Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Neals Janitorial Service

File: B-279633

Date: June 3, 1998

Ralph B. Neal for the protester.
Thomas W. Berndt, Esq., and Bernard J. Roan, Esq., National Aeronautics and Space Administration, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. An agency may disclose bid prices to competitors after the prices have been announced at a public bid opening.

2. Agency's determination that slightly unbalanced prices for separately priced, indefinite-quantity line items do not present a risk that the government will pay unreasonably high prices for contract performance is reasonable, where the evaluated price of the items is based on estimated quantities and there is no evidence that the estimates are inaccurate.

DECISION

Neals Janitorial Service protests an award to South Bay Maintenance Company, Inc., under request for offers (RFO) No. 2-36308(MXD), issued by the National Aeronautics and Space Administration (NASA), Ames Research Center for janitorial, refuse collection, grounds maintenance, and pest control services at Ames Research Center (including Moffet Federal Airfield), Moffet Field, California, and at Onizuka Air Station Annexes I, II and III (adjacent to Ames).

We deny the protest in part and dismiss it in part.

The services to be performed at Ames were previously solicited under invitation for bids (IFB) No. IFB2-36271(JMS). NASA canceled the IFB after bid opening after determining that the statement of work did not provide adequate information to permit all bidders to determine workload requirements, and thus the IFB did not allow for competition on a common basis. Neals, which had submitted the second low bid on that solicitation, protested the cancellation. Our decision, Neals Janitorial Serv., B-276625, July 3, 1997, 97-2 CPD ¶ 6, denied the protest, finding that the agency had a compelling reason to cancel the IFB.

On December 18, 1997, NASA issued the RFO for the services at Ames, and for additional services at Onizuka. The RFO, issued under NASA's Mid-Range Procurement Procedures (NFS 1871) as a total set-aside for section 8(a) qualified small business concerns, contemplated the award of a fixed-price, indefinite-quantity contract for 1 year with 4 option years. The RFO stated that the procurement was an acquisition of a commercial item under Part 12 of the Federal Acquisition Regulation (FAR), and that the FAR Part 15 rewrite (FAC 97-02) was also applicable.[1]

Section RFO.4 of the solicitation stated that offers would be evaluated for price, past performance and technical capability in meeting the requirements. The solicitation stated at section RFO.6 that award would:

> be based on the lowest priced, technically acceptable offer responsive to the requirements of the solicitation submitted by a responsible offeror as determined in accordance with the minimum requirements set forth in the solicitation.

NASA received three offers by the due date of February 4, 1998. South Bay submitted the lowest total price of $15,681,893 ($12,864,335 for the services at Ames and $2,817,558 for the services at Onizuka). The protester's slightly higher-priced offer was the next lowest.

The source selection decision, dated March 10, stated:

> All offers received in response to the [RFO] have been evaluated in accordance with [applicable procedures and terms of the RFO]. . . . Based on this evaluation, the offer from [South Bay] has been determined to be the lowest priced technically acceptable offer.

By letter of March 12, NASA notified Neals that South Bay's offer had been selected for award. By letter of the same date, Neals protested to NASA. Neals also requested and received a debriefing, which NASA conducted on March 17. On March 26, Neals protested to our Office (and subsequently withdrew its agency-level protest).

Neals protests that the integrity of NASA's procurement process has been compromised by the disclosure of the bid prices from the canceled IFB. This disclosure allegedly provided South Bay an improper opportunity to lower its offer based on the disclosed bid prices, and allegedly constitutes an improper release of

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[1]For solicitations issued between October 10 through December 31, 1997, agencies had the option to invoke the FAR Part 15 rewrite, as NASA did here.

information from a protective order issued by our Office in connection with the protest of the canceled IFB. These contentions are without merit.

The nature of an unclassified IFB, as was the canceled IFB, is that bids submitted in response to the IFB are publicly opened at the time stated in the IFB, and the bid prices are generally announced and available for examination by interested persons. FAR § 14.402-1. The bid prices are recorded on an Abstract of Offers form (Standard Form 1409), which is also made available for public inspection. FAR § 14.403(b). Since bid opening for the IFB occurred prior to cancellation, NASA properly complied with the mandates of the FAR for conducting a public bid opening, recording the bid prices on a bid abstract, and making that information available to the public. Moreover, since the bid prices were public information at the time of bid opening, they were not subject to the protective order issued by our Office in connection with the protest of the IFB cancellation.

