Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Reece Contracting, Inc.

File: B-285666

Date: August 21, 2000

S. Leo Arnold, Esq., Ashley, Ashley & Arnold, for the protester.
Robert M. Anderson, Esq., and Edward Goldstein, Esq., Army Corps of Engineers, for the agency.
Christina Sklarew, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Award based on bid that may have included unbalanced pricing is unobjectionable where agency's comparison of bids along with analysis of awardee's contract line item prices provided an appropriate basis for determination that the prices were reasonable and did not present an unacceptable level of risk to the government.

DECISION

Reece Contracting, Inc. protests the award of a contract to Merrick Construction Co. by the Army Corps of Engineers under invitation for bids (IFB) No. DACW38-00-B-0010 for a levee construction project. Reece alleges that Merrick's bid should have been rejected because it contained unbalanced pricing that presented the likelihood of an advance payment.

We deny the protest.

The IFB, issued in January 2000, sought fixed-price bids for the construction of levees, drainage structures, closure structures, and levee surfacing as part of a larger project in Catahoula Parish, Louisiana. The IFB listed 18 contract line item numbers (CLIN) for the work to be performed, and required bidders to submit lump-sum prices for certain CLINs and unit prices for others. Reece's protest is directed only at Merrick's prices for CLINs 0001 (mobilization and demobilization), 0002 (clearing and grubbing), 0003 (turfing), and 0008 (compacted fill).

The Corps estimated $5,973,246.20 as the cost of performance, without profit, and received twelve bids ranging $4,962,359 to $8,726,490.62. After the apparent low bidder discovered a mistake in its bid and was permitted to withdraw, Merrick's bid of $5,396,557.50 became low, and Reece's $5,428,398 bid was next low. Reece filed an agency-level protest against the possible award to Merrick, alleging that Merrick's bid was impermissibly unbalanced because its acceptance would allow an advance payment. Agency Report, Tab E, Agency-Level Protest, at 3. On June 5, the agency denied Reece's protest because the contracting officer determined that while Merrick's bid appeared to be unbalanced, it did not present an unacceptable risk to the government; award was made to Merrick on June 9. Agency Report, Tab L, Agency Protest Decision, at 13. Reece then filed this protest with our Office.

In arguing that Merrick's bid is impermissibly unbalanced, Reece points to the prices below:

CLIN	Gov't Estimate	Merrick	Reece
0001 (Mob & Demob)	$ 39,610	$300,000	$215,000
0002 (Clearing & Grubbing)	$228,500	$550,000	$418,500
0003 (Turfing)	$184,760	$ 10,000	$127,200
0008 (Compacted Fill)	$399,747	$681,000	$354,120

The thrust of Reece's argument is that Merrick's price for CLIN 0003 (turfing) is significantly underpriced, therefore, the reasonable costs of this work must have been shifted to other CLINs that would be performed earlier, resulting in an advance payment.[1] The protester argues that while it "cannot be determined with specificity exactly where in its bid Merrick shifted the reasonable costs for turfing," Protest at 5, these costs "appear to have been shifted by the low bidder into either line items 1, 2, or 8, or a combination of these items." Protest at 3.

The current provisions of the Federal Acquisition Regulation (FAR) governing unbalanced pricing provide that unbalanced pricing exists where, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated or understated. FAR § 15.404-1(g)(1). Although prior FAR Part 15 provisions called for rejection of an unbalanced offer if it was so grossly unbalanced that its acceptance would be tantamount to allowing an "advance payment," FAR § 15.814(b)(2) (June 1997), the recent revisions to FAR Part 15 eliminated any reference to "advance payments," instead requiring a procuring agency to perform a risk analysis to determine whether award on the basis of an

---

[1] To the extent that Reese's allegation is actually nothing more than that Merrick's price for CLIN 0003 is unreasonably low, the protest is not for consideration on the merits as there is no legal basis to object to the submission or acceptance of a below-cost offer. Stocker & Yale, Inc., B-249466.2, Jan. 29, 1993, 93-1 CPD ¶ 88 at 4, n.3.

