



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Industrial Builders, Inc.

File: B-283749

Date: December 29, 1999

Philip L. Bruner, Esq., and William L. Roberts, Esq., Faegre & Benson, for the protester.

Marvin T. Fabyanske, Esq., and Arlene D. Anderson, Esq., Fabyanske, Westra & Hart, for Swanberg Construction Company, Inc., an intervenor.

Robert M. Andersen, Esq., Karen Da Ponte, Esq., and Steven P. Adamski, Esq., U.S. Army Corps of Engineers, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under invitation for bids (IFB) for construction of water control structure, agency reasonably rejected bid as unbalanced where bidder failed to allocate the cost of a cofferdam (a dewatering measure) among related work items requiring dewatering measures, as provided in the IFB, and instead included the cost of a cofferdam in its lump-sum line item price for a relatively minor work requirement for clearing, grubbing, and snagging of debris on the site, rendering the bidder's price for that line item many multiples higher than the government's estimate for the item and the other bids received; rejection of the bid was proper based upon agency's reasonable determination that the unbalancing posed an unacceptable risk that the government would make a substantial payment to the bidder upon completion of the required clearing, grubbing, and snagging work, without any assurance that the bidder would have constructed the cofferdam which was included in its price for that line item.

DECISION

Industrial Builders, Inc. (IBI) protests the rejection of its bid as unbalanced under invitation for bids (IFB) No. DACW37-98-B-0017, issued by the U.S. Army Corps of Engineers, St. Paul District, for the installation of a new water control structure at the outlet of a Lake Traverse flood control reservoir, located on the Minnesota/South Dakota border.

We deny the protest.

The IFB contemplated the award of a fixed-price contract for the removal of an existing structure, the construction of a new water control structure, and associated work. IFB § 00100, ¶ 22, at 00100-6. The requirements were divided among 30 contract line items (CLIN) set out in the IFB's bid schedule, for each of which bidders were required to submit a lump-sum price.¹ IFB § 00010, at 00010-3 through 00010-5. IBI's protest relates to CLIN 0004, for clearing, grubbing, and snagging work. Section 02110 of the IFB described the scope of the work required under CLIN 0004 as "clearing, grubbing, snagging; disposal of cleared, grubbed, and snagged materials; and filling of grubbing holes." IFB § 02110, ¶ 1.1, at 02110-2.² With respect to payment for the CLIN 0004 work, bidders were instructed that such work "will not be measured for payment and shall be performed on a job basis, complete." *Id.* ¶ 1.5.

The agency's general requirements for water control measures during contract performance were set out in the IFB's specifications, which provided that:

dewatering work/operations involved in the execution of the contract project work includes primarily the drawdown of water table, but may also require temporary barriers (small cofferdams,³ earth diking, sheeting, or other satisfactory type of barrier) to protect against the prevailing creek/river/stream stages at outfalls.

IFB § 01000, ¶ 1.22.1, at 01000-20. Several IFB provisions specifically referred to a need for dewatering equipment or barriers. For example, the IFB provided that the new control structure would require temporary barriers, and that dewatering operations were to be performed "so that excavation, foundation preparation, cast-in-place concrete placement, precast concrete installation, and backfilling for all

¹ Some CLINs, not relevant to the protest, which were not priced on a job basis, also required unit prices.

² Clearing consisted of felling, trimming, cutting, and disposal of trees and other vegetation, including "down timber, snags, brush, and rubbish occurring in the areas to be cleared." *Id.* ¶ 1.3.2. Grubbing consisted of "the removal and disposal of stumps, roots, buried logs, old piling, old paving, and other objectionable matter, below the ground surface not classified as excavation." *Id.* ¶ 1.3.3. Snagging consisted of "the removal and disposal of snags . . . [such as] dead and broken trees and portions of trees that may be lodged in bodies of water." *Id.* ¶ 1.3.4.

