



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: K.G., Inc.

File: B-281948

Date: May 10, 1999

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Gena E. Cadieux, Esq., and Joseph Lenhard, Esq., Department of Energy, for the agency.

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DIGEST

Protest that awardee's bid should have been rejected as nonresponsive for alleged failure to comply with a solicitation requirement that bids for first 2 performance years be priced in accordance with an applicable wage determination is denied where the bid satisfied the requirement.

DECISION

K.G., Inc. (KGI) protests the award of a contract to Miracle Services, Inc. under invitation for bids (IFB) No. DE-FB01-99AD66850, issued by the Department of Energy (DOE) as a small business set-aside for certain janitorial and maintenance services to be performed at the agency's Forrestal Building headquarters in Washington, DC and at an adjacent child development center. The protester principally alleges that Miracle's bid should have been rejected as nonresponsive for failure to comply with an IFB pricing requirement, and that the bid is unbalanced.

We deny the protest.

The IFB was issued on November 10, 1998, and bids were opened on December 10. Bidders were required to submit all-inclusive prices for a base year (year 1) and four 1-year option periods (years 2 through 5). The bid schedule provided that, for each year, the bidder was to submit separate pricing for: (1) a "DOE Unilateral Option for Cleaning of Forrestal Cafeteria"; (2) a "DOE Unilateral Option for Cleaning of the Forrestal Child Development Center," which is adjacent to the Forrestal Building; and (3) "[a]ll remaining cleaning services in accordance with the Statement of Work [SOW]." IFB amend. 3, § B.5; IFB § B.6. The IFB notified bidders that the contract awarded would be subject to the Service Contract Act (SCA). IFB § B.9(c). A Collective Bargaining Agreement (CBA) between the Service Employees International Union and the current contractor was to serve as

the SCA wage determination for the first 2 years of the contract. IFB attach. 3. The IFB further provided that price adjustments would be applied to subsequent contract years once a new wage determination had been incorporated into the contract. IFB § B.9(c). The CBA established \$13.74 per hour as the minimum labor rate for year 1 and \$ 14.62 per hour as the minimum labor rate for year 2. See CBA art. XVI and §§ 24.2, 25.1 and 26.3(a).

Bid prices were to include "all direct and indirect expenses associated with the performance of the contract." IFB § E.1(i). The IFB set forth an agency minimum estimate of 325 hours per work day for SCA personnel to adequately perform the work set forth in the SOW. Id. Contractors were required to perform approximately 251 days per year (i.e., weekdays exclusive of 10 regular government holidays). IFB § B.10.3.C.

In addition to providing personnel subject to the SCA wage rates, bidders were responsible for providing supervisory personnel, specified supplies, equipment and uniforms, as well as telephone service for external calls. IFB §§ B.10.5.C, 6.B. The IFB did not call for bidders to break down the labor costs to separately identify profit and labor costs, or to specify associated overhead, materials, administrative and other costs incorporated into their bid prices.¹

Section E.1(i) of the IFB provided as follows:

This is an all or nothing solicitation, bidders will provide prices for all items in Clauses B.5 and Clause B.6. FAILURE TO PROVIDE ALL PRICES WILL RENDER THE BID NONRESPONSIVE AND IT WILL BE REJECTED.

Additionally, the bidder should provide total prices by year and the total cumulative price in Clause B.7 "Summary." The evaluation of price will include all 60 months The bid prices are to include all direct and indirect expenses associated with the performance of the contract.

Bidders will price year one and two in accordance with the [SOW] and Wage Determination. The Wage Determination is applicable through January 31, 2001. Years Three, Four and Five will be bid the same as year two. Afterward and once the new wage determination is

¹Section E.1(o) of the IFB required the contractor to submit a certified list of personnel who would be staffing the contract within 5 working days after award. It further provided that all proposed rates of pay must, at a minimum, conform to the CBA; failure to so conform would result in the contractor being ineligible for an adjustment in contract price following the adoption of a new wage determination after the expiration of the current CBA.

incorporated into the contract, the price(s) for the remaining years will be adjusted in accordance with clause B.9.

