

Government of the District of Columbia

CONTRACT APPEALS BOARD

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May 3, 1989

TO: Mr. Keith F. Byrd
Byrd's Paint & Decorating Company
7313 Georgia Avenue, N.W.
Washington, D.C. 20011

Beth Brown Ornstein, Assistant Corporation
Counsel, D.C.
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Washington, D.C. 20001

SUBJECT: CAB No. P-74, Protest of Byrd's Paint & Decorating
Company

Enclosed is a copy of the Board's opinion in the
above-referenced case.


ROSE M. GILLISON
Clerk to the Board

Enc.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

BYRD'S PAINT & DECORATING CENTER)	
)	CAB No. P-74
Under IFB No. 8006-AA-80-0-8-KC)	

For the protester: Keith F. Byrd. For the Government: Beth Brown Ornstein, Assistant Corporation Counsel, D.C.

Opinion by Administrative Judge Sharpe ¹ with Administrative Judges Booker and Davis concurring.

OPINION

This protest was filed by Byrd's Paint & Decorating Center (Byrd) on November 4, 1987.² See Byrd's protest letter dated November 2, 1987. Byrd protests the District's award of a contract to General Merchandise, Inc. (GMI) under Invitation for Bids No. 8006-AA-80-0-8-KC (IFB) on two grounds.³ The first ground of the protest in effect alleges that the bid GMI submitted in connection with the IFB is nonresponsive because it is materially unbalanced. The second ground alleges that GMI and another

¹Judge Sharpe's participation in this case is pursuant to the authority contained in the D.C. Procurement Practices Act of 1985, D.C. Code, sec. 1-1189.2(c)(2)(1987).

²This case originated during the period when the District of Columbia Contract Appeals Board was functioning pursuant to Commissioner's Order No. 9, D.C. Code, Supplement V (1978), as amended by Mayor's Order 86-65, 33 DCR 3006 (May 16, 1986). Pursuant to the D.C. Procurement Practices Act of 1985 (PPA), D.C. Code, sec. 1-1189.1(1987), a new independent agency denominated as the Contract Appeals Board was created. This new Board became operational on August 1, 1988, and succeeded to the jurisdiction of all cases pending before the previously established Board.

³Byrd made a number of new allegations in its comments on the agency report and during a telephone conference between the Board and the parties which we do not concern ourselves with for the reason that they are either untimely or not a proper subject of protest.

bidder (Jo-Na Corporation) failed to submit with their bid a sworn affidavit as instructed by the IFB provision entitled, Business Interest in the Republic of South Africa or Namibia (see IFB at 38 and 39). Byrd closes its protest with the following:

In conclusion we feel that General Merchandise, being a newly formed Corporation (12-24-86) overreacted in bidding this bid. We feel that they are not being responsible to the District and should be rejected as a bidder from this bid.

I. BACKGROUND

A. Solicitation and Award

The IFB was issued on August 28, 1987, and solicited bids from certified minority firms for various paints and painting supplies. See IFB 1 - 24. For award purposes, these items were set forth in aggregate groups and as individual items. Id. and IFB at 34, para. 4. The IFB provided for the award of an estimated quantities contract for a one-year base period with an option to extend the contract for one additional year. See IFB General Conditions, para. 25, Estimated Quantities; and IFB at 40, para. 12, Term of Contract. Most significantly, the IFB contains an Evaluation of Options provision (EO provision or provision) which advises all prospective bidders that a bid could be rejected as nonresponsive "if it is materially unbalanced as to prices for the basic requirement and the option requirement." See IFB at 40, Evaluation of Options, subpara. b. The prospective bidders were also informed that the contract would be awarded on the basis of the lowest combined price after "adding the total price for all options to the total price for the basic requirement." See IFB at 40, Evaluation of Options, subpara. a.

A number of minority firms responded to the IFB with a bid. None of the bidders, however, submitted a bid on all of the items specified in the IFB. See Agency Report of the District of Columbia (District's Agency Report) at 3 and 4. With respect to the aggregate groups Byrd calls attention to in its protest (the aggregate groups covering items 1-23, 55-62 and 63-71), GMI submitted the lowest price for each group. See District's Agency Report at 4.

