



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: ACC Construction Company, Inc.

File: B-289167

Date: January 15, 2002

Karl Dix, Esq., Smith, Currie & Hancock, for the protester.
Charles M. Powers for R.C. Construction Co., Inc., an intervenor.
William A. Hough, Esq., and Susan K. Weston, Esq., U.S. Army Corps of Engineers, for the agency.
Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where bids (including options) exceeded the available funding and agency does not have additional funds available to exercise the options, the contracting activity, in accordance with the solicitation provision for evaluation of options, reasonably determined that evaluation of options would not be in the best interest of the government.

DECISION

ACC Construction Co., Inc. protests the proposed award of a contract to R.C. Construction Company under invitation for bids (IFB) No. DACA21-01-B-0010, issued by the Army Corps of Engineers for the construction of an ammunition holding area at Fort Bragg, North Carolina.

We deny the protest.

On July 18, 2001, the agency issued the solicitation for a fixed-price construction contract. The solicitation, as amended, requested prices for the following: contract line item number (CLIN) 0001, construction of new ammunition storage facility; CLIN 0002, site preparation and development; CLIN 0003, undercut excavation; CLIN 0004, option No. 1, munitions handling system Type F magazine; CLIN 0005, option No. 2, munitions handling system, oval arches; CLIN 0006, option No. 3, scissors lift Type F magazine; CLIN 0007, option No. 4, scissors lift, oval arches; CLIN 0008, option No. 5, security system; CLIN 0008AA, option No. 5, material only; CLIN 0008AB, installation only. Agency Report (AR) encl. 10, IFB schedule. The

solicitation notified bidders that options would be evaluated in accordance with 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).

AR, encl. 9, IFB, at 10.

The agency received nine bids. The low bidder, ECI Construction, notified the Corps that its bid contained a mistake and the Corp permitted the firm to withdraw its bid. ACC submitted the second low bid of \$15,784,240. AR, encl. 6, Abstract of Bids. R.C. submitted the third low bid of \$15,962,000. Id. In its bid, R.C. certified itself as an eligible HUBZone small business concern, thereby entitling it to the 10 percent evaluation preference.¹ AR, encl. 7, R.C.'s Bid. After application of the HUBZone preference, R.C. became the low bidder.

On October 12, ACC filed this protest with our Office. Specifically, ACC objected to the award to R.C. on the grounds that: (1) R.C.'s bid is materially unbalanced; (2) the agency has improperly applied the HUBZone evaluation preference to this procurement; (3) R.C. failed to provide the necessary certifications in its bid to claim the preference and (4) R.C.'s bid was an unauthorized facsimile bid because all of R.C.'s prices were transmitted by facsimile as a bid modification and the solicitation did not allow submission of facsimile bids.

On December 19, 2001, after the development of the record, including the submission of the agency report in response to the protest, and the submission of comments from both ACC and R.C., Army headquarters notified the Corps in writing that its pending request for funds to cover the option work under this IFB was denied.² Due to the unavailability of funds, the Corps determined that it is in the best interest of the government to evaluate offers without consideration of the option prices consistent with the solicitation provision that the government will evaluate offers for

¹ Federal Acquisition Regulation § 19.001 defines the term "HUBZone" as "a historically underutilized business zone, which is an area located within one or more qualified census tracts, qualified nonmetropolitan counties, or lands within the external boundaries of an Indian reservation." The Small Business Administration maintains the list of HUBZone concerns.

² Headquarters agreed to fund the option for installation of a security system only. The Corps states that it will most likely exercise this inexpensive option and it does not affect R.C.'s standing as low bidder.

award purposes by adding the total price for all options to the basic bid except when it determined not to be in the government's best interests. If the options are not part of the evaluation, R.C. is low with or without application of the HUBZone preference, and the Corps proposes to award the base items to R.C.

In our view, the agency's decision to evaluate the bids without considering the option prices moots ACC's unbalanced bid and HUBZone allegations since R.C. is the low bidder without application of the HUBZone preference and the unbalancing essentially relates to the scissors lift option, an option which the agency is not exercising.

ACC objects to the agency's proposal to award the base items to R.C., rather than to cancel and resolicit.³ ACC contends that the solicitation provides that the contract may be extended for a total of 5 years, and that the contracting officer cannot legitimately state with reasonable degree of certainty that funding will not become available in the next 5 years.

