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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Building Construction Enterprises, Inc.

File: B-294784

Date: December 20, 2004

Kendall Schoonover for the protester.

Denis L. Durkin, Esq., and Edgar Stanton, Esq., Baker & Hostetler, for David Boland, Inc., the intervenor.

Capt. Joseph V. Fratarcangeli, and Roger Christopher Paden, Esq., Department of the Army, for the agency.

Katherine I. Riback, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly awarded contract based on evaluation of base and optional items, where invitation for bids informed bidders that option items would be evaluated and there was not reasonable certainty that the funds would be unavailable to permit the exercise of the options.

DECISION

Building Construction Enterprises, Inc (BCE) protests the award of a contract to David Boland, Inc. by the U.S. Army Corps of Engineers under invitations for bids (IFB) No. W912DQ-04-B-0011 for the construction of the Combined Arms Collective Training Facility at Fort Riley, Kansas. BCE contends that the Corps should not have evaluated bidders' option prices.

We deny the protest.

The IFB sought bids for the construction of a combined arms collective training facility, an urban assault course, an offensive defensive building, live fire shoot house, a breach facility, and airfield buildings. The IFB included five option items, including Option 2 for bituminous paving for a landing zone and concrete runaround and Option 3 for concrete paving of the same landing zone and concrete runarounds. Bidders were informed that Options 2 and 3 were mutually exclusive and that only one of these two options would be exercised. IFB amend. 1, at 4. The IFB also

included the standard “Evaluation of Options” clause, Federal Acquisition Regulation (FAR) § 52.217-5, which provides as follows:

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 at 12. The IFB also included a Notice of Price Evaluation Preference for Historically Underutilized Business Zone (HUBZone) Small Business Concerns, FAR § 52.219-4, which provides that for evaluation purposes the agency would add 10 percent to the price of all bids, except bids from HUBZone small business concerns and otherwise successful bids from small business concerns. IFB at 12-13.

At bid opening, the agency received five bids, including those of BCE (a large business), David Boland, Inc. (a HUBZone small business concern), and MW Builders (a large business). After applying the HUBZone price evaluation preference the agency determined that David Boland had submitted the low bid with an evaluated price of \$25,117,000, that MW Builders had submitted the second low bid with an evaluated price of \$25,528,800, and that BCE’s bid, with an evaluated price of \$26,110,795, was third low. Contracting Officer’s Statement at 3. The agency awarded the contract to David Boland, and this protest followed.

BCE argues, citing FAR § 17.206(b),¹ that the contracting officer should not have evaluated bidders’ option pricing, because he could not confirm that “funds are currently available or will be available for any or all of the options.” Comments at 2.

Where, as here, the IFB includes a provision requiring the evaluation of options, such options must be evaluated “[e]xcept when it is determined in accordance with FAR § 17.206(b) not to be in the government’s best interest.” FAR § 52.217-5; Contractors NW, Inc., B-293050, Dec. 19, 2003, 2003 CPD ¶ 232 at 4. The only example presented in FAR § 17.206(b) of a circumstance that would permit the agency to not evaluate option prices, where a solicitation provides for such an evaluation, is where there is

¹ FAR § 17.206(b) provides:

The Contracting Officer need not evaluate offers for any option quantities when it is determined that evaluation would not be in the best interests of the Government and this determination is approved at a level above the contracting officer. An example of a circumstance that may support a determination not to evaluate offers for option quantities is when there is a reasonable certainty that funds will be unavailable to permit exercise of the option.

reasonable certainty that funds will not be available to permit the exercise of the option.

Here, the contracting officer states that he intended to exercise options at the time of contract award if bid prices were low enough to permit him to do so. However, because the bid prices were not low enough to permit the contracting officer to exercise options at contract award, the contracting officer states that Fort Riley is “attempting to secure additional funds so that options could be awarded” and that he anticipated, based upon his experience, that additional funds might become available, although that is not certain. Affidavit of Contracting Officer at 2.

Although the contracting officer cannot state with certainty that funds will be available to exercise options, this is not the test. FAR § 17.206(b) does not require the agency to be clairvoyant in forecasting the availability of option quantity funding. Charles J. Merlo, Inc., B-277384, July 31, 1997, 97-2 CPD ¶ 39 at 3-4. Absent a showing that there is reasonable certainty that funds will not be available, an agency should evaluate option prices, where the solicitation provides for their evaluation. See Federal Contracting, Inc., B-250304.2, June 23, 1993, 93-1 CPD ¶ 484 at 6. The record here shows that the agency is continuing to seek funds to permit the exercise of the options and that the contracting officer does not know with reasonable certainty that funds will be unavailable to permit the exercise of the options. Accordingly, we find that the agency reasonably evaluated option prices, as was provided for by the IFB.

BCE also argues that the Corps should not have evaluated the option prices, because two of the IFB’s options are mutually exclusive and could not both be exercised. The Army responds that this argument is an untimely challenge to the terms of the solicitation, which must be filed prior to bid opening under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2004). BCE contends, citing our decision in Kruger Constr., Inc., B-286960, March 15, 2001, 2001 CPD ¶ 43, that a post-award challenge to the evaluation of option prices is timely, even where the IFB provides for the evaluation of options, where the agency knows with reasonable certainty that not all options can or will be exercised.

We agree with the Corps that BCE’s assertion that the agency should not have evaluated any of the option prices, because two of the five options are mutually exclusive, is an untimely challenge to the terms of the IFB. In Kruger, we found timely the protester’s challenge to the agency’s evaluation of two mutually exclusive, alternate option items, because it was the agency’s decision to add the prices for both option items in the price evaluation, despite the fact that the agency knew it could not exercise both options, that was the event that triggered the protest; the protester in Kruger did not argue that the remaining option items should not be evaluated. Kruger Constr., Inc., *supra*, at 4-5. Here, however, BCE does not challenge the evaluation of only the two mutually exclusive options but asserts that, because these two options cannot both be exercised, that the agency should not evaluate any of the option items. Thus, this challenge is not to the agency’s decision

to evaluate both of these alternative options items but is a challenge to the solicitation's evaluation scheme that provided for the evaluation of both the base and option items.

As to the two mutually exclusive options, our calculations indicate that the protester's bid would not be low, even if one of the two alternative option items were excluded from the agency's price evaluation. That is, BCE's bid price would not be low regardless of which option (Option 2 or 3) was excluded from the agency's price evaluation. The question that was dispositive in Kruger is therefore of no relevance here.

The protest is denied.

Anthony H. Gamboa
General Counsel