³ A cofferdam is "a temporary watertight enclosure built in the water and pumped dry to expose the bottom so that construction . . . may be undertaken"; cofferdams may be constructed of dirt and earth, or supported by steel sheet piling, depending on the desired strength. Agency Report at 2 n.1, citing Webster's II New Riverside University Dictionary 278 (1988).

structures are made in the dry.” Id. ¶ 1.22.3, at 01000-20.⁴ There was no provision in the IFB’s dewatering specifications which specifically required dewatering measures for the clearing, grubbing, and snagging work of CLIN 0004. The IFB provided specific instructions to bidders regarding bid preparation and payment for the contractor’s dewatering work. In this regard, the IFB provided the following instructions:

No separate payment will be made for dewatering protection work. Compensation for performing the necessary dewatering work for various items of the contract project permanent work such as outlet lines, interceptor lines, manholes, inlets, gatewells, and closure structures shall be included in the contract items for the work to which the dewatering operations pertain.

Id. ¶ 1.22.7, at 01000-22 (emphasis added).

Three bids were received by the scheduled bid opening on May 28, 1999. IBI submitted the apparent low total bid, \$1,294,860; Swanberg Construction Company submitted the next low bid, \$1,328,500; and the third bid was \$1,442,580. Agency Report at 1. The government estimate, initially set at \$919,815, was revised after bid opening to \$1,171,145.⁵ Id. at 1-2. IBI’s CLIN 0004 price, however, was significantly higher than the other bids received for that item, as follows:

IBI	\$397,000
Swanberg	\$ 3,000
Bidder No. 3	\$ 5,000
Government Estimate (revised)	\$ 1,900

The contracting officer notified IBI of his concerns regarding IBI’s apparently inflated price for CLIN 0004. By letter of June 7, IBI verified its bid, explaining that, since the IFB did not provide a CLIN for mobilization or water control, IBI chose to include those costs (\$70,000 for mobilization, and \$320,000 for water control,

⁴ This provision included other examples of the type of contract work, in addition to the construction of the new structure, which similarly required dewatering protection equipment and barriers (e.g., temporary sheeting and earth barriers), including new gage house wells, foundation preparation, and concrete placement. Id. at 01000-21.

⁵ The agency explains that after the agency noted that its original estimate failed to include certain dewatering costs, \$200,000 was added, on a pro rata basis, over several “wet” line items which would benefit from dewatering, such as CLIN 0026, for the new control structure, and CLIN 0012, for bedding for riprap. Another \$300 was added to the agency’s estimate for work under CLIN 0004 for the cost of pulling any dead trees and logs out of the water. Agency Report at 2.

including \$312,000 for a cofferdam) in its line item price for CLIN 0004.⁶ Letter from IBI to Contract Specialist (June 7, 1999). From this information, the agency was able to calculate that \$7,000 remained under IBI's CLIN 0004 bid price to reflect the firm's work for the clearing, grubbing, and snagging required under that CLIN. Agency Report at 3 n.3. In its June 7 letter, IBI further explained that, since its mobilization and water control costs would be expended early in the performance of the contract, the firm included those costs in a CLIN (CLIN 0004) that would be performed early in the contract period. After additional post-bid opening communications, the agency and IBI agreed to incremental payments for CLIN 0004 work as the work progressed. On the basis of that payment agreement, the agency determined that its concerns that IBI's bid was "unbalanced and that the Government would be paying an unreasonably high price for contract performance" were alleviated. Determination and Findings, June 21, 1999, at 2. The agency awarded a contract under the IFB to IBI on June 23.

Swanberg, the bidder next in line for award, protested the IBI award to the agency, contending that the bid was unbalanced under CLIN 0004 compared to the other bids received and the agency's estimate for the work item. The agency sustained the protest, finding that IBI improperly failed to spread the cost of the firm's cofferdam among the IFB's CLIN items to which the dewatering operations relate, as required by the IFB. Agency Protest Decision, Sept. 9, 1999, at 8-11. Consequently, the agency determined that, by including all of its cofferdam costs in the firm's CLIN 0004 item price, IBI submitted a nonresponsive bid with an inflated CLIN 0004 price greatly exceeding the value of the work required under CLIN 0004. *Id.* That decision pointed out that under the IFB's terms, payment for the CLIN 0004 work was to be made on a lump-sum basis at the total price bid by IBI for the CLIN--here, \$397,000--which represents a price more than 200 times higher than the agency's estimate of the value of the work described under that CLIN item. *Id.*; Agency Report at 5.

In sustaining Swanberg's protest, the agency determined that acceptance of IBI's bid would be tantamount to an advance payment, in light of the fact that payment at the full CLIN 0004 price would have to be made early in the contract performance period when the clearing, grubbing, and snagging work was completed, regardless of whether the cofferdam was constructed at the time, since a cofferdam was not specifically required by the IFB for CLIN 0004. Agency Protest Decision at 11. Consequently, the agency rejected the bid and terminated IBI's contract for the convenience of the government. This protest followed.