We find the determination made here by the agency was reasonable. The FAR § 17.206(b) provides an agency with authority to not evaluate options in making an award, even where the solicitation informed bidders that options would be evaluated, where the agency properly determines that evaluation of options is not in the best interests of the government. Thus, a determination not to evaluate options, made after receipt of bids, does not preclude an award on the basis of base bid items and, by implication, does not require the receipt of new bids. Foley Co., B-245536, Jan. 9, 1992, 92-1 CPD ¶ 47 at 3; see also Occu-Health, Inc., B-270228.3, Apr. 3, 1996, 96-1 CPD ¶ 196 at 4. Under FAR 17.206(b), the unavailability of funds is an appropriate reason for not evaluating the option prices for award. Here, Army headquarters, in response to the activity's request to fund the option items for the facility, notified the activity that no funds are available to fund these options. Headquarters advised that while the options would improve ammunition handling, the munitions handling and scissors lift equipment were not in the Congressionally approved project scope and therefore no funds were programmed for their

³ Regarding whether the agency improperly accepted R.C.'s facsimile bid modifications, which contained R.C.'s prices for the work, in a conference call with all parties, our Office pointed out that where, as here, the solicitation authorizes the modification of bids by facsimile, a bidder may use a facsimile transmission to modify unit prices or line items that were not previously bid. American Eagle Indus., Inc., B-256907, Aug. 8, 1994, 94-2 CPD ¶ 156 at 2. While the protester was given the opportunity to submit a written rebuttal, it failed to comment on this issue. We therefore deem it to be abandoned. See LSS Leasing Corp., B-259551, Apr. 3, 1995, 95-1 CPD ¶ 179 at 5 n.6.

construction, and that in fact the project was already \$2,000,000 above the appropriated amount. The Corps confirms that there is “no longer any reasonable likelihood that options will be awarded. The funds have been denied and the options will not be exercised in this procurement.” Corps Submission of January 8, 2002. Given the headquarters decision not to fund the options, the agency’s decision not to evaluate option prices for award was reasonable and in accordance with the solicitation.⁴

The protester argues that our decision, Occu-Health, Inc., B-270228; B-270228.3, Apr. 3, 1996, 96-1 CPD ¶ 196, should control here. In that decision, we concluded that an agency cannot rely on FAR § 17.206(b) without requesting revised proposals when the agency knows, prior to the receipt of best and final offers (BAFOs), that its needs have materially changed, so that it will not be evaluating options. However, as the protester itself has noted, the facts in Occu-Health decision were substantially different from the current situation. In Occu-Health, the agency decided prior to the receipt of BAFOs that it would be more effective not to exercise options to provide health services because of a base realignment and reorganization. Thus, the agency had the opportunity to advise offerors prior to receipt of BAFOs that agency needs had changed materially and to allow offerors to submit revised proposals on the basis of the agency’s revised needs. Here, the agency’s decision to not evaluate options is based on the unavailability of funds, which only became clear after bids were opened. Moreover, unlike Occu-Health, Inc., the agency’s immediate needs can be satisfied through the award of the base bid items. Further, ACC does not argue, as did the protester in Occu-Health Inc., that it would have reduced its base bid price, had it known the options would not be evaluated.

ACC speculates that the agency’s determination that there is no money to fund the options is actually motivated by the agency’s desire to defeat the protest and that funding could become available in the future. Government officials are presumed to act in good faith and, where a protester contends that contracting officials are motivated by bias or bad faith, it must provide convincing proof since this Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or suppositions. ACS Sys. & Eng’g., Inc., B-275439.3, Mar. 31, 1997, 97-1 CPD ¶ 126 at 5. Throughout the protest process, the agency defended its decision to

⁴ The protester speculates that funding could become available at a later date if the agency extends the contract past the initial 600 days, as authorized by the IFB clause regarding the option to extend the term of the contract. While this clause gives the agency the right to extend the term of the contract, there is nothing in the record to suggest that the contract will not be completed in the initial 600 days or that the decision not to fund the options will change.

award to R.C. and addressed all issues raised by ACC. The Corps made the decision to evaluate bids without consideration of options only after it was advised by headquarters that funds were not available to fund the options. We see no basis in the record to question the agency's good faith.

The protest is denied.

Anthony H. Gamboa
General Counsel