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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Kruger Construction, Inc.

File: B-286960

Date: March 15, 2001

Thomas S. Finegan, Esq., Goetz Fitzpatrick Most & Bruckman, and William J. Thompson, Jr., Esq., Thompson & Waldron, for the protester.
Marion T. Cordova, Esq., Department of Agriculture, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a sealed bid procurement which provided for adding the prices for option items to the price bid for the basic item to determine the total evaluated bid price, except where it was not in the best interests of the government, the procuring agency could not properly add together the price of two alternate option items in its price calculation, where the agency knew that it could not exercise both options.

DECISION

Kruger Construction, Inc. protests the intended award of a contract to Danco Contractors, Inc. under invitation for bids (IFB) No. 8273-3K15-00, issued by the Agricultural Research Service, Department of Agriculture, for construction services at the Plum Island Animal Disease Center, Greenport, New York. Kruger argues that it offered the lowest evaluated price for the actual work to be performed, after proper application of the evaluation preference for small disadvantaged business (SDB) concerns.

We sustain the protest.

The IFB provided for the award of a contract for one basic item--the construction of a new power plant at the Plum Island Animal Disease Center--with five option items covering additional services. Option items Nos. 4 and 5 were as follows:

Option Item No. 4-- Hazardous material abatement and demolition of Building 103.

Option Item No. 5-- Same as Option Item No. 4 above except include crushing building rubble (concrete and CMU) and stockpiling on the island in lieu of removal from the island.

IFB § B.2. Bidders were instructed to bid on all line items.¹

The IFB included the standard Evaluation of Options clause, Federal Acquisition Regulation (FAR) § 52.217-5, which provides:

Except when it is determined in accordance with FAR 17.206(b) not to be in the Government's best interests, the Government will evaluate offers 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 option(s).

IFB § M.2. The IFB also included a Notice of Price Evaluation Adjustment for SDB Concerns, FAR § 52.219-23, which provides that for evaluation purposes the agency would add 10 percent to the price of bids from other than SDB concerns (and other bid categories that are not relevant to this case). IFB § I.11. The IFB also incorporated by reference the Contract Award--Sealed Bidding--Construction clause of FAR § 52.214-19, which provides that the agency will award a contract to the conforming bid found to be most advantageous to the government, considering only price and price-related factors specified in the IFB. IFB § L.1.

At bid opening, Agriculture received nine bids, including those of Kruger (an SDB concern) and Danco Contractors (not an SDB concern), which were the apparent two lowest-priced bids. As verified, Danco's and Kruger's bids were as set forth in the table on the following page:²

¹ Prior to bid opening, Kruger called the contracting officer regarding how to price option items Nos. 4 and 5, because "Building 103 could not be demolished twice." Kruger was instructed to fully price each line item. Contracting Officer's Statement at 3; Protest at 4. Kruger also contends that the contracting officer stated that the apparent price duplication for demolishing Building 103 would be accounted for during the bid price evaluation. Protest at 4. The agency denies that this statement was made. Contracting Officer's Statement at 3.

² Both firms made errors in accounting for the pricing of option items Nos. 4 and 5. Danco only indicated for its option item No. 5 price the amount of reduction from its option item No. 4 price (\$45,000), and Kruger priced option item No. 5 but did not include that price in its total bid price calculation. The table shows the intended bids.

	Danco	Kruger
Base item	\$10,942,000	\$11,263,503
Option item No. 1	883,960	1,185,305
Option item No. 2	31,310	69,000
Option item No. 3	86,690	126,620
Option item No. 4	580,630	939,148
Option item No. 5	535,630	919,148
TOTAL	\$13,060,220	\$14,502,724

Legal Memorandum at 4.

To account for Kruger's SDB preference, Agriculture added 10 percent (\$1,306,022) to Danco's total bid price indicated above (which included both its option item Nos. 4 and 5 prices) to calculate an evaluated price of \$14,366,242. Because Danco's evaluated total bid price was still lower than Kruger's \$14,502,724 bid price, the agency determined that Danco should receive award of the contract. This protest followed. Contract award has not been made pending our decision in this matter.

