



**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Barnard-Slurry Walls, J.V.

**File:** B-274973; B-274973.2

**Date:** January 15, 1997

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Carter B. Reid, Esq., and Robert M. Fitzgerald, Esq., Watt, Tieder & Hoffar, L.L.P., and Brian M. Morris, Esq., and William L. Madden, Esq., Goetz, Madden & Dunn, P.C., for the protester.

Thomas J. Madden, Esq., Charles R. Marvin, Esq., and W. Craig Dubishar, Esq., Venable, Baetjer & Howard, L.L.P., for Solentanche-Inquip, JV, an intervenor.

Clark J. Hulce, Esq., and William L. Henson, Esq., Department of the Army, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Low bid for levee reconstruction work was properly rejected as materially unbalanced where the lump sum price for preparatory work line item was many multiples higher than the reasonable value of the work, such that the bid was grossly front-loaded, and the unit price for the levee reconstruction work was significantly less than the government estimate and other bid prices.

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## DECISION

Barnard-Slurry Walls, J.V. protests the rejection of its bid as unbalanced under invitation for bids (IFB) No. DACW05-96-B-0066, issued by the United States Army Corps of Engineers, Sacramento District, for levee reconstruction work.

We deny the protest.

The IFB, issued on August 13, 1996, contemplated the award of a firm, fixed-price contract for levee reconstruction at two sites in the Maryville/Yuba City area of California. The project required the construction of an impervious slurry cut-off wall at the south levee of the Yuba river and at the east levee of the Feather river.

The pricing schedule for the project contained nine separate contract line items (CLIN) as follows: CLIN 0001 - Preparatory Work; CLIN 0002 - Demolition; CLIN 0003 - Aggregate Base Course; CLIN 0004 - Erosion Control Seeding; CLIN 0005 - Slurry Cut-off Wall; CLIN 0006 - Soil Explorations; CLIN 0007 - Bituminous Surface Course; CLIN 0008 - Bituminous Prime Coat; and CLIN 0009 - Site Clean-Up. All of

the line items, except CLIN 0003 and CLIN 0005, requested a lump sum bid price. CLIN 0003 requested a per ton unit and extended price for an estimated 6,400 tons of aggregate base course and CLIN 0005 requested a per square foot unit and extended price for constructing an estimated 750,000 square feet of slurry cut-off wall.

The technical specifications described the work to be performed and the method of payment for each CLIN. With regard to the CLIN 0001, preparatory work, the IFB provided:

"1.1 Scope: Preparatory work shall consist of operations including, but not limited to, those necessary for the movement of personnel, equipment, supplies, and incidentals to the project site; for the establishment of all facilities necessary for work on the project, and for all other work and operations which must be performed, or costs incurred prior to beginning work on the various Contract items on the project site.

. . . . .

"7. Measurement and Payment: Measurement and payment . . . for . . . covered by this section . . . shall be made at the contract lump sum price for "PREPARATORY WORK" . . . .

With regard to CLIN 0005, slurry cut-off wall, the IFB provided that the contractor was required to furnish "all necessary plant and equipment" to construct the slurry cut-off wall. The IFB further provided that payment for the work covered by this CLIN would be made at the contract per square foot price for the measured work and that no separate payment would be made for work performed under this CLIN for materials and equipment.

The IFB incorporated the Payments under Fixed-Price Construction Contracts clause at Federal Acquisition Regulation (FAR) § 52.232-5, which among other things authorizes progress payments. The IFB also required the contractor to submit a project schedule (of values) if it expected to receive progress payments during the contract.

The IFB contemplated award to the low responsive and responsible bidder, but cautioned that "any submitted pricing schedule determined to be unbalanced may be considered nonresponsive and cause the bidder to be ineligible for the award." In this regard, the IFB required bidders to distribute their "indirect costs (overhead, profit, bond, etc.) over all the items in the" schedule.

The Corps received three bids at the September 12 bid opening. Barnard submitted the apparent low bid of \$4,827,500, Solentanche-Inquip, JV, submitted the next low bid of \$5,342,500, and Geo-Con submitted the third low bid of \$5,918,300. The government estimate for the project was \$5,579,000.<sup>1</sup> Barnard's CLIN 0001 price was \$2,114,000, while the other bids for this CLIN were \$350,000 and \$585,000, respectively; the corrected government estimate for this CLIN was \$250,000.<sup>2</sup> Barnard's CLIN 0005 unit price was \$3.25 per square yard for an extended price of \$2,437,500, while the other bids for this CLIN were both \$6.35 per square yard for an extended price of \$4,762,500, and the government estimate for this CLIN was \$6.65 per square yard.

By letter dated October 2, the Corps rejected Barnard's bid as unbalanced. The Corps found that Barnard's CLIN 0001 price grossly overstated the cost of the work for that item--8.4 times the government estimate and 6 times the next low bid--such that payment of this item would be tantamount to an advance payment, while Barnard's slurry cut-off wall unit price in CLIN 0005 significantly understated the cost for work under that line item. Consequently, the Corps made award to Solentanche, the next low bidder.

A bid which is materially unbalanced must be rejected as nonresponsive. FAR § 14.404-2(g) (FAC 90-29); Howell Constr., Inc., 66 Comp. Gen. 413 (1987), 87-1 CPD ¶ 455; The Ryan Co., B-238932, June 13, 1990, 90-1 CPD ¶ 557. Pursuant to FAR § 15.814(b)(2) (FAC 90-37), a bid is materially unbalanced and should be rejected, if it is mathematically unbalanced, and if the bid is grossly unbalanced such that its acceptance would be tantamount to allowing an advance payment, even if the bid represents the lowest cost to the government.<sup>3</sup> ACC Constr. Co., Inc., B-250688, Feb. 16, 1993, 93-1 CPD ¶ 142; F & E Erection Co., B-234927, June 19, 1989, 89-1 CPD ¶ 573. A bid is mathematically unbalanced "if it is based on prices which are significantly less than cost for some contract line items and significantly overstated in relation to cost for others." FAR § 15.814(b). We have only found bid prices to be grossly front-loaded where the front-loaded price(s) are many multiples higher than the value of the work to be performed or the remaining contract prices.

