



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Atherton Construction, Inc.

File: B-266345

Date: February 8, 1996

Denver C. Snuffer, Esq., Nelson, Snuffer & Dahle, P.C., for the protester.
David H. Doro, Esq., Department of the Air Force, for the agency.
Jeanne W. Isrin, Esq., and John M. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Where agency's methodology for determining which additive items to award, and which bid was low, was based on the solicitation scheme and did not allow for manipulation of funds to direct award to any particular bidder, protest challenging award is denied; moreover, since all base bids exceeded funding amount established prior to bid opening, making base bids the determining factor for award, protester which was not low on the base bid was not entitled to award.
2. Solicitation provision stating that award would