GAO
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Burney & Burney Construction Company, Inc.

File: B-292458.2

Date: March 19, 2004

Michael P. Byrne, Esq., Lane & Waterman, for the protester.
Kateni T. Leakehe, Esq., Department of the Army, for the agency.
Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly rejected protester's bid as unbalanced is denied where bid included overstated prices for some line items, and agency determined that, due to uncertainty in estimated quantities for those items, bid posed risk that government would pay an unreasonable price for contract performance.

DECISION

Burney & Burney Construction Company, Inc. protests the rejection of its bid as unbalanced under invitation for bids (IFB) No. DAKB13-013-B-0003, issued by the Department of the Army for painting and related services.

We deny the protest.

The solicitation called for the award of a requirements contract for a base year, with 4 option years. It listed 18 line items (per year), each describing a painting service to be performed, and each setting forth a quantity estimate. Bidders were required to supply unit and extended prices for each line item, with the overall price to be determined by multiplying the unit prices by the corresponding estimated quantities, and then totaling the resulting extended unit prices. Burney's bid, at $2,463,354.50, was the lowest of the five bids received; the next low bid was $2,523,133.00. The contracting officer determined that Burney's bid was unbalanced because some line item prices were overstated, and further that, due to the uncertainty inherent in the estimates for those overpriced items, an award based on Burney's apparent low bid might result in the government's paying an unreasonably high price for contract performance. The contracting officer therefore rejected Burney's bid. Burney protests the rejection.

Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated (typically one or more other line items are underpriced). Where an unbalanced bid is received, the contracting officer is required to conduct a risk analysis to determine whether award to the firm will result in the government's paying an unreasonably high price for contract performance. Federal Acquisition Regulation (FAR) § 15.404-1(g)(2). A bid properly may be rejected if the contracting officer determines that the lack of balance poses an unacceptable risk to the government.[1] FAR § 14.404-2(g); L. W. Matteson, Inc., B-290224, May 28, 2002, 2002 CPD ¶ 89 at 3.

With respect to the risk that the agency would pay an unreasonable price for performance, where, as here, the issue of unbalancing arises in the context of a requirements contract, the accuracy of the solicitation estimates is critical, since the unbalanced bid will become less advantageous than it appears if the government ultimately requires a greater quantity of the overpriced items. Alice Roofing & Sheet Metal Works, Inc., B-275477, Feb. 24, 1997, 97-1 CPD ¶ 86 at 4. Accordingly, where an agency has reason to believe that its actual needs may vary significantly during performance from the solicitation estimates, it may reasonably view an unbalanced bid as not representing the lowest cost to the government. Id.

The contracting officer here explains that, while the agency prepared the estimates for each line item based on historical data and made a good faith effort to make them accurate, the work under the IFB is subject to many variables, so the work actually ordered under any line item could deviate substantially from the estimates. In this regard, the agency explains, painting is not directly funded but, rather, is funded under the maintenance budget, and is given low priority because many other maintenance projects, such as mechanical repairs, cannot be delayed. Thus, if a large quantity of priority work arises, less painting than estimated may be ordered, while, if less priority work is required, more painting may be ordered. Due to the uncertainty resulting from these variables, the contracting officer was concerned that Burney's bid, with its overstated prices for some line items, could result in other than the lowest total cost to the government if the actual quantities for those items exceeded the estimates. In order to verify her position, the contracting officer calculated the effect if the ordered quantities under the current contract ultimately were the same as the quantities actually ordered under the fiscal year 2003 contract. She determined that, for several line items, including those overpriced in Burney's bid, the amount of work ordered by the Army was significantly higher than the

---

[1] The agency also determined that Burney's bid was unbalanced because some line item prices were understated, creating a performance risk. However, low prices (even below-cost prices) are not improper and do not themselves establish (or create the risk inherent in) unbalanced pricing. See Island Landscaping, Inc., B-293018, Dec. 24, 2003, 2004 CPD ¶ 9 at __.

amount of work estimated, and that the total cost to the government would be greater than the next low bid if the same quantities were ordered at Burney's bid prices for those items. It was on this basis that the contracting officer concluded that Burney's bid should be rejected.

The agency's actions were unobjectionable. Viewing just two of the overpriced items in Burney's bid against the actual fiscal year 2003 requirements, Burney's total bid increases such that it is no longer low. Specifically, for line item No. 6 (coverage of wood trim), Burney's bid was \$7.25, while the government estimate was \$1.91 and the average price of the other bids was \$4.19; multiplying Burney's item price by the solicitation estimate of 20,000 square yards yielded an extended price of \$145,000. In fiscal year 2003, the agency actually ordered 39,815 square yards; if the agency ultimately ordered the same quantity under the current contract, at Burney's \$7.25 bid price the government's cost for the line item would increase by \$143,658.75, to \$288,658.75. For line item No. 10 (coverage of metal surfaces), Burney bid \$7.25, compared to the government estimate of \$1.59 and the average bid price of \$4.70. The IFB estimate was 3,500 square yards, which yielded an extended bid price of \$25,375 for Burney. However, in fiscal year 2003 the agency ordered 70,307 square yards of work under line item No. 10; if the same quantity were ordered from Burney under the current contract, the cost to the government would increase by \$484,350.75, to \$509,725.75. Thus, based on the fiscal year 2003 actual requirements for just these two items, Burney's bid would increase by \$628,009.50, far in excess of Burney's evaluated price advantage--\$59,778.50--over the second low bidder. The risk that this would occur provided a reasonable basis for the agency to reject Burney's bid.

Burney argues that the agency's reliance on the fiscal year 2003 quantities to reject its bid is improper, because doing so, in effect, improperly changes the estimates in the solicitation that were to be the basis for evaluating bids; Burney's bid was low based on those estimates. In any case, Burney asserts, there is no reason to believe that the actual fiscal year 2003 requirements, rather than the solicitation estimates, reflect the amount of painting that the agency will order under the current contract. In this regard, Burney reasons that the fact that an agency ordered more of a line item under the prior contract does not mean that it will do the same under the current contract; in fact, Burney asserts, the fact that the Army ordered more painting than estimated under certain line items in fiscal year 2003 could indicate that it will order less painting under those line items this year.

These arguments are without merit. In light of the agency's experience under the fiscal year 2003 contract, there is no basis on this record for us to disagree with the agency that the quantities ordered may substantially deviate from the estimated quantities. In this regard, contrary to Burney's suggestion, the agency is not using the actual fiscal year 2003 quantities to change the estimates in the solicitation, or the evaluated bid prices. Rather, the agency is using them in its separate unbalancing analysis to demonstrate that it cannot predict with accuracy the amount of painting that will be required, and to assess the potential risk posed by Burney's unbalanced bid if larger quantities of the high price items ultimately are ordered. Further, while Burney is correct that the Army could order less painting under the line items where larger quantities were ordered under the prior contract, this possibility does not preclude possibility--and does not establish that the agency unreasonably determined--that larger quantities again could be ordered under the current contract.

Accordingly, we conclude that the agency reasonably determined that Burney's bid posed an unacceptable risk, due to its overstated prices for certain line items and the possibility that the quantities ordered under those items will be substantially greater than the IFB estimates, that the bid might not represent a reasonable price for the contract. The agency therefore properly rejected the bid as unbalanced.

The protest is denied.

Anthony H. Gamboa
General Counsel