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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: JND Thomas Company, Inc.

File: B-402240

Date: January 28, 2010

William L. Bruckner, Esq., Bruckner & Walker, LLP, for the protester.
Annette B. Kuz, Esq., U.S. Army Corps of Engineers, for the agency.
Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest that intended awardee's bid is impermissibly unbalanced--due to alleged overstated prices for excavation/dredging line items and understated prices for related re-handling of material items--is denied where agency conducted analysis of pricing and concluded that there was no significant price risk in accepting bid.

DECISION

JND Thomas Company, Inc., Riverdale, California, protests the award of a contract to CJW Construction, Inc., of Santa Ana, California, under invitation for bids (IFB) No. W912PL-09-B-0005, issued by the U.S. Army Corps of Engineers for excavation and dredging work at the Marine Corps Base, Camp Pendleton, California. JND asserts that CJW's bid should have been rejected as unbalanced.

We deny the protest.

The purpose of the procurement is to increase the surface water storage capacity of Lake O'Neill at Camp Pendleton by performing maintenance dredging and related rehabilitation of existing (dry) recharge pond Nos. 4-7 through excavation, installation of spillway culverts, and construction of a levee around pond Nos. 6 and 7. Under the terms of the IFB, the contractor would be allowed 600 days to complete the project. IFB § 00800 at 2. The IFB called for lump-sum bids for mobilization/demobilization, clear/grub pond Nos. 4-7, storm water pollution prevention plan development/compliance, and temporary water delivery, and unit price bids for excavation/re-handling of dry excavated material from pond Nos. 4-7 (estimated 257,000 cubic yards (CY)), levee construction, culvert installation, riprap placement, and dredging/re-handling of wet dredge material (estimated 361,000 CY)

from Lake O'Neill. IFB § 00010 at 2. Of the estimated 618,000 CY to be excavated and dredged, the contractor was expected to use 147,000 CY for construction of the levees. IFB § 01 11 00 at 5. The IFB estimated that 177,000 CY of salvageable sand material would be available as a cost benefit to the contractor and--apart from the needed levee material--there was no restriction on the quantity of material available for salvage. Id. The remaining material could be dumped at a designated site on Camp Pendleton at a cost of \$2.25 per CY tipping fee. Id. at 6. The IFB warned that bids could be rejected as nonresponsive if the prices bid were materially unbalanced. IFB § 00100 at 7. Award was to be made to the responsive, responsible bidder with the lowest price.

Of the four bids received, CJW's, at \$5.9 million, was low and JND's, at \$8.1 million, was second low. JND filed an agency-level protest, asserting that CJW's bid was materially unbalanced and represented an unacceptable risk of non-performance. After review of CJW's bid and a pre-award survey, the contracting officer concluded that CJW's bid was not materially unbalanced and did not pose an unacceptable risk to the government. The contracting officer requested that JND withdraw its agency-level protest; instead, JND filed this protest with our Office.¹

JND asserts that CJW's bid was materially unbalanced because it included overstated and understated prices. Specifically, CJW's \$4.00 per CY price for line item No. 3 (preparation and excavation of pond Nos. 4-7) and \$10.00 per CY for No. 9 (dredging of Lake O'Neill) were higher than the protester's prices and the agency's independent government estimate (IGE), and CJW's prices of \$.01 per CY for line item No. 4 (re-handling of excavated material from pond Nos. 4-7) and \$.01 per CY for item No. 10 (re-handling material dredged from Lake O'Neill) were lower than the IGE and all other bids, and insufficient to cover the cost of performing the work. JND maintains that CJW's prices for line item Nos. 3 and 9 were front-loaded (representing advance payments), and placed the agency at risk that, after being paid for these line items, CJW would not return to the project during the 600-day potential performance period to re-handle the material under line item Nos. 4 and 10.

Unbalanced pricing exists where the prices of one or more line items are significantly overstated, despite an acceptable total evaluated price (typically achieved through underpricing of one or more other line items). See Federal Acquisition Regulation (FAR) § 15.404-1(g)(1); 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.

Here, JND has produced no definitive evidence that CJW's prices are significantly overstated. While higher than the IGE and JND's prices, CJW's price for line item

¹ JND has raised a number of arguments, all of which we have reviewed and found to be without merit. This decision will only address the more significant arguments.

