



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: John C. Grimberg Company

File: B-284013

Date: February 2, 2000

Shelly L. Ewald, Esq., Watt, Tieder, Hoffar & Fitzgerald, for the protester.
Douglas L. Patin, Esq., Spriggs & Hollingsworth, for Charles H. Tompkins Company, an intervenor.
Frank J. Sando, Esq., Department of Justice, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The determination of the low bid submitted in response to an invitation for bids for a construction base item with various additive items must be based on the items encompassing the actual work to be awarded and may not consider additive items that are not awarded.

DECISION

John C. Grimberg Company protests the award of a contract to Charles H. Tompkins Company under invitation for bids (IFB) No. 7213R, issued by the Federal Bureau of Investigation (FBI), for the construction/renovation of firearms ranges at the FBI Academy in Quantico, Virginia. Grimberg contends that it should have received the award because it submitted a lower price than did Tompkins for the actual work awarded under the IFB.

We sustain the protest.

Under attachment A of the IFB, bidders were required to enter separate prices for the "Base Bid," three separate "Add Alternates," and a total bid amount determined by adding the prices for the Base Bid and Add Alternates. The Base Bid was for the construction of three 25-meter ranges and a ballistic screen wall, as well as soil remediation, general site work, and demolition of existing facilities. Add Alternate No. 1 was for the construction of a 50-meter range and associated site work. Add Alternate No. 2 was for the construction of a stress obstacle range and associated

site work. Add Alternate No. 3 was for the construction of a combat range and associated site work. IFB § 00200, ¶ 1.26. Attachment A also stated:

The Government reserves the right to select all, none or any combination thereof of the Add Alternates listed above. A single award will be made to the lowest priced responsive and responsible bidder inclusive of the Base Bid and sum total of the Add Alternates.

The IFB also stated:

A single award will be made to the lowest priced responsive and responsible bidder. Discounts for Early Payment, if offered, will not be considered in evaluation for award. Award shall be made on the total bid amount.

IFB § 00200, ¶ 1.23(1). Along with this statement, this section, consistent with attachment A, contained blank spaces for bidders to insert separate pricing for the base bid, three alternates, and total bid amount.

At bid opening on June 24, 1999, the FBI received seven bids in response to the IFB, including bids from Grimberg and Tompkins. The FBI determined that Tompkins submitted the lowest-priced bid based upon its total bid amount of \$35,969,000, which included a Base Bid price of \$19,969,000, an Add Alternate No. 1 price of \$6,000,000, an Add Alternate No. 2 price of \$3,000,000, and an Add Alternate No. 3 price of \$7,000,000. Grimberg submitted the next low priced total bid at \$37,230,000, which included prices of \$18,950,000 for the Base Bid, \$7,150,000 for Add Alternate No. 1, \$3,900,000 for Add Alternate No. 2, and \$7,230,000 for Add Alternate No. 3. Due to funding restrictions, the FBI determined that award would be made to Tompkins for the Base Bid and Add Alternate No. 2 only. Agency Report, Tab 14, Memorandum (Sept. 21, 1999). The FBI awarded the contract to Tompkins on October 21 for the Base Bid and Add Alternate No. 2 at a price of \$23,029,000.¹

Grimberg protests that it is entitled to the award since it submitted the lowest price for these two items (that is, \$22,850,000). The FBI defends the award to Tompkins on the basis that the language in attachment A and section 00200, paragraph 1.23 of the IFB (quoted above) requires that the low bid be determined by evaluating the bid prices for the total bid amount, reflected by the Base Bid plus all three alternates, irrespective of the items actually awarded. Contracting Officer's Statement at 4-5; Agency Memorandum of Law at 2-4.

¹ The award amount was for \$60,000 more than Tompkins' Base Bid and Add Alternate No. 2 prices to account for a mistake in Tompkins' bid that the agency found should be corrected. Agency Report, Tab 14, Memorandum (Sept. 21, 1999).

An award under a procurement conducted under sealed bid procedures must be made consistent with the requirements of 41 U.S.C. § 253b(c) (1994), which in pertinent part states:

[The agency] shall award a contract with reasonable promptness to the responsible source whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation.

This requirement was also stated at section 00200, paragraph 1.11(1) of the IFB. This language requires that award under an IFB be made at the most favorable terms to the government, which means that a determination of the low bid must be measured by the actual work to be contracted for; otherwise award cannot be said to have been made to the lowest bidder.² See Castle Constr. Co., Inc., B-197466, July 7, 1980, 80-2 CPD ¶ 14 at 3; Sterling Eng'g and Constr. Co., Inc., B-184577, Nov. 11, 1975, 75-2 CPD ¶ 293 at 2; Square Deal Trucking Co., Inc., B-183695, Oct. 2, 1975, 75-2 CPD ¶ 206 at 2; 50 Comp. Gen. 583, 585 (1971).

The IFB should be interpreted consistent with this statutory requirement. Attachment A and paragraph 1.11(1) of the IFB specifically provide for award under the IFB to be made to the low responsive/responsible bidder and on the basis of awarding any item or combination of the items in attachment A. Paragraph 1.23 states that “[a]ward shall be made in the total bid amount.” Reading these provisions together and consistent with 41 U.S.C. § 253b(c), the low bid must be based on the items that will actually be awarded. Thus, the total of the base bid plus all alternates has no relevance in determining the low bid where not all items are to be awarded.³

² To support its interpretation of the IFB, the agency cites Charles J. Merlo, Inc., B-277384, July 31, 1997, 97-2 CPD ¶ 39, where the low bid was determined considering option prices, even though the options would not be exercised at the time of award. In that case, since the agency had a reasonable certainty that the options would ultimately be exercised under the contract, the determination of the low bid properly included the option prices. Here, there is no provision under the IFB for the work covered by the Add Alternates that were not awarded to be later added under the contract.

³ The FBI argues that the protest actually concerns an apparent solicitation defect that was required to be protested prior to bid opening under our Bid Protest Regulations, 4. C.F.R. § 21.2(a)(1) (1999). Where a protester asserts that it reasonably interpreted an IFB consistent with 41 U.S.C. § 253b(c) as requiring award to the low bidder for the actual work to be awarded and was not reasonably aware that the IFB would be interpreted otherwise, the protester is contending that the IFB award provisions mandates that the award be based on the actual work to be ordered and is not alleging an apparent solicitation impropriety. See Northeast Constr. Co., B-205246, Apr. 1, 1982, 82-1 CPD ¶ 293 at 4.

In any event, even assuming that the IFB can be read as posited by the agency, such an award would be inconsistent with 41 U.S.C. § 253b(c) and the IFB would be defective. Since there is no suggestion that the competition has been adversely affected by the award provisions in the IFB, such that cancellation of the IFB and resolicitation would be required, award should be made on the basis of the lowest properly evaluated bid, that is, Grimberg's bid. Square Deal Trucking Co., Inc., supra, at 3; 50 Comp. Gen. at 585-86; see Federal Acquisition Regulation § 14.404-1(a)(1).

Consequently, the agency's award to Tompkins for the Base Bid and Add Alternate No. 2 was improper since Grimberg's bid for these items was priced lower.

We recommend that the FBI terminate the contract awarded to Tompkins, and make award to Grimberg, if otherwise appropriate. We also recommend that Grimberg be reimbursed for the cost of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving the decision.

The protest is sustained.

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of the United States