

MAY 1, 1996



TO: BOARD OF DIRECTORS

FROM: STANLEY G. PHERNAMBUCQ 

SUBJECT: UNBALANCED BIDDING AND FRONT-END LOADING

Los Angeles County
Metropolitan
Transportation
Authority

ISSUE

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The purpose of this memorandum is to provide a definition of the term "unbalanced bid" and explain both its impacts upon the MTA and the techniques utilized by staff to mitigate these impacts.

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BACKGROUND

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Before defining and examining what exactly constitutes an "unbalanced bid," it is worthwhile to first explain what a balanced bid is. A balanced bid is an offer whereby, for each line item included in the bid, the quoted unit price for the item includes a proportionate share of costs and profit in relation to the overall bid price. An offer is mathematically unbalanced if it includes one or more line items which have prices either significantly more than, or less than, cost and a reasonable profit. The issue of unbalanced bids is critical because it can result in public agencies actually paying more overall for sealed bid contracts, even though the contracts are awarded to the lowest overall bidder. The existence of overstated line item prices in the bid can potentially result in excessive contractor profits and unreasonable government expenditures if greater than estimated quantities on overpriced line items are actually ordered/purchased.

The fact that a bid is mathematically unbalanced does not mean that it is automatically judged to be nonresponsive and therefore rejected. The "litmus test" for ruling nonresponsiveness with respect to unbalanced bidding depends upon whether or not a contractor's bid is judged to be "materially unbalanced." A contractor's bid is materially unbalanced if it is mathematically unbalanced and one of the following two conditions exists:

- (1) There is reasonable doubt the offer will result in the lowest overall costs to the government, even though it is the lowest evaluated bid.
- (2) The bid is so grossly unbalanced that its acceptance would result in allowing an advance payment.

It should be pointed out that it is a regular practice in government construction contracts (with durations longer than one year) for contractors to engage in what is commonly referred to as "front loading" a bid. Front loading is the practice of increasing the line item prices for those items that occur during the initial phase of the contract, while simultaneously decreasing the prices for items that happen during the latter part of the contract. The overall total bid price is unaffected by this act. However, the contractor's risk associated with financing the contract may be reduced because contract monies are obtained earlier than the actual work would justify. Given that contractors are in the business to make a profit, it is understandable that contractors will perform actions that will support their bottom line. However, front loading of a bid is unacceptable where payment for the early line items would constitute an advance payment.

Although the terms "unbalanced bid" or "front loading" are not explicitly addressed anywhere in our contract solicitation documents, the MTA has implemented measures to mitigate against these practices. Some of the actions taken include:

1. Ensuring that the estimated quantities estimated are precisely determined.
2. Placing a provision in the contract general conditions that allows for renegotiating the unit price for line items if the actual quantity of work varies by 25% (increase or decrease) from the estimated quantity of work.
3. Indicating in the contract document that payment for certain lump sum line items will be spread out over a period as opposed to being paid in one lump sum amount.
4. Limiting the lump sum price for some items to a specific percent of the total bid price (e.g. Mobilization - 5% of the total bid price).
5. Predetermining a reasonable cost for particular line items and "plugging in" the number in the IFB (e.g., General Requirements, Travel).
6. Obtaining a bid price or using a predetermined reasonable cost for certain line items (e.g., delay cost/day resulting from lack of access to work site caused by another party).

Of the above steps taken to mitigate the effect of unbalanced bids, the primary one the MTA relies upon to prevent excessive overcharging is item 2. We reserve the right to renegotiate the price for items if the actual quantities purchased varies by 25% from the estimated quantity in the bid document. Attached is a generic copy of the schedule of quantities and prices and the general condition which applies to the variation in quantities.

In summary, unbalanced bidding and front-end loading are, unfortunately, a fact of life in public sector contracting. While private sector owners are permitted to "negotiate out" any perceived problems with contractor bids/offers, public agencies must use sealed bidding, which generally fails to provide such opportunities. Unfortunately, the probability of changing MTA's procurement laws to permit negotiated procurement for construction is very low. Notwithstanding this fact, MTA has instituted "mitigative" measures designed to reduce the occurrence and impact of unbalanced bidding and front-end loading.

Prepared by: LeRoy H. Graw

SCHEDULE OF QUANTITIES AND PRICES

~~??Schedule to be reviewed by County Counsel~~

INSTRUCTIONS

The Bidder shall submit its firm unit prices and lump sum prices for the Work set forth in the Bid and described in the Invitation for Bids (IFB) Documents on the following Bid Form entitled SCHEDULE OF QUANTITIES AND PRICES.

The estimated quantities shown on the SCHEDULE OF QUANTITIES AND PRICES are approximate and are based on the best information available at the time of Bid; they are used solely for the purpose of evaluating the Bids. The AUTHORITY does not represent, expressly or by implication, that the actual quantities used in the Work will equal the estimated quantities. The AUTHORITY further reserves the right to increase or decrease the amount of any or all Bid items and/or to omit portions of the Work.

