

My Spiegel



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Seaward Corporation--Reconsideration

**File:** B-237107.3

**Date:** October 24, 1990

Daniel B. Abrahams, Esq., and Gilbert J. Ginsburg, Esq., Epstein, Becker & Green, P.C., for the protester. Craig E. Hodge, Esq., and David H. Scott, Esq., Department of the Army, for the agency. Robert A. Spiegel, Esq., and James A. Spangenberg, Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest that awardee's bid should be rejected as materially unbalanced was timely filed under Bid Protest Regulations, where it was filed within 10 working days of receipt of the agency's report on a prior protest; and the protester first became aware, from reading the report, of the agency's post bid opening acceptance of a breakdown of the awardee's lump-sum bid for the line items specified in the invitation for bids, which was then incorporated into the awardee's contract.
2. Protest that a bid must be rejected as materially unbalanced is denied where: (1) there is no possibility that an award on the basis of the bid will not result in the lowest cost to the government, and (2) the bid is not so grossly unbalanced as to constitute an improper advanced payment or interest-free loan.

### DECISION

Seaward Corporation requests reconsideration of our decision in Seaward Corp., B-237107.2, June 13, 1990, 90-1 CPD ¶ 552, which denied in part and dismissed in part Seaward's protest of an award to Barnes Electric Co., under invitation for bids (IFB) No. DAAD05-89-B-1568, issued by the Department of the Army for certain electrical work at Aberdeen Proving Grounds Maryland.

049820 / 142519

In our prior decision, we denied Seaward's protest that Barnes' bid should be rejected as nonresponsive because it failed to identify its subcontractors or include separate prices for the two IFB line items. We also dismissed as untimely several protest bases first raised by Seaward in its comments on the agency report, including an allegation that the price breakdown of the two line items provided by Barnes to the Army after bid opening constituted prohibited unbalanced bidding.

On reconsideration, Seaward contends that our dismissal as untimely of its protest concerning unbalanced bidding was erroneous. Upon further review, we agree that Seaward's protest on this point was timely filed. However, we deny this protest basis.

The IFB was issued on August 21, 1989, with amendment No. 0001. The IFB schedule specified two line items: (1) conversion of the existing electrical system, and (2) construction of a new electrical supply substation. The amendment stated that a bidder "must quote on both [line] items . . . to be eligible for award" and that the "award shall be all or none." The amendment further specified that item No. 0002 must be completed within 300 days from receipt of notice to proceed, and item No. 0001 in 900 days.

By the bid opening date of September 20, 1989, the Army received five bids; Barnes was the low bidder at \$1,730,000 and Seaward was second low at \$1,778,990. While Seaward's bid separately priced the line items (\$1,261,680 for item No. 0001 and \$527,310 for item No. 0002), Barnes submitted a lump-sum bid with no price breakdown. The Army solicited and obtained a breakdown from Barnes (\$930,000 for item No. 0001 and \$800,000 for item No. 0002), shortly after bid opening for incorporation into the contract. After Barnes was selected for award, Seaward protested on March 13, 1990.<sup>1/</sup>

---

<sup>1/</sup> Seaward initially protested to our Office that Barnes' bid was nonresponsive in September 1989. We dismissed this protest as premature since the agency had not decided whether or not to accept Barnes' bid. Seaward then timely protested when the Army decided to accept Barnes' bid.

Seaward asserts that its protest, that Barnes' corrected bid was unbalanced, was timely filed under our Bid Protest Regulations. Seaward explains that it was first made aware in the April 10, 1990, agency report on Seaward's protest that the Army permitted Barnes to provide a post bid opening price breakdown. Seaward then protested this matter in its April 24 comments on the agency report. Where new protest issues first become apparent during the pendency of a protest, they may be timely protested within 10 working days of when the protester becomes aware or should have been aware of them. 4 C.F.R. § 21.2(a)(2) (1990); Pacific Consol. Indus., B-228724, B-228724.2, Dec. 3, 1987, 87-2 CPD ¶ 548, aff'd, B-238724.3, Jan. 19, 1988, 88-1 CPD ¶ 46.