Although the integrity of the competitive bid process generally dictates that an award must be made after bids have been exposed, cancellation and recompetition is permitted even after such disclosure where a compelling reason to do so exists. FAR § 14.404-1; Neals Janitorial Serv., supra, at 4. As explained in our prior decision, such a compelling reason existed for the cancellation of the IFB because the bids submitted demonstrated that, due to an inadequate statement of specifications, bidders did not prepare their bids on a common basis, nor in a manner that would meet the agency's actual minimum needs. Neals Janitorial Serv., supra, at 4-6. Under such circumstances, no improper auction is created by a resolicitation after the cancellation of an IFB. See Atkinson Dredging Co., Inc., B-250965, B-250967, Feb. 17, 1993, 93-1 CPD ¶ 153 at 4.

Neals next alleges that South Bay's line item prices on the RFO are unbalanced, such that South Bay's offer should be rejected.

FAR § 15.404-1(g)(1) (FAC 97-02) provides that unbalanced pricing may increase performance risk and could result in payment of unreasonably high prices; unbalanced prices arise where the prices of one or more contract line items are significantly over- or understated as indicated by the application of cost or price analysis techniques.[2] FAR § 15.404-1(g)(2) requires that all offers with separately priced line items or sub-line items be analyzed, using cost or price analysis techniques, to determine if the prices are unbalanced, and if an offer is found to be unbalanced, the contracting officer must (i) consider the risks to the government

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[2]FAR § 15.404-1(g)(1) also states that the risks of unbalanced pricing are greatest when: (i) start-up, mobilization, or first article production or testing are separate line items; (ii) base and option year requirements are separate line items; or (iii) the evaluated price is the aggregate of estimated quantities to be ordered under separate line items of an indefinite-delivery contract.

associated with the unbalanced pricing in determining the competitive range and in making the source selection decision, and (ii) consider whether award of the contract will result in paying unreasonably high prices for contract performance. An offer 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).

Here, the agency conducted a price analysis of the offers and, although it found some evidence of slightly unbalanced sub-line item prices, the agency determined that such prices did not pose an unacceptable price risk and did not indicate that the government would be paying unreasonably high prices for contract performance.[3]

When there is concern about potential risk arising from unbalanced pricing of indefinite-quantity work, a key factor is the accuracy of the government's estimates of the anticipated quantities of the various tasks to be performed--if the estimates are reasonably accurate, then evidence of mathematical unbalancing generally does not present a risk that the government will pay unreasonably high prices for contract performance. See Allstate Van & Storage, Inc., B-247463, May 22, 1992, 92-1 ¶ 465 at 5; G.C. Ferguson 4-T Constr., B-247014, Apr. 22, 1992, 92-1 CPD ¶ 381 at 7. Here, Neals does not allege, and the record does not reflect, that the estimated quantities in the solicitation are not reasonably accurate. Therefore, we have no basis to question the reasonableness of NASA's conclusion that whatever limited unbalancing existed in sub-line item pricing did not pose an unacceptable price risk.

Neals also alleges that the terms of the solicitation unfairly favored South Bay. This allegation is untimely filed under our Bid Protest Regulations, which requires that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time, 4 C.F.R. § 21.2(a)(1) (1998), and will not be considered.

Finally, Neals states in its comments on the agency report submitted on May 7, that it learned at the debriefing that its offer for the Onizuka portion of the contract was the lowest price for that work, and thus alleges that Neals should receive a contract for the Onizuka work requirements. Our Bid Protest Regulations require that a protest not based upon alleged improprieties in a solicitation must be filed no later than 10 days after the protester knew or should have known of the basis for protest. 4 C.F.R. § 21.2(a)(2). Here, NASA conducted the debriefing of Neals on March 17. Neals thus knew that it had offered the lowest price for the Onizuka

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[3]To the extent Neals alleges that South Bay's prices for the Ames and Onizuka portions of the contract may have been unbalanced, there is no evidence to support such an allegation. South Bay's prices for each portion is close to the government estimate and to the protester's prices for the same work.

portion of the contract at the time it first protested to our Office on March 26, but failed to raise this as a protest issue. We thus dismiss this allegation as untimely since it was first raised nearly 2 months after the debriefing. See Swafford Indus., B-238055, Mar. 12, 1990, 90-1 CPD ¶ 268 at 2.

The protest is denied in part and dismissed in part.

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