apparently unbalanced offer would result in paying unreasonably high prices or would otherwise present an unacceptable level of risk to the government. FAR § 15.404-1(g)(2).[2] The required risk analysis entails the agency's determination of price reasonableness for the various line items, which we review for reasonableness.[3] J&D Maintenance and Serv., B-282249, June 18, 1999, 99-2 CPD ¶ 28 at 7. If our review of that determination results in our conclusion that it is unobjectionable, there is no separate basis for concern about a possible proscribed advance payment since, if it is true that the government is paying a reasonable price for each of the various line items (and overall), it follows that the government is not paying more than the value of the good or service being provided under each of the line items. Duke Eng'g & Sons, Inc., B-284605, May 17, 2000, 2000 CPD ¶ ___.

Here, after reviewing Merrick's bid, the contracting officer concluded that it appeared unbalanced. Agency Report at 4. In particular, the contracting officer noted that Merrick's bid of $10,000 for turfing appeared to be significantly understated when compared with the government estimate of $184,760 and with other bids, such as Reece's $127,200 bid for this CLIN. Id. The agency also considered the allegations raised by Reece in its agency-level protest, and after reviewing Merrick's CLIN pricing, as outlined below, concluded that notwithstanding the possibility of unbalanced pricing, Merick's bid did not present an unacceptable risk to the government.

The agency considered each of the three CLINs that Reece cites as possibly having overstated prices. The first of these, CLIN 0001, involved mobilization and demobilization, for which Merrick bid $300,000, Reece bid $215,000, and the government estimate was $39,610 (without profit). The agency recognized that the cost for this item is dependent upon a number of factors, including the location of the bidder and the way in which the work would be performed, and notes that the bids submitted for this CLIN varied significantly, ranging from 62 percent below to 1036 percent above the government estimate. The agency also points out that the RFP included Defense FAR Supplement clause 252.236-7004, which specifically allows the contracting officer to limit payment for mobilization and demobilization to a contractor's actual costs and postpone payment until final payment where the contracting officer determines that the lump-sum price for this CLIN does not bear a reasonable relation to the cost of the work. Agency Report, Tab L, Agency Protest Decision, at 4-5. Moreover, the clause provides that where the contractor has failed

---

[2] FAR § 14.404-2(g) makes these considerations applicable to sealed bids, providing that a bid may be rejected if prices for any line items or subline items are materially unbalanced using the FAR § 15.404-1(g) risk analysis.

[3] FAR § 14.408-2 provides that the price analysis performed in making the required determination that a bid is reasonable shall consider whether the bid is materially unbalanced under FAR § 15.404-1(g).

to justify its price for this portion of the bid, the contracting officer's determination of the actual costs is not subject to appeal. Id. at 5. This clause effectively minimizes the risk that the government will make an early payment of an unreasonably high price for this portion of the work.

With respect to the second CLIN cited by Reece as possibly overstated, CLIN 0002 for clearing and grubbing, the Corps notes that prices also varied widely among bidders, ranging from $185,000 (19 percent below the government estimate) to $1,225,000 (436 percent above the government estimate). Id. The contracting officer reasonably concluded that Merrick's $550,500 bid for this CLIN was not overstated as it was broadly in line with other bids and was, in fact, not much higher than Reece's $418,500 bid. We see no basis to object to this conclusion.

Regarding CLIN 0008 for compacted fill, the protester points out that bids for this item were submitted as unit prices, which were then extended by the agency's estimate of the number of cubic meters of fill that would be required. Reece hypothesizes that if the agency has underestimated the required fill quantity, a relatively high unit price would have a determinative impact on total price. Reece thus argues that Merrick's $10 per cubic meter price for this item, in comparison to Reece's $5.20 price and the government estimate of $5.87, is sufficiently overstated that if the actual requirement overruns the quantity estimate of 68,100 cubic meters by slightly less than 10 percent, Merrick's price would no longer be low. Protest at 6.

