



Decision

Matter of: Ken Leahy Construction, Inc.

File: B-290186

Date: June 10, 2002

Charles F. Adams, Esq. , Stoel Rives, for the protester.

Charles R. Schrader, Esq., Jordan Schrader, for Elite, Inc., an intervenor.

Timothy J. Binder, Esq., Federal Highway Administration, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that intended awardee's bid is impermissibly unbalanced due to the inclusion of option requirement mobilization costs in price for the base requirement is denied; bid cannot be unbalanced where there would be no need for mobilization in performing the option work, thus eliminating factual predicate for finding of unbalancing.
2. Protest that agency improperly exercised option for additional road construction at the time of award even though agency had not yet secured all necessary rights-of-way is denied; the agency was not required to obtain all rights-of-way as a condition precedent to awarding the option requirement.

DECISION

Ken Leahy Construction, Inc. (KLC) protests the proposed award of a contract to Elite, Inc. under invitation for bids (IFB) No. DTFH70-01-B-00033, issued by the Department of Transportation (DOT), Federal Highway Administration, for the construction of a road in Siuslaw National Forest in Tillamook, Oregon. KLC maintains that Elite's bid is impermissibly unbalanced and should have been rejected.

We deny the protest.

The IFB called for bidders to offer fixed prices for various line items to perform base and option portions of the project. The base portion of the project requires construction of approximately 8.6 kilometers of roadway, while the option requires construction of approximately 3.7 additional kilometers. The record shows that the

agency divided the requirement because, at the time it issued the IFB, it had not secured all of the rights-of-way necessary to construct the option portion of the roadway. The IFB provided that low price would be determined by adding the bidders' base and option prices. IFB at section 102.05A.

The agency received 13 bids. Although Elte's bid was low for the base and option requirements, KLC's was low for the base requirement alone.¹ After reviewing the bids, the contracting officer decided to exercise the option at the time of award, since, of the 95 rights-of-way necessary to perform the entire requirement, all but one had been obtained, and the cognizant agency employee had advised her that the remaining right-of-way issue would be resolved within 30 days. The contracting officer determined that Elte was in line for award. KLC then filed this protest.

KLC contends that Elte's bid should be rejected as unbalanced. KLC principally maintains that Elte improperly front-loaded the costs associated with mobilization for the option requirement into the mobilization line item for the base requirement.² The record shows, in this respect, that Elte's bid includes a mobilization price of \$1,189,290 for the base requirement and only \$1 for the option requirement.

Unbalanced pricing exists where the price of one or more contract line items is significantly overstated, despite an acceptable total evaluated price (typically achieved through underpricing of one or more other line items). See FAR § 15.404-1(g)(1). Where an agency determines that a firm's pricing is unbalanced, it is required to conduct a risk analysis to evaluate whether award to the firm will result in the government paying an unreasonably high price for contract performance. FAR § 15.404-1(g)(2).

We find that Elte's bid is not unbalanced. First, the agency asserts, and the protester does not dispute, that there will be no need for the contractor to incur mobilization

¹ Elte's bid was \$7,514,975.15 for the base requirement and \$1,697,269.50 for the option, for a total bid of \$9,212,244.65. KLC's bid was \$7,046,846.53 for the base requirement and \$2,667,241.51 for the option, for a total bid of \$9,714,088.04.

² KLC also maintains that Elte impermissibly front-loaded (into the base requirement) the costs associated with seven other line items. These items in the aggregate, however, amount to only 0.3 percent of Elte's entire bid (\$36,684 out of \$9,212,224), and in each instance Elte's price for the base requirement line item (into which the costs allegedly are front-loaded) is lower than KLC's price (and the majority of other bidders' prices) for the same item. In these circumstances, there is no basis for concluding that Elte's prices were significantly overstated; accordingly, there is no unbalancing of these items. Federal Acquisition Regulation (FAR) § 15.404-1(g)(1).

costs in performing the option requirement. In this regard, the option work consists of merely extending the roadway an additional 3.7 kilometers beyond the 8.6 kilometers called for under the base requirement. Since mobilization will have taken place for the base requirement, the contractor's equipment and personnel will already be on-site to perform the optional requirement, and thus will not need to be mobilized again. Consequently, the factual predicate for unbalanced pricing—that there must be actual costs associated with performance of the option line item—is absent, and there thus cannot be unbalanced pricing in these circumstances. Accordingly, the agency was not required to perform a risk analysis.

In any event, the IFB includes a limitation on the amount that a contractor may be paid for mobilization prior to completion and acceptance of the entire requirement. Specifically, the IFB provides that the contractor may be paid no more than 10 percent of the entire value of the contract for mobilization costs prior to completion and acceptance of the entire project. IFB at A-1.³ Consequently, there is no risk that Elite could receive a disproportionate amount of the contract payment early in the performance period. See Beldon Roofing Co., B-283970, Jan. 28, 2000, 2000 CPD ¶ 21 at 4 (contract's terms regarding method of payment effectively precluded possibility of firm receiving advance payment).

KLC also contends that the contracting officer improperly decided to exercise the option at the time of award. According to KLC, the agency could not properly exercise the option at that time because it had not secured all of the rights-of-way necessary to build the entire project. In support of its position, KLC relies on an August 17, 2001 memorandum prepared by the contracting officer to document her rationale for using a base and option contract format, in which she states that the option "will be eligible for award upon receipt of all rights-of-way . . ." KLC concludes that, since the option exercise was improper, and Elite's price is not low without exercise of the option, award to Elite was improper.

This argument is without merit. First, the protester's assertion notwithstanding, there was no legal impediment to the agency's exercising the option at the time of award. Nothing in the IFB imposed any conditions precedent on the agency in this regard, and the memorandum to the contract file relied on by the protester is merely an internal agency document that in no way limits the agency's right to exercise the option. Second, KLC's conclusion that Elite would not be in line for award without exercise of the option ignores the express terms of the solicitation. As noted, the

³ The IFB, at A-1, provides that performance of the requirement is governed by FP-96, Standard Specification for Construction of Roads and Bridges on Federal Highway Projects. Section 151.03 of FP-96 expressly limits the payment of lump-sum mobilization costs prior to completion of the project to 10 percent of the overall value of the contract; the remainder of a firm's mobilization costs, if any, are to be paid after final acceptance of the work.

IFB provided that the low bid would be determined by adding the base and option prices. IFB, § 102.05A. Based on this evaluation scheme, Elte was the low bidder entitled to the award, whether or not the agency exercised the option at the time the contract was awarded.⁴

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ There may be situations where the language of the solicitation or actual circumstances (where there is a “reasonably certainty” that the agency will not exercise one or more options) make it improper for the agency to include an option price in determining the apparent low bidder or offeror. See FAR § 17.206(b); Kruger Constr., Inc., B-286960, Mar. 15, 2001, 2001 CPD ¶ 43. This is not the case here.