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<sup>1</sup>After receipt of bids, the Corps revised the original government estimate of \$3,706,000 after it was determined that the estimates for certain CLINs were in error.

<sup>2</sup>The original erroneous estimate for CLIN 0001 was \$66,500.

<sup>3</sup>Under FAR § 15.814(b)(1), a bid is also materially unbalanced if it is mathematically unbalanced and if "there is a reasonable doubt that the offer would result in the lowest overall cost to the [g]overnment, even though it is the lowest evaluated offer." This provision is inapplicable to the present case.

Rust Int'l Corp.; ABB Susa, Inc./Brown & Root, J.V., B-256886.2 et al., Aug. 30, 1994, 94-2 CPD ¶ 84 at 6, and cases cited therein.

FAR § 15.814(b)(2) is based on two concerns. First, where during performance the bidder will receive payments based on inflated prices for bid items for which it will receive payment early in the performance of the contract, there is a legitimate concern that the bidder has received an improper competitive advantage. By accepting such a grossly unbalanced bid, the agency affords that bidder an advantage not enjoyed by its competitors for the award--the use of interest-free money. Second, by receiving early payments which exceed the value of work performed, the contractor will have a reduced incentive to properly complete the work. ACC Constr. Co., Inc., supra.

Here, Barnard's bid for the preparatory work is many multiples higher than the reasonable value of the work to be performed, as indicated by the government estimate and the other bidders' prices, and Barnard's unit price for the slurry cut-off wall is less than half the government estimate and the other bids.

Barnard nevertheless argues that its bid could not reasonably be considered either mathematically or materially unbalanced because its pricing did not result from overstating or understating costs, but reflected its legitimate costs based upon an innovative approach to the work. Barnard explains that the government estimate and other bids were based upon the traditional approach to slurry wall work, which requires substantially more material handling, extensive hauling, and slower production rates, whereas Barnard's bid was based on using a track-mounted, slurry/soil processing and batching unit that would follow the excavation. Barnard asserts that its unique approach called for "up front" costs to be incurred for design, acquisition, erection of the equipment, personnel, assembly and testing, which it contends had to be included under the preparatory work CLIN.<sup>4</sup>

Whatever business reasons are offered to justify a particular bid, the government may not pay more for an item or service than its reasonable value. Sawadi Corp., B-265740; B-265741, Dec. 21, 1995, 95-2 CPD ¶ 279. Preparatory or start-up costs generally are not permitted to carry a disproportionate share of the total contract price, unless explicitly contemplated by the IFB. Id.; cf. Rust Int'l Corp.; ABB Susa, Inc./Brown & Root, J.V., supra (low bid, which allocated all costs of acquiring and shipping construction equipment to the mobilization line item, was not

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<sup>4</sup>Barnard did not contend that its preparatory work bid was the result of an innovative construction method until it commented on the agency's report. The agency's contemporaneous notes reflect that Barnard initially indicated that it had failed to allocate certain costs among the line items.

mathematically or materially unbalanced because the IFB expressly instructed bidders to so allocate their equipment costs).

Here, contrary to the protester's arguments, the preparatory work CLIN did not specifically authorize the inclusion of the extensive equipment and overhead costs which Barnard allocated to this line item. CLIN 0001 only authorized the costs of movement of personnel and equipment to the site or costs which must be incurred prior to beginning work on the various contract items. Under the IFB, we think the up-front equipment and set-up costs associated with Barnard's "innovative" method of constructing the slurry cut-off wall work should more properly have been allocated to CLIN 0005. In this regard, CLIN 0005 expressly states that the equipment associated with the performance of constructing the slurry cut-off wall was to be allocated to that CLIN.

Barnard argues that construction contracts are not subject to the same concerns ordinarily associated with an advance payment because the government will be protected by the progress payment clause, and the requirement in the contract to submit a schedule of values. We disagree. Here, the IFB required bidders to submit individual prices for separate CLINs and this breakdown is incorporated into the contract. Pursuant to the progress payment contract provision at FAR § 52.232-5, the contractor will receive progress payments based on the amount it bid for the particular line item. Since Barnard's bid for the lump-sum preparatory work CLIN is far in excess of the value of the work to be performed under that CLIN, the progress payments based on this line item will not reflect the value of the work performed. ACC Constr. Co., Inc., *supra*.

Due to the gross unbalancing of its bid, we think the agency properly rejected Barnard's bid. Under the IFB's terms, which anticipate completion of and payment for the preparatory work independent of the other contract work, particularly the construction of slurry cut-off wall, award to Barnard may result in early inflated progress payments. Award based on Barnard's bidding structure grants Barnard the use of interest-free money, a competitive advantage not enjoyed by other bidders which submitted bids which more reasonably reflected the cost of each line item. Id. Moreover, award on the basis of Barnard's grossly front-loaded bid poses an unacceptable risk of performance since it provides a disincentive to the protester to promptly and properly complete the work. Id. Finally, by allocating costs as it did, Barnard improperly shifted costs from the slurry cut-off wall estimated quantity CLIN, whereunder Barnard would only be paid based on the square yard of

construction actually completed, to the fixed-price preparatory work CLIN that was to be paid upon completion of the preparatory work scheduled to be performed before the other contract work commenced.

The protest is denied

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of the United States.