Eleven bids were received. The apparent low bidder was permitted to withdraw its bid for reasons not pertinent to this protest. The next two low bidders were the eventual awardee and the protester. Their bids were as follows:

	Miracle	KGI
Year 1	\$1,630,086.00	\$1,594,104.34
Year 2	\$1,633,013.88	\$1,668,574.17
Year 3	\$1,636,050.24	\$1,668,574.17
Year 4	\$1,639,154.28	\$1,668,574.17
Year 5	\$1,642,353.36	\$1,668,574.17
TOTAL	\$8,180,657.76	\$8,268,401.02

Agency Report at 3. The agency made award to Miracle on January 20, 1999, and KGI filed this protest on January 28.

Stating that the \$74,469.83 increase in its own bid price from year 1 to year 2 solely reflected the \$0.88 per hour increase in the wage determination from year 1 to year 2, KGI asserts that the minimal \$2,927.88 increase in Miracle's bid price for the same time frame shows that Miracle did not price year 1 and year 2 "in accordance with the [SOW] and Wage Determination," as required by section E.1(i), and concludes that the agency was required to reject the bid as nonresponsive.

As a general matter, even where an offeror bases its price on rates below those specified in a wage determination, that firm is eligible for award if the offeror does not take exception to the SCA wage determination requirements. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 2. Here, nothing in its bid indicates that Miracle took exception to the wage determination requirements. Further, there is no indication that Miracle somehow failed to price the first 2 years "in accordance with" the SOW and the applicable wage determination. As indicated above, bidders were required to provide a minimum of 325 SCA labor hours per day for 251 days per year for a total of 81,575 SCA labor hours per year; when the specified wage rate for year 1 (\$13.74 per hour) is multiplied by the minimum number of SCA hours required by the IFB per year, the required yearly SCA wages add up to \$1,120,840.50; using the specified wage rate for year 2, the amount is \$1,192,626.50. In each case, Miracle's all-inclusive price substantially exceeds the relevant minimum yearly total. Thus, as the agency points out, since Miracle's total bid for each year is more than sufficient to pay the applicable SCA rates for each

year, there is no basis to conclude that Miracle did not bid "in accordance with" the SOW and the CBA.

Other non-wage rate elements required to be included by the IFB into the all-inclusive bid prices (e.g., profit, overhead, supervisory costs, supply and equipment costs, uniform costs and the cost of telephones for external calls) may have caused the structure of Miracle's bid for the first 2 years to differ from that of KGI's bid. However, even if this were not the case, and it appeared that Miracle had bid below its cost, there is simply no prohibition on such below-cost bidding. Bollinger Mach. Shop & Shipyard, Inc., B-261135.2, Sept. 1, 1995, 96-1 CPD ¶ 123 at 3. Accordingly, this aspect of the protest is denied.

Noting that Miracle's bid prices for years 3, 4 and 5 contain progressive (although minimal) increases through time, KGI further alleges that Miracle failed to comply with the requirement in section E.1(i) that "Years Three, Four and Five will be bid the same as year two." However, the section pertains only to the SCA-derived wages for which there is a uniform escalation, and does not, as the protester suggests, prohibit any increases in prices throughout the remainder of the contract for non-SCA-wage items.

KGI also maintains that Miracle's bid was materially unbalanced. KGI asserts that Miracle's bid does not become low until year 3 at the earliest, noting that if the government does not exercise at least two options, or if the next CBA results in wage reductions, KGI's price would be low. KGI argues, therefore, that Miracle's bid should have been rejected as unbalanced since the agency is not reasonably assured that an award to Miracle will result in the lowest price to the government.

Federal Acquisition Regulation (FAR) § 14.404-2(g) provides that materially unbalanced bids may be rejected and references FAR § 15.404-1(g), which provides that unbalanced pricing arises where the prices of one or more contract line items are significantly over- or understated. KGI's unbalancing allegation is entirely premised on the assertion that Miracle's year 2 prices fail to rise enough to reflect the CBA wage increase between years 1 and 2; KGI has not provided any other support for the proposition that Miracle's year 1 prices are overstated and its year 2 prices are understated. Since we reject, for the reasons explained above, KGI's argument that Miracle's prices fail to conform to the required year 2 CBA wage increase, we similarly find without merit KGI's assertion that Miracle's prices are understated or overstated. Accordingly, the factual predicate for a finding of unbalanced pricing does not exist.

The protest is denied.

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