B. Position of the Parties

1. Materially Unbalanced Bid

In an apparent effort to demonstrate that GMI's bid is materially unbalanced, Byrd lays out in its protest letter three charts, each of which includes columns setting forth GMI's bid price for certain IFB items, the price offered by three other bidders (Duron distributors) for the same items and the 1987 and 1986 contract award price for each item. Byrd notes after each chart the considerable percentage difference between some of GMI's bid prices and the bid prices of the three Duron distributors.⁴ In addition, Byrd comments that the considerable disparity between GMI's bid prices and the Duron distributor's bid prices, coupled with the fact that the bid prices of the Duron distributors are all within a very small range of one another, indicates that GMI's prices are significantly less than cost. Aside from the points just discussed, Byrd does not present in its protest letter any

⁴The percentage differences between GMI's prices and all of the other Duron distributors varied somewhat between a low of 15% and a high of 38%.

other analyses or arguments in support of its position that GMI's bid is materially unbalanced.

Because Byrd's protest is void of an allegation that GMI's bid prices are unbalanced as to prices for the basic year items and the options year items, the District argues that under the terms of the EO provision, Byrd has not stated a materially unbalanced bid case. The District asserts that indeed such a case cannot be made in view of the fact that GMI's bid does not include nominal prices for the basic year items and enhanced prices for the same items for the option year. The District cites several U.S. Comptroller General decisions for the proposition that a bid cannot be materially unbalanced unless it is mathematically unbalanced. It urges that we give great deference to these decisions in deciding the instant case as they reflect a thorough consideration of the circumstances under which a bid should be considered materially unbalanced and nonresponsive.

The District argues that even if GMI's bid were mathematically unbalanced, the District would not have been required to reject it as nonresponsive because an award to GMI for the items at issue will result in the lowest cost to the District. In this regard, the District makes the observation that Byrd has not alleged that the acceptance of GMI's bid will not result in the lowest cost to the District, but rather only argues that GMI's bid is unbalanced simply because some of its bid prices are allegedly below cost. In the situation where a firm submits a below-cost bid, the District argues the Board should hold, as the U.S. Comptroller General has consistently held, that the bid does not necessarily have to be rejected as nonresponsive but that the low cost

aspect of the bid should be considered in a determination of the bidder's responsibility.

2. Failure to Submit Affidavit with Bid

Byrd contends that because GMI did not submit with its bid the affidavit requested by the Business Interest in the Republic of South Africa and Namibia provision, the 6% evaluation differential specified in paragraph D of the provision should be applied to GMI's bid. The District concedes that GMI failed to submit the affidavit, but argues that under the Materiel Management Manual, sec. 2620.14, the failure is curable as a minor informality. See District's Agency Report at 13 and 14. Moreover, the District argues, there were no regulations in existence at the time of the procurement "which would permit the application of a penalty to the bid price of a bidder with business interest in South Africa or Namibia." See District's Agency Report at 14. (The District does not give any indication of the status of the regulations.)

II. DISCUSSION

A. Materially Unbalanced Bid

Byrd's materially unbalanced bid allegation, without question, rests on the EO provision. Since we have not previously considered this provision, it is necessary that we examine it in some detail. The provision reads in full as follows:

EVALUATION OF OPTIONS

- a. The Government will evaluate proposal (sic) bids for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the options(s)[sic].

- b. The Government may reject an offer as nonresponsive if it is materially unbalanced as to prices for the basic requirement and the option requirement. An offer is unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated for other work.
- c. A prospective contractor may be determined non-responsive if he or she fails to bid on the option items.

This provision warns that a bid which is materially unbalanced as to the prices for the basic year items and option year items may be rejected by the District as nonresponsive to the invitation for bids.⁵ It is most significant that the provision apprises the bidders of the risk of submitting a materially unbalanced bid and gives no warning respecting a bid which is merely unbalanced (a bid which is merely unbalanced is also commonly referred to as a mathematically unbalanced bid). Insofar as it is relevant to the issue we are now addressing, the operative words in the EO provision are "materially unbalanced". While the provision explains when a bid is unbalanced it does not go on to expressly state when a bid is "materially" unbalanced. We therefore look to the reason behind the provision to discern when a bid is "materially" unbalanced.