Reece describes the work to be performed under CLIN 0008 as part of the construction of a levee embankment across a bayou for a distance of approximately 160 meters in water approximately 2 meters deep. As a first step, the contractor must construct two uncompacted fill dikes across the bayou and pump the water out from between the two dikes; then the mud is removed and replaced by a 1.5 meter-thick layer of stone, under CLIN 0011. Compacted fill material, covered by CLIN 0008, is then placed to a specified elevation. Protest at 3. Reece argues that the quantity of material that must be placed under CLIN 0008 could vary substantially from the estimated quantity. Further, Reece alleges that the foundation under the stone layer consists of the bayou bottom "which is subject to subsidence or settlement," and contends that the inclusion of a provision in the RFP permitting the placement (at the contractor's option and expense) of settlement gages to measure the amount of any additional fill material required indicates that the potential for settlement is great. Protester's Comments at 4.

We do not find these arguments persuasive. Reece did not challenge the accuracy of the estimates prior to bid opening, and the mere inclusion of a clause providing a measuring methodology for an increased quantity of fill material does not, in our view, reflect any probability that the requirement will, in fact, exceed the initial estimate. The Corps acknowledges that there are potentially greater risks to the government where prices are based upon quantity estimates, but concluded here that the risk was not unacceptable because the dirt fill quantity estimates are reasonably certain. Agency Report at 7. The chief of the Corps's cost engineering section

associated with this project assessed the fill requirement and determined that there was no basis to conclude that there were any possible estimate variances that were likely to cause Merrick's actual price to become greater than Reece's. Agency Report, Tab M, Technical Analysis, at 1. This assessment pointed out that the estimate is based on the best information available, which is reflected in the IFB plans and specifications that permit accurate calculation of the required fill, and that there is an equal possibility that the quantity required will be less than the estimate. The engineer further noted that this CLIN involves filling and closure of areas that the contractor itself would have excavated under CLIN 0010 and that the specifications require that upon completion of the excavation of the soft material, the area will be surveyed to determine the pay quantities of the fill material based on the theoretical volume. Thus, any increase in the quantity of CLIN 0008 would be the direct result of a soft material over-excavation of CLIN 0010,[4] and any overrun in quantity of the fill material (CLIN 0008) will be equal to the quantity of overrun in the soft material excavation (CLIN 0010), where the overrun is a result of the lowering of the foundation elevation. Id. at 1-2. Since Reece's unit price for the excavation work was $14 per cubic meter, while Merrick's price was $5, if there were any overruns for these two CLINs, the agency reasonably concluded that Reece's overall price would remain higher than Merrick's. Agency Report at 8.

In sum, the protester has not shown any basis to conclude that the requirement under CLIN 0008 is likely to be greater than the estimate reflects, and the agency analyzed the requirement and the awardee's pricing and reasonably determined that award to Merrick would not result in payment of unreasonable prices and that there was not an unacceptable risk associated with Merrick's pricing of this CLIN and of the other CLINs at issue. In our view, the agency has satisfied the FAR requirements regarding Merrick's possibly unbalanced pricing by reasonably determining that the risks presented by Merrick's pricing structure were not significant enough to render its low bid unacceptable. Red River Serv. Corp., B-282634, B-282634.2, July 15, 1999, 99-2 CPD ¶ 31 at 2-3. The fact that the protester disagrees or can construct a hypothetical situation under which the awardee's bid might not be low does not call into question the reasonableness of the agency's conclusion.

The protest is denied.

Robert P. Murphy
General Counsel

---

[4] While Reece disputes this conclusion, arguing that an increased requirement under CLIN 0008 could be the result of subsidence of the foundation, it offers no explanation why this should occur, beyond its allegation that "[g]iven the nature of the work required by Bid Item 8 . . . it is likely that it will substantially overrun the estimated quantity." Protest at 6.