In the case of Bid items for which a fixed dollar amount predetermined by the AUTHORITY has already been entered on the SCHEDULE OF QUANTITIES AND PRICES, the dollar amount so-entered shall be binding on all Bidders as the price for such item; said dollar amount shall not be revised unless the AUTHORITY directs a change in the Work affecting the item to which said dollar amount relates.

The Bidder's unit price shall be based on the Estimated Quantity of Work and shall remain firm within the range of a twenty-five percent (25%) increase or decrease in actual quantity.

Unit prices, lump sum prices, and other values must be entered in the appropriate spaces provided in the SCHEDULE OF QUANTITIES AND PRICES. Unit prices must be multiplied by the estimated quantity shown and the total inserted in the "Total Price" column. The "Total Prices" must be added together in arriving at the "Total Bid Price". The Total Bid Price shall be for the completion and acceptance of all Work as required by the Contract.

The unit prices and lump sum prices must conform to their respective requirements and parameters as specified in the Technical Specifications (Part A). They also must be inclusive of all costs for the Work specified in other Contract Documents, including the proportional costs for overhead, profit, all applicable taxes, tariffs, insurance and other expenses of the Contractor, Subcontractors, and Suppliers of all tiers.

DETERMINATION OF TOTAL BID PRICE

The Contract will be awarded on the basis of the Total Bid Price shown on the SCHEDULE OF QUANTITIES AND PRICES.

In event of error or discrepancy between the unit price Bid and the Total Bid Price calculated, the unit price is agreed to be the valid bid per unit. The Total Bid Price shall be the sum of the Total Prices (unit prices multiplied by the estimated quantities). The award amount will be based on the actual sum as recalculated by the AUTHORITY.

Should any unit price be left blank, the Bid will be considered non-responsive unless the blank item can be calculated from the information available (i.e., unit price can be determined by dividing the total price by the estimated quantity).

Should any total price be left blank, the Bid will be considered non-responsive unless the blank item can be calculated from the information available (i.e., total price can be determined by multiplying the unit price by the estimated quantity).

Bidder: _____

If any one line item is left blank, and the above situations do not apply, no attempt will be made to reconcile the amounts. The Bid in this case will be considered non-responsive.

~~??When Option(s) are a part of the Contract, add the following:~~

~~??The award will be based on the Base Contract plus Option(s) - list the specific option letter(s):~~

~~??The initial award will be for the Base Contract only:~~

Only the actual delay necessarily resulting from the causes specified in this Article shall be grounds for extension of time. In case the Contractor is delayed at any time or for any period by two or more of the causes specified in this Article, the Contractor shall not be entitled to a separate extension for each one of the causes; only one extension will be granted for the delay.

GC-23-G Performance on the Contract shall continue and be carried on in accordance with all the provisions of the Contract. The Contract shall remain in full force and effect during the continuance and until the completion and Final Acceptance of the Goods and/or Technical Services covered by the Contract, unless formally suspended or terminated in accordance with the terms of the Contract. Permitting the Contractor to finish the Goods and/or Technical Services, or any part thereof, after the time fixed for completion or after the date to which the time for completion may have been extended and/or making payments to the Contractor after any such periods shall not constitute a waiver on the part of the AUTHORITY of any rights under the Contract.

GC-23-H Where a Contractor is granted an extension of time to complete a portion of the Goods and/or Technical Services by the AUTHORITY, which may extend the Contract completion date, such an extension shall not be deemed a waiver by the AUTHORITY to terminate the Contract for abandonment or failure to complete within the time specified or to impose and deduct damages as may be specified.

In any event, neither the granting of an extension of time nor the performance and Acceptance of any part of the Goods and/or Technical Services after the time specified shall be deemed a waiver.

GC-23-I A CO will be issued to the Contractor within a reasonable period of time after approval of a request for extension of time, specifying the number of days allowed, if any, and the new date for any Contract Milestones or delivery dates.

GC-23-J The grant of an extension of time for delay shall not be deemed to be a waiver by the AUTHORITY of the AUTHORITY's right to impose and deduct liquidated damages for other delays, or of any other rights to which the AUTHORITY is entitled.

GC-24 **INCREASED OR DECREASED QUANTITIES**

GC-24-A This Article applies to line items with estimated quantities of four (4) or more shown in the Article entitled SCHEDULE OF QUANTITIES AND PRICES of the Compensation and Payment Provision (Part D), and to the associated measured quantities required to complete the Goods and/or Technical Services.

1. Where the measured quantity of the line item varies no more than twenty-five percent (25%) above or below the line item estimated quantity stated in the Contract, the line item's contract unit price shall be used to calculate any increase or decrease in the total contract line item price.
2. Where the measured quantity of the line item is greater than one hundred twenty-five percent (125%) or less than seventy-five percent (75%) of the line item estimated quantity stated in the Contract, the actual unit price (Contractor's actual supplier invoiced cost) of the item shall be used to calculate the total price of the measured quantity, establishing a Contract line item cost for the entire measured quantity (not including profit and overhead).
3. The Contract line item cost will be adjusted to add profit and overhead, in an amount as agreed to between the parties, establishing the new Contract line item price.