

**USALSA Report**  
*United States Army Legal Services Agency*

***Contract Appeals Division***

**GAO Offers Up a Concise Primer on Unbalanced Bids**

In *Burney & Burney Construction Co., Inc.*,<sup>1</sup> the Government Accounting Office (GAO) provides a nice, capsulated primer on the topic of unbalanced bids. At issue in this protest was a requirements contract for painting and related services at Fort Huachuca, Arizona. With a base period of one year and four option years, the solicitation listed eighteen line items describing various paint work requirements. The solicitation also contained specific work estimates, based on historical data, for each line item. Each bidder was required to submit a price for each line item. The total price was calculated by multiplying the estimated quantity of each line item by its respective bid price. Burney's bid was the lowest, at approximately \$2.463 million, with the next lowest at approximately \$2.523 million. Despite Burney's lower price (by almost \$60,000), the contracting officer rejected the bid as unbalanced. A protest ensued.<sup>2</sup>

In its opinion denying the protest, the GAO reminds us that unbalanced pricing exists when "the price of one or more contract line items is significantly overstated (typically one or more of the other line items are underpriced)."<sup>3</sup> When an unbalanced bid is received, the contracting officer must conduct a risk analysis to determine whether a contract based on disparate pricing will result in the best buy for the U.S. government. While unbalanced pricing may increase the risk of higher contract costs, the contracting officer is not required to reject an offer solely because it is unbalanced.<sup>4</sup> If, however, the contracting officer decides that the unbalanced pricing poses an unacceptable cost risk, the bid may properly be rejected.<sup>5</sup>

In *Burney*, the contracting officer determined the protester's bid was unbalanced because it selectively overstated the price of some of the contract line items for paint work, the quantity of which was inherently uncertain. Although the solicitation contained a good faith estimate of work based on historical work data, the contracting officer determined that the nature of the work could vary significantly from government estimates. To confirm her position, the contracting officer reviewed the most recent year's work data for this type of paint work. This data was not included with the solicitation estimates. Using this data, the contracting officer discovered that several line items, some of which Burney had overpriced, required work in significantly higher amounts than described in the solicitation estimates.<sup>6</sup>

When the GAO examined the underlying record, it focused on just two of Burney's overpriced line items.<sup>7</sup> The GAO noted that for the "coverage of metal surfaces" line item, Burney bid \$7.25.<sup>8</sup> The government estimate was \$1.59 and the average remaining bid estimate for this line item was \$4.70. When multiplied by the solicitation's estimate of work for this line item, Burney's extended price was only \$25,375. When compared to the most recent work data, however, Burney's price jumped by more than \$484,000 to almost \$509,726. A similar phenomenon occurred for the other line item. In light of the most recent year's work data, the GAO found that Burney's bid price, based on the two line items, would increase by more than \$628,000—far more than the \$60,000 price advantage if analyzed solely on the solicitation estimates.<sup>9</sup>

The protester argued that the contracting officer's reliance on the most recent year's work data improperly changed the solicitation estimates of work. Moreover, Burney contended there was no reason to believe the Army, based upon the new data, would order similarly high quantities of work for the overpriced line items in the future. In fact, Burney surmised that because such work had just been performed, future requirements for the line items would be *less*.<sup>10</sup>

After noting that Burney may be right about future painting requirements, the GAO rejected the contractor's arguments as "without merit."<sup>11</sup> The GAO acknowledged that "where . . . the issue of unbalancing arises in the context of a requirements contract, the accuracy of the solicitation estimates is critical . . ." <sup>12</sup> The GAO, however, could not disagree

<sup>1</sup> Comp. Gen. B-292458.2, Mar. 19, 2004, 2004 CPD ¶ 49.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.* at 2. See also GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 14.404-2(g) & 15.404-1(g) (July 2003) (sealed bids and negotiated procurements).

<sup>4</sup> *Burney & Burney Constr. Co. Inc.*, 2004 CPD ¶ 49, at 2, n.1 (citing *Island Landscaping, Inc.*, Comp. Gen. B-293018, Dec. 24, 2003, 2004 CPD ¶ 9 (noting that low prices by themselves are not improper and do not establish unbalanced pricing)).

<sup>5</sup> *Id.* at 2 (citing *L.W. Matteson, Inc.*, Comp. Gen. B-290224, May 28, 2002, 2002 CPD ¶ 89).

<sup>6</sup> *Id.* at 2-3.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 2 (citing *Alice Roofing & Sheet Metal Works, Inc.*, Comp. Gen. B-275477, Feb. 24, 1997, 97-1 CPD ¶ 86 (addressing an Army roofing contract that was "dependent upon wholly unpredictable and unique variables," to include availability of funding)).

with the contracting officer's approach to identifying contract cost risk or her determination that the actual workload could substantially deviate from the solicitation estimates.<sup>13</sup> The GAO found that the contracting officer was not using the most recent year's work data to change the solicitation estimates, but to demonstrate the uncertainty of the amount of paint work that might be required for certain line items. Given the type of work involved, the contracting officer reasonably concluded that Burney's unbalanced bid prices did not represent the lowest cost to the government.<sup>14</sup>

The GAO also pointed out that the Army prepared the solicitation estimates based on available historical data and that it "made a good faith effort" to produce accurate estimates.<sup>15</sup> Although it did not dispute Burney's arguments regarding possible future paint work, the GAO could not conclude that the contracting officer's determination was unreasonable. The contracting officer merely recognized the obvious cost risk inherent with Burney's bid and, importantly, had the work data to support her conclusion that the quantity of work involved was unpredictable and subject to significant fluctuation.<sup>16</sup>

*Burney* provides a good refresher on unbalanced bidding, a topic that is frequently encountered with installation-level maintenance and repair work—often by contractors that attempt to "game" contract requirements for such work. GAO's decision in this case underscores the old adage that "reasonable minds may differ." In the context of GAO protests, however, this means that where a protester and the agency offer up reasonable justifications, the government will always win. Contract Appeals Division.

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<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 3-4.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.* at 3-4.