The crux of Kruger's protest is that Agriculture erred in adding the firms' prices for all option line items to the basic line item prices to determine the total evaluated bid price, because, as the agency acknowledges, Agriculture cannot exercise both option item Nos. 4 and 5, inasmuch as they are alternate options. Protest at 4-5; Legal Memorandum at 2. Kruger states that under any reasonable evaluation that considered the firms' prices to perform the work for either option item No. 4 or option item No. 5, Kruger's evaluated bid price would be lower than Danco's evaluated price (after adjustment for Kruger's SDB evaluation preference). Under such an evaluation, the firms' evaluated bid prices (with the addition of the SDB evaluation of preference) would be as set forth in the table on the following page:

	Kruger		Danco	
	Option 4	Option 5	Option 4	Option 5
Base	\$11,263,503	\$11,263,503	\$10,942,000	\$10,942,000
Option 1	1,185,305	1,185,305	883,960	883,960
Option 2	69,000	69,000	31,310	31,310
Option 3	126,620	126,620	86,690	86,690
Option 4	939,148		580,630	
Option 5		919,148		535,630
Total	\$13,583,576	\$13,563,576	\$12,524,590	\$12,479,590
Evaluated Price (Considering SDB preference)	\$13,583,576	\$13,563,576	\$13,777,049	\$13,727,549

Protest, exh. F, at F.2.

Agriculture does not dispute that Kruger's bid offered the lowest evaluated price, if either option item no. 4 or no. 5 were considered, but not both. Moreover, as noted above, Agriculture acknowledges that both options cannot be exercised, but are alternate options. The agency argues, however, that the RFP provided for including the prices of both option items to determine the total evaluated bid price, and that Kruger's post-bid-opening protest of the solicitation evaluation scheme is an untimely challenge to an apparent solicitation impropriety. Agency Request for Dismissal at 3.

Kruger responds that the agency's request for dismissal ignores the standard FAR Evaluation of Options clause, which provides that the agency would evaluate offers for award by adding the total price for all options to the total price for the basic requirement, unless the agency determined it not to be in the government's best interests. Kruger argues that it is not in the government's best interest to evaluate the prices of both option items Nos. 4 and 5, where the two options cannot both be exercised or performed. Response to Request for Dismissal at 4.

We disagree with Agriculture that Kruger's protest is untimely. As indicated, the IFB provided that the agency would add the price of all options to the price for the basic item, unless the agency decided that to do so was not in the government's best interest. The FAR provides one example of a situation where it may not be the government's best interests to evaluate all options, that is, where "there is a reasonable certainty that funds will be unavailable to permit exercise of the option." FAR § 17.206(b). Similarly, we have noted that not all options should be evaluated under the standard Evaluation of Options clause, where the contracting officer

knows with “reasonable certainty” that not all the options will be exercised. See, e.g., Charles J. Merlo, Inc., B-277384, July 31, 1997, 97-2 CPD ¶ 39 at 3. Here, as the agency was well aware, both option item Nos. 4 and 5 cannot be exercised. Under the circumstances, it is not the inclusion of the standard FAR Evaluation of Options clause that triggers the time for Kruger’s protest, but the agency’s implementation of the clause. Thus, Kruger’s protest is timely.

Agriculture argues that it is proper to include the prices of both option item Nos. 4 and 5 in its total evaluated price because it did not know (and still does not know) which of the two options will be exercised. Legal Memorandum at 11-12. The agency also argues that it is not in the best interest of the government to exclude consideration of the price of one or the other of the two options where this would result in the award of a contract to a higher-priced bidder (that is, Kruger, if its price is considered without application of the SDB evaluation preference). Id. at 12.

We disagree with the agency that it is not in the best interests of the government to make award to a firm entitled to an SDB evaluation preference at a price higher than that offered by a firm that is not entitled to such an evaluation preference. See Legal Memorandum at 12. This argument ignores the government’s interest in promoting awards to SDB concerns. See FAR § 19.201. Indeed, the use of an evaluation preference in favor of SDB concerns contemplates that an award may be made to an SDB concern at a price that is higher than offered by a competing, non-SDB concern. See AMI Constr., B-286351, Dec. 27, 2000, 2000 CPD ¶ 211 at 5; Vitronics, Inc., B-237249, Jan. 16, 1990, 90-1 CPD ¶ 57 at 2, aff’d, Interstate Commerce Commission--Recon., B-237249.2, Apr. 16, 1990, 90-1 CPD ¶ 391.

We find that Agriculture could not reasonably determine that it was in the government’s best interests to evaluate both of these alternate options to determine the total evaluated price. In this regard, as noted above, Agriculture knew it would not exercise both options. Given that Kruger’s bid price, after application of the SDB evaluation preference, would be low, regardless of which option is evaluated and exercised, we conclude that only Kruger’s bid could be determined most advantageous to the government, considering price and price-related factors.

We sustain the protest and recommend that Agriculture make award to Kruger based upon that firm’s low evaluated bid price, if the agency otherwise concludes that the bid price is fair and reasonable and that the firm is responsible. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including attorney’s fees. 4 C.F.R. § 21.8(d)(1) (2000). 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 after receipt of this decision.

Anthony H. Gamboa
General Counsel