Gilhooly

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Earthworks of Sumter, Inc.

File: B-232067.2

Date: January 5, 1989

DIGEST

Cancellation of solicitation which contains a flawed evaluation scheme is justified where defect made it impossible to accurately determine which bid represented the lowest cost to the government.

DECISION

Earthworks of Sumter, Inc., protests the cancellation, after opening, of invitation for bids (IFB) No. F38601-88-B-0038, issued by the Department of the Air Force for grounds maintenance services at Shaw Air Force Base, South Carolina. Earthworks contends that the Air Force lacked a compelling reason to cancel and that it should be awarded a contract as the low responsive bidder.

We deny the protest.

The IFB sought bids to provide grounds maintenance for a 4-month basic period with 4 option years. For the basic period and each option year, the bid schedule included a base bid item for cutting grass on 301.33 acres, and additive bid items for cutting grass on other acres and establishing grass in bare areas. The schedule noted that bids would be evaluated on the aggregate of all bid items in accordance with the IFB's Additive and Deductive Items clause and the Evaluation of Options clause.

The IFB incorporated the provision at Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 52.236-7082 entitled "Additive or Deductive Items." That provision is required by DFARS § 36.303 for construction projects for which available funding may be insufficient for all desired work. It states that award will be made to the bidder offering the low aggregate amount for the base item, plus or minus (in order of priority listed in the schedule) those additive or deductive bid items providing the most features

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of the work within the funds determined to be available before bid opening. The clause further provides that after the low bidder is determined on that basis:

> ". . . award in the best interests of the Government may be made to him on his base bid and any combination of his additive or deductive bid for which funds are determined to be available at the time of the award, provided that award on such combination of bid items does not exceed the amount offered by any other conforming responsible bidder for the same combination of bid items."

The IFB also incorporated by reference the 1984 Federal Acquisition Regulation (FAR) Evaluation of Options clause (FAR 52.217-5), providing that the government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The option year prices were to include only those additive items which were awarded for the basic requirement.

Eight bids were received by the June 17, 1988, bid opening date. Earthworks submitted its bid based on a 7-month basic period rather than the 4-month period required by the IFB because the Air Force had mistakenly sent it a bid schedule citing a 7-month period. Considering that the Air Force caused the mistake and that unit prices took precedent over total price, the contracting officer calculated Earthworks total bid based on the 4-month period. Earthworks was determined the apparent low bidder based on its total price for the base item and all additive items for the basic period and all option years.

Williams Services, another bidder, protested to our Office on July 25, alleging that Earthworks was improperly allowed to adjust its bid at bid opening, was not a regular dealer, and had submitted an unbalanced bid. In reviewing the protested acquisition, the Air Force concluded that the solicitation was flawed in two areas and canceled the solicitation on September 2.

In reaching its conclusion that the solicitation was flawed, the Air Force determined that bidders were not placed on equal footing since they were bidding on different schedules; i.e., some solicitation packages contained the correct schedule with a 4-month basic period while others contained an incorrect schedule with a 7-month basic period. The Air Force also determined that the IFB's evaluation criteria incorrectly cited the Additive or Deductive Items clause, which is authorized for use in construction contracts and not designed for service contracts with

unfunded option years as in this IFB. According to the Air Force, the clause requires the contracting officer to determine the amount of funds available for evaluation purposes prior to opening of the first bid, but no amount was determined or announced in this case. The Air Force states that it is unclear what amount could have been appropriately announced, since the four options were unfunded, and it would be impossible to determine who the actual low bidder should have been. Since the option years were unfunded at the time of bid opening it is not known whether any or all of the five additive items would be included in the option years. The Air Force anticipates that a significant restructuring of the IFB's evaluation criteria will be required.

Earthworks contends that all bidders were on equal footing, even though some IFB schedules cited incorrect basic performance periods, since unit prices took precedence over total price. Earthworks further argues that, although the Additive or Deductive Items clause might have been intended for construction use only, the language of the clause makes no reference as to whether it was intended for construction or service contracts. Earthworks states that but for the delay in award caused by Williams Services' protest, the issue about the clause's interpretation would not have arisen and it would have been awarded the contract. Finally, Earthworks argues, a resolicitation would result in an unfair advantage to the other bidders since Earthworks' bid is common knowledge.

An IFB may be canceled after bid opening only when a compelling reason for cancellation exists. Summerville Ambulance, Inc., B-217049, July 1, 1985, 85-2 CPD ¶ 4. We have recognized that an IFB which does not set forth a common basis for evaluating offers, and thereby does not insure that award will be based on the lowest cost to the government, is materially deficient and properly may be canceled. See North-East Imaging, Inc., B-216734, Aug. 28, 1985, 85-2 CPD ¶ 237.

Here, we conclude that the Air Force had a compelling reason to cancel the IFB. It is clear that the evaluation scheme was flawed. The Additive or Deductive Items clause provided for award based on items providing the most features of the work within the "funds determined to be available before bid opening." Since no amount of funds available for evaluation purposes was ever determined, it is impossible to determine which bid was low, even for the initial 4-month award period. No bidder was definitely low without regard to considering the funds available. Depending on the funds available, which the Air Force states could have varied

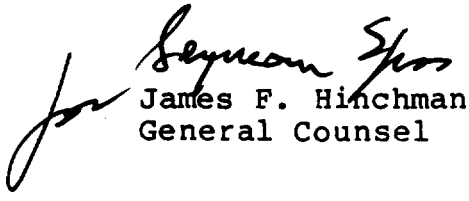
between $91,000 and $102,000, several bidders could have been evaluated as low, depending on which additives were considered. This is exactly the reason why an announcement or definite determination of the funds available, prior to bid opening, is crucial when the Additive or Deductive clause is utilized. Huntington Construction, Inc., B-230604, June 30, 1988, 67 Comp. Gen. ____, 88-1 CPD ¶ 619.

Moreover, while the IFB provided, under the Evaluation of Options clause, that all option prices would be evaluated, option prices could not be evaluated because, in the absence of a determination as to which, if any, additive items would be included for the initial award period, the agency could not determine which additive items should have been considered for the option years.

Under the circumstances here, where in light of the IFB provisions the Air Force could not determine which bid was in fact low, the solicitation was clearly materially defective. We find, therefore, that cancellation of the solicitation was proper. Although Earthworks complains about the timing of the cancellation, we have held that information relating to whether there is sufficient reason to cancel a solicitation can be considered no matter when the information which justifies the cancellation first surfaces. See Ford Aerospace and Communications Corp. et al., B-224421.2 et al., Nov. 18, 1986, 86-2 CPD ¶ 582.

We also do not find that Earthworks has been prejudiced by the disclosure of its bid price because Earthworks will have the same opportunity to compete on the resolicitation as other competitors and to offer whatever price it desires. See Metric Constructors, Inc. et al., B-229947 et al., Mar. 25, 1988, 88-1 CPD ¶ 311.

The protest is denied.



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General Counsel