The Army argues that Seaward's unbalanced bidding allegation was properly dismissed as untimely. The Army explains that since this correction in Barnes' bid schedule was made in September 1989, Seaward easily could have discovered this information in the seven month period before it filed its protest. The Army contends that this delay was not consistent with Seaward's duty to diligently pursue its protest. See Technical Co., Inc., B-233213.2, Feb. 26, 1990, 90-1 CPD ¶ 222.

We disagree. From our review, we believe that Seaward had no reason to suspect that the agency permitted Barnes to provide a post-bid-opening price breakdown for incorporation into the contract, until Seaward received the Army's report on its protest. The agency certainly did not apprise Seaward of this fact. Moreover, as a general rule, bids may not be explained or supplemented after bid opening. See A.D. Roe Co., Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194. Therefore, we now consider Seaward's protest on this point to be timely filed.

With regard to the merits, Seaward claims that Barnes' price breakdown rendered its bid materially unbalanced because Barnes allocated a disproportionate share of its total price to line item No. 0002. Seaward contends that this allocation of Barnes' bid price would amount to an advanced payment in violation of 31 U.S.C. § 3324(a) (1988), and thus Barnes's bid must be rejected. In support of this allegation, Seaward notes that Barnes' bid allocated \$800,000 to the second line item, that is, approximately 46 percent of its total bid price. On the other hand, 30 percent of the government estimate was allocated to the second line item, and the other three bidders allocated 29 to 39 percent of their total bid

prices to this line item. Seaward notes that since the period of performance for the second line item is only 300 days, while the period of performance for the balance of the contract is 900 days, Barnes' pricing scheme will result in an advanced payment or interest-free loan to Barnes.

It is true that a bid which is materially unbalanced must be rejected as nonresponsive. The Ryan Co., B-238932, June 13, 1990, 90-1 CPD ¶ 557; F&E Erection Co., B-234927, June 19, 1989, 89-1 CPD ¶ 573. A bid is materially unbalanced if it is based on nominal prices for some items and enhanced prices for other items, and there is a reasonable doubt that the award based on the bid will result in the lowest cost to the government. Id. Here, as discussed in our prior decision, award was to be made on an "all or none" basis to the lowest priced bidder on the two items. Since there are no options or estimated quantities involved, but rather only two fixed-price amounts, there is no possibility that an award to Barnes will not result in the lowest cost to the government, regardless of how Barnes allocated its price between the two line items. Id.

However, as noted by Seaward, there are certain other circumstances where a bid, which is grossly unbalanced, should be rejected if payments made under a contract awarded pursuant to such a bid would amount to an improper advance payment. Id.; Canaveral Maritime, Inc., B-231857.4, B-231857.5, May 22, 1989, 89-1 CPD ¶ 484. An improper advance payment would occur when a payment under a contract to provide services or deliver an article is more than the value of the services provided or the article delivered.<sup>2/</sup> F&E Erection Co., B-234927, supra. Such advance payments would be detrimental to the competitive bidding system, since they would allow the bidder to enjoy an advantage not enjoyed by its competitors for the award--the use of interest-free money. Nebraska Aluminum Castings, Inc.--Second Request for Recon., B-222476.3, Nov. 4, 1986, 86-2 CPD ¶ 515.

Here, whether or not Barnes' price allocation is mathematically unbalanced, we do not regard any possible unbalancing in Barnes' bid as so gross as to require

---

<sup>2/</sup> The Army claims that the progress payment provisions in the contract will not permit an improper advance payment because payments will be made only on the actual work performed. We have rejected this argument, where, as here, the contractor is required to submit individual prices for separate line items and this breakdown is incorporated into the contract, since the contractor should receive progress payments based on the amount it bid for each particular line item. See F&E Erection Co., B-234927, supra at 4-5.

rejection of its bid. Indeed, Barnes' price of \$800,000 for this item is generally in line with the government estimate (\$721,551), as well as the other bid prices for the second line item (\$756,600, \$736,000, and \$527,310). Therefore, Barnes bid was not so front-loaded as to require rejection.

The protest is denied.



*for* James F. Hinchman  
General Counsel