⁶ IBI's inclusion of its mobilization costs in its CLIN 0004 item price has not been challenged by the agency, which reports that it did not object to the IBI bid in that regard, since although the IFB gave instructions to the bidders regarding inclusion of their dewatering costs in their prices for work items which relate to the dewatering efforts, the IFB provided no instruction to bidders as to where to include mobilization costs in their bids. Agency Report at 3 n.2.

IBI contends that, since the IFB did not provide a separate CLIN for water control operations, the “bid specification . . . left to [IBI] the allocation of the cost of cofferdam installation to the first CLIN work [cleaning, grubbing, and snagging under CLIN 0004] that could not be completed without the cofferdam being in place . . . because 51 [percent] of the area to be grubbed was under water.”⁷ Protest at 4-5. In its protest submission, IBI summarizes its position on the issue as follows:

Inclusion of the cost of the cofferdam in CLIN 0004 (1) was reasonable, (2) was directly related to [IBI’s] planned sequence of construction, (3) was intended to assure that [IBI] would not be obliged to borrow much money to build the cofferdam, (4) had as its objective the creation of a balanced cash flow throughout the project, (5) was not precluded by the bid specifications, and (6) does not result in any payment to [IBI] in advance of performance of the work.

Protest at 5.

We have considered each of IBI’s contentions in support of its protest and, as discussed further below, we find that the record supports the reasonableness of the contracting officer’s rejection of the IBI bid as unbalanced.

As a preliminary matter, IBI argues that, since the IFB did not provide a specific CLIN for the firm’s cofferdam price, or provide payment terms for cofferdams in particular, the firm was free to include it in its price for CLIN 0004, which CLIN IBI states it planned to perform at the same time (early in the contract period) that it would build its cofferdam. In fact, the IFB did provide guidance to bidders regarding payment for cofferdams. The dewatering provisions at IFB § 01000, ¶ 1.22.1, at 01000-20, quoted above, specifically reference the use of cofferdams by the contractor in its dewatering efforts. Consequently, the IFB dewatering payment provision, *id.* ¶ 1.22.7, at 01000-22, also quoted above, which calls for the bidder’s costs for measures like a cofferdam to be spread over the CLINs requiring dewatering, governs the payment terms for IBI’s cofferdam. Similarly, we find

⁷ The agency reports that it is “aware of little, if any, clearing and grubbing work that would be performed in the area IBI identified as under water.” Contracting Officer’s Statement at 9-10. Our decision, as discussed below, rests upon the protester’s failure to follow the IFB’s bidding instructions for the distribution of dewatering costs among related CLIN items, as opposed to IBI’s inclusion of such costs in one minor CLIN item. Accordingly, we need not resolve the factual issue regarding the extent of underwater clearing and grubbing work at the site, since, even if the cofferdam, was necessary for clearing and grubbing, its total cost was not to be included under CLIN 0004; rather, the cost of any dewatering work was to be spread among the bidder’s prices for all the CLINs in the contract that would involve the need for the same water control effort. *See* IFB § 01000, ¶ 1.22.1, at 01000-20.

unreasonable IBI's argument that the firm's inclusion of its total cofferdam price in a minor CLIN item for clearing and grubbing work is acceptable simply because the IFB did not specifically prohibit it. Rather, IBI, in an exercise of its own business judgment, based upon its admitted desire to limit its own financial obligations to construct the cofferdam, and despite solicitation language to the contrary, failed to allocate, as instructed, its substantial dewatering costs among relevant items in the IFB. The opportunity for a lump-sum payment for the dewatering work early in the contract period, as included in IBI's bid, simply was not contemplated by the IFB, or extended to any other bidder in preparation of its bid.