The procurement regulations (Material Management Manual, sec. 2620.16 A.) which were in effect at the time the IFB was issued, provided that ". . . award shall be made . . . to the lowest responsive responsible bidder whose bid . . . will be most advantageous to the D.C. Government." Setting other considerations aside, this language requires that the District award what was formerly called formal

⁵It is noted that the EO provision does not speak to a bid which is materially unbalanced as between the prices for basic year items alone.

advertised contracts and now is called sealed bidding contracts to the lowest bidder. This requirement has been carried forward in the PPA (sec.1-1183.3(e)) and the District's current procurement regulations (27 DCMR sec. 1541.1). Given the mandate that contracts are to be awarded to the low bidder, we think it apparent that the purpose of the EO provision is to inform bidders that if there is an imbalance between their base year prices and option year prices, their bids are at risk in terms of not being accepted for award, if an evaluation of the imbalanced prices reveals that the prices do not constitute the low bid.⁶ We, therefore, consider a bid to be materially unbalanced (for purposes of the EO provision) if it is mathematically unbalanced and it can be reasonably said that it will not likely result in a contract award representing the lowest ultimate price to the District.

Before closing out this discussion, we note that the Federal government utilizes a clause substantially similar to the EO provision.⁷ See the Federal Acquisition Regulation (FAR), 48 C.F.R. sec. 52.217-5 (1986), entitled Evaluation of Options. We further note that the U.S. Comptroller General, the General Services Board of Contract Appeals and at least one federal court have defined materially unbalanced similarly as we have in this opinion. See, e.g., Professional Waste Systems, Inc.;

⁶We note that subparagraph B. of the EO provision states that the District "may" reject a materially unbalanced bid. The provision, however, does not state any guidelines for the exercise of the District's discretion. It is therefore questionable under what circumstances the District would or would not reject a materially unbalanced bid. The District may therefore wish to consider whether a revision to the EO provision in this regard is in order.

⁷This is not to say, however, that we necessarily agree with the authorities' application of the stated definition in all respects.

Tri-State Services of Texas, B-228934, B-228934.3, November 10, 1987, 87-2 CPD para. 477, 2 CGEN para. 101,291 at 102,165 (" . . . a bid is materially unbalanced if there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the government." (Citation omitted.); and SMC Information Systems, Inc., GSBGA No. 8071-P, 85-3 BCA para. 18,388, at 92,236 (" . . . mathematical imbalance alone is not objectionable. It becomes material--and therefore objectionable--only if it will cause an award on some basis other than the lowest ultimate cost to the Government or (GAO's catch-all), if the irregularity is such that it will adversely affect the integrity of the competitive bidding system.") (Citing ABC Siding; TWI Inc., 61 Comp. Gen. 99, 103 (1981)). See also Severn Companies, Inc., GSBGA No. 9353-P, 88-2 BCA para. 20,689 and Solon Automated Services, Inc. v. United States, 658 F. Supp. 28 (D.D.C. 1987).

With the above principles in mind, we now turn to the question of whether GMI submitted a materially unbalanced bid as alleged by Byrd. We pointed out earlier, a materially unbalanced bid under the EO provision presupposes that the bid is unbalanced mathematically. We too observed (as we noted the District so observed in its agency report) that Byrd does not allege that the pricing structure or GMI's bid is such that there exists a significant differential between the prices for the basic year and option year items. Rather, Byrd only alleges that GMI's prices were below cost and, ergo, GMI's bid is materially unbalanced.

The EO provision defines an unbalanced bid as one "based on prices significantly less than cost for some work and prices which are significantly overstated for other work." In light of this definition

and the fact that a mathematically unbalanced bid is an indispensable requirement to a materially unbalanced bid finding, it is clear Byrd's contention alone that GMI's bid is based on below cost prices is insufficient to state a materially unbalanced bid case. Despite the shortcoming in Byrd's statement of its protest ground, we compared GMI's prices for the basic year items and the option year items. Before stating our finding in this regard, we note that the IFB's schedule of items for the basic year consists of 93 individual items. These 93 items are repeated in the IFB's schedule of items for the option year. GMI's item prices for the option year are the same as its item prices for the basic year. We therefore find that the price structure of GMI's bid does not fit the EO provision's definition of an unbalanced bid. Because the first test for finding a bid to be materially unbalanced has not been met, we need not proceed to what would otherwise be the second test for determining if a bid is materially unbalanced, i.e., to determine whether acceptance of the mathematically unbalanced bid will likely result in the lowest ultimate cost to the District.