No. 3 is lower than that of bidder Furby Construction Co., Inc. and its line item No. 9 price is lower than that of bidder Cutting Edge Concrete Services, Inc. See Reece Contracting, Inc., B-285666, Aug. 21, 2000, 2000 CPD ¶ 135 at 4 (prices not overstated where they fall within range of government estimate and other bids). Similarly, JND has not shown that CJW's \$.01 prices for line item Nos. 4 and 10 are understated. In this regard, the agency accepted CJW's explanation that its lower prices were based on its intent to cover its costs through sale of salvaged material. Agency Report (AR) at 5. Below-cost prices on fixed-price contracts are not prohibited, see Reece Contracting, Inc., supra, at 2 n.1, and whether a bidder can perform at its bid price is a matter of bidder responsibility, which is not reviewable by our Office absent circumstances not present here. See Bid Protest Regulations 4 C.F.R. § 21.5(c) (2009); Ventura Petroleum Servs., Inc., B-281278, Jan. 21, 1999, 99-1 CPD ¶ 15 at 6.²

In any case, even where a firm's pricing is found to be unbalanced, an agency need not reject the bid if, after conducting a risk analysis, it determines that award will not result in the government's paying an unreasonably high price for contract performance or otherwise present an unacceptable level of risk to the government. See FAR §15.404-1(g)(2), (3).

The record shows that the agency conducted a risk assessment, considering information from CJW, its prior experience with the bidder, and the anticipated order of work. For example, in response to the agency's inquiries, CJW confirmed its bid and its intent to perform all work in accordance with the IFB's specifications. Engineer's Memorandum ¶ 4. In connection with its \$.01 prices for line item Nos. 4 and 10, CJW explained that it had a buyer for at least 177,000 CY of material (the amount identified in the IFB as salvageable and a cost benefit to bidders); that profit from the sale would cover its cost of re-handling the material; and that, even if it failed to sell all of the material, CJW expected that sale of a certain percentage would produce profits sufficient to cover re-handling of the remaining material. Id. As to other work, CJW had a history of good performance on a number of projects

² JND's assertion regarding "advance payments" does not change our conclusion. The current version of the FAR no longer provides for rejection of unbalanced bids where acceptance would be tantamount to an advance payment, and instead requires the agency to perform a risk analysis. FAR § 15.404-1(g)(2). In any event, in the past we found prices to be impermissibly front-loaded only in limited situations where the prices were substantially higher than the value of the work to be performed or the remaining contract prices. See, e.g., ACC Constr. Co., Inc., B-250688, Feb. 16, 1993, 93-1 CPD ¶ 142 (line item price 163% higher than government estimate). Here, CJW's price for line item No. 3 is 40% higher--and its price for line item No. 9 is 34% higher--than the IGE; it does not appear that these amounts are sufficiently overstated to constitute an advance payment. Further, as discussed below, the expected order of work and progress payments will limit the amount of funds allegedly paid in advance. See Beldon Roofing Co., B-283970, Jan. 28, 2000, 2000 CPD ¶ 21 at 3-4.

with another Corps district office, including a 2005 dredging job where CJW demonstrated its knowledge of the sediment market by successfully marketing all of the excavated sand. Id. ¶ 7. While the IFB did not specify the order of work, the agency's analysis showed that the contractor would have to excavate pond Nos. 4-7 (line item No. 3) in order to provide the necessary capacity to "store" the dredge material to be pumped from the lake (line item No. 9), and thus would have to re-handle virtually all of the dry excavated material (line item No. 4) prior to dredging. AR at 7. Further, payment for dredging (line item No. 9) would not be made in a lump sum but, rather, would be based on the percentage of dredging completed, and the agency anticipated that a portion of the dredged material would have to be re-handled (line item 10) prior to completion of the dredging process. Engineer Declaration ¶¶ 4, 6. At the time dredging is complete, the agency estimates that various aspects of the work--worth more than \$1 million--will remain to be completed and paid for, including final excavation of pond Nos. 4-7, final levee construction, and riprap/crushed rock placement. Id. ¶ 7.

Based on its consideration of the above information, the agency concluded that CJW's bid did not pose a significant risk of non-performance or the payment of unreasonably high prices. Contracting Officer's Statement ¶¶ 17-18; AR at 8. In our view, the agency's conclusion was reasonable, since CJW's plan to offset the cost of re-handling excavated and dredged material represented a plausible explanation for its low prices; its conclusion was based on prior experience with CJW in which the firm had successfully performed contracts involving the sale of salvage material; and the expected order of work will effectively prevent payment for all of the allegedly overstated line items prior to performance of much of the understated items and will include other contract line items providing incentive to continue performance.³

The protest is denied.

Lynn H. Gibson
Acting General Counsel

³ JND asserts that, with the high cost of re-handling excavated and dredged material, the agency should have conducted its own investigation of the market for sand and sediment; had the agency done so, it would have found--as did JND--that the market is currently very limited and that Lake O'Neill sediment was not deemed suitable for sale. Supplemental Comments at 3; attachs. A and B. However, based on CJW's prior successful performance of similar contracts under which it had successfully marketed excavated materials, we think the agency reasonably could conclude that such further investigation was not necessary. See HSG Philipp Holzmann Technischer Serv. GmbH, B-289607, Mar. 22, 2002, 2002 CPD ¶ 67 at 6 (depth of price analysis is matter within agency's discretion). JND's disagreement with the agency's judgment is not sufficient to establish that it was unreasonable.