Federal Acquisition Regulation (FAR) § 14.404-2(g), provides that any "bid may be rejected if the prices for any line items or subline items are materially unbalanced (see [FAR §] 15.404-1(g))." Unbalanced pricing exists where, as here, the price of one or more contract line items is significantly overstated, despite a relatively low total evaluated price. FAR § 15.404-1(g)(1). Offers with separately priced line items must be analyzed to determine if the prices are unbalanced by, for example, comparing offered prices with prices in other bids or with an independent government estimate. FAR § 15.404-1(b), (g)(2). A bid "may be rejected if the contracting officer determines that the lack of balance poses an unacceptable risk to the Government." FAR § 15.404-1(g)(3). While the agency here analyzed the unbalancing in terms of an "advance payment," that term does not appear in the discussion of unbalanced pricing in the revised Part 15 of the FAR, which applies to solicitations issued after January 1, 1998, such as the subject IFB. We believe, however, that the agency's analysis remains valid when couched in terms of the risk that IBI's pricing poses to the government.

Specifically, our review of the record confirms that there is nothing improper in the agency's decision to reject the bid, since the agency had a reasonable basis for concluding that IBI's pricing for CLIN 0004 was unbalanced. The agency's price analysis shows that IBI's CLIN 0004 price of \$397,000 is many multiples higher than the other bids received for the item (\$3,000 and \$5,000) and the agency's estimate (\$1,900). Although IBI stated after bid opening that its CLIN 0004 price includes \$320,000 for water control costs related to the construction of a cofferdam, it has cited to no provision in the IFB, and we have not found one, that required the construction of the cofferdam under CLIN 0004's work requirements, or authorized payment for it under that CLIN. See Barnard-Slurry Walls, J.V., B-274973, B-274973.2, Jan. 15, 1997, 97-1 CPD ¶ 23 at 5. Rather, the IFB here specifically instructed bidders that dewatering work would not be paid for separately and that such costs were to be "included in the contract items for the work to which the dewatering operations pertain."⁸ IFB section 01000, ¶ 1.22.7, at 01000-22.

⁸ In its comments, IBI, for the first time, argues that the "dewatering" payment provisions should not apply to its cofferdam, which is designed to accomplish "unwatering" efforts. We will not consider this argument, since it is untimely filed, as
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IBI states that it structured its bid based upon its anticipated sequence of construction, and that it did so to receive early payment for the cofferdam and not have to finance the costs of constructing it. IBI's performance approach and its desire to limit its own monetary risks or obligations simply do not resolve the unbalancing of the IBI bid, given that IBI prepared its bid contrary to the IFB's terms, in order to benefit from a competitive advantage not shared by the other offerors that were willing to compete on the agency's terms. See Barnard-Slurry Walls, supra, at 4-5.

As stated above, the agency's price analysis shows that the protester's CLIN 0004 price is significantly overstated, by many multiples, for the work described by the IFB for that line item due to the inclusion of IBI's cofferdam price. The IFB, however, did not specifically require the cofferdam for the performance of CLIN 0004, and did not authorize payment for it as part of the work to be performed under that CLIN. The IFB required a lump-sum payment for CLIN 0004, but provided no means for the agency to compel construction of the cofferdam IBI included in its price under that CLIN. Accordingly, we find that the agency acted reasonably in concluding that it faced substantial risk in any award of the contract on the basis of IBI's unbalanced bid. Specifically, the agency reasonably concluded that it could be faced with payment to the contractor at a significantly inflated price for a minor work item, as soon as the nominal clearing, grubbing, and snagging work was completed, regardless of whether the cofferdam had been constructed.⁹ Thus, in the event of early termination of the contract, the agency would find itself having expended a substantial sum (approximately a third of the contract price) at the time of payment for the clearing, grubbing, and snagging work, without receiving the

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it could have been included in the initial protest submission, but was not. See 4 C.F.R. § 21.1(a)(2) (1999). In any event, we note that the IFB does not distinguish between these terms, and the agency has provided evidence of industry use of the term dewatering to include IBI's definition of unwatering. Agency Supplemental Report at 1-3.

⁹ We note in this regard that the contracting officer would appear to have had an adequate basis to reject IBI's bid as unreasonable as to the price of CLIN 0004. See FAR § 14.404-2(f) (bid may be rejected due to the unreasonableness of the prices of individual line items).

majority of the work sought under the IFB. See Barnard-Slurry Walls, J.V., supra; Sawadi Corp., B-265740, B-265741, Dec. 21, 1995, 95-2 CPD ¶ 279 at 4. Accordingly, given the reasonableness of the agency's risk assessment of IBI's unbalanced bid, we see no reason to question the propriety of its rejection of that bid.

The protest is denied.

Comptroller General
of the United States