Assuming that GMI's bid consists of below-cost prices, as Byrd alleges, we cannot glean from the record GMI's reason for quoting the below-cost prices. We can only presume that GMI purposely did this for a reason that would be advantageous to it. In any event, as the District asserts, the submission of a bid which includes below-cost prices, without more, is a matter which goes to the responsibility of the bidder and not whether the bid is materially unbalanced. Byrd does not allege in its protest letter that GMI is a nonresponsible bidder. The first time Byrd does this is in its comments on the District's agency report.

Because the allegation at that time does not satisfy the ten-working day requirement for filing a protest ground, we do not address it.

Based on the foregoing discussion, we conclude that there is no merit to Byrd's allegation that GMI's bid is materially unbalanced.

B. Requirement to Submit Affidavit

We now turn to Byrd's allegation that GMI failed to submit with its bid the affidavit requested by the IFB's Business Interest in The Republic of South Africa or Namibia provision (South African provision).⁸

The South African provision apparently relates to the PPA, as amended May 23, 1986, by the "South Africa and Namibia Contracting Sanction Amendment Act of 1986," D.C. Law 6-116, sec. 2, 33 DCR 2432, D.C. Code, secs. 1-1192.1 to 1-1192.6 (Act). The Act, among other things, states that the rules necessary to implement its provision were to be issued as a part of the District's procurement regulations within 60 days of May 23, 1986. See sec. 1-1192.6(a). The Act also provided for the Council of the District of Columbia's approval or disapproval of the rules. In this connection, we note that paragraph D of the South African provision states that after the promulgation of regulations by the District, a bidder doing business in South Africa or Namibia shall be subject to a price penalty (not to exceed 6%) for the purpose of bid evaluations only.

Since there were no regulations in effect at the time the IFB was issued, we are at a loss to understand why the District incorporated the

⁸As the District found Jo-Na Corporation to be nonresponsible and did not award a contract to it, we do not include in our discussion Byrd's allegation that Jo-Na Corporation also did not submit an affidavit.

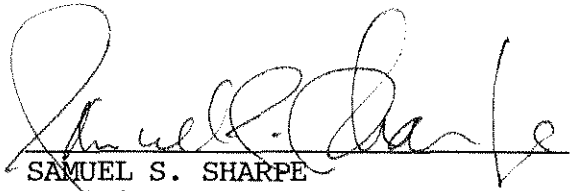
South African provision into the IFB. Whatever the reason, we observe that the Act makes clear that the completion of the statutorily prescribed rulemaking procedure was necessary before the District could implement its provisions. Thus, inasmuch as the prerequisite for the implementation of the South African provision had not been satisfied at the time of procurement, we view the inclusion of South African provision in the IFB as premature and therefore a nullity. For this reason, we do not discuss further the question raised by Byrd's allegation.

Finally, we note that Byrd submitted with its comments on the agency report certain materials (marked Exhibit 7) to be withheld from the District's examination. We reviewed, in camera, the information in the exhibit and determined it to be irrelevant to the issues in this protest. For this and other reasons, the exhibit was not considered by us in reaching our conclusions.


ORDER

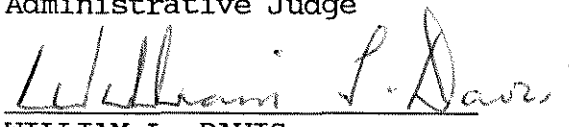
The protest is denied.

DATE: May 3, 1989


SAMUEL S. SHARPE
Administrative Judge

CONCUR:


CLAUDIA D. BOOKER
Administrative Judge


WILLIAM L. DAVIS
Chief Administrative Judge