have been "actually earned" at the time the charge was made, and that only a portion of the entire capital cost of the leased equipment represented the current fiscal year's needs.

By contrast, under the mobilization and preparatory work clause of the protested solicitation, the Government's interest is protected. ASPR 7-603.37 requires documentation of actual costs as incurred, appraisal of the equipment at the site of the contract, a showing that it has been acquired free of encumbrances, and an agreement that it will not be removed from the construction site before completion and acceptance of the entire work. The contracting officer must find that the equipment is suitable and necessary for efficient prosecution of the contract, and specific limits are placed on the amounts which may be paid as mobilization and preparation costs. Moreover, in this case salvage value will be subtracted from the purchase price of the contractor's equipment.

In the event of termination, the termination clause for construction contracts, set forth in ASPR 7-602.29 (b)(vi) and included in the contract in Standard Form 23, states that the contractor shall transfer title and deliver to the Government supplies and other material acquired in connection with performance of the work which has been terminated. It appears to us that title to the special equipment acquired by the contractor under the mobilization clause would come within the reach of this provision. See also ASPR 7-602.29(b)(ix), which states that the contractor shall "take such action as may be necessary or as the contracting officer may direct for the protection and preservation of the property related to this contract which is in the possession of the contractor and in which the Government has or may acquire an interest."

Finally, we are dealing with a major construction contract of the type in which special financing arrangements such as progress payments have always been permitted. The Government, as shown by the mobilization and preparatory work clause, recognizes that a qualified contractor may have to acquire special equipment to perform this type of contract and, by regulation, permits costs of such equipment to be paid as incurred.

For the foregoing reasons, we find that payments under this clause are not advance payments. They are not made in advance of or in excess of eligible costs incurred on the contract. Rather, we believe, they are in the nature of progress payments for construction contracts. See B-152600, June 11, 1976.

The other advance payment decisions of our Office cited by M&B concern payment of attorney's fees and other expenses in administrative proceedings, 56 Comp. Gen. 111 (1976); station housing allowances for military personnel, 56 Comp. Gen. 180 (1976); and the federal share of student salaries under a college work-study program, 56 Comp. Gen. 567 (1977). We do not find them relevant to this case.

We therefore find that the cost of equipment to be used in performing the contract properly was included in Harbert's bid as a mobilization cost, and may be paid in the fiscal year incurred without violating statutory limitations. Since Farrell's bid is nonresponsive, award may be made to Harbert as the low, responsive, responsible bidder, and we need not reach the question of whether M&B's bid is unbalanced.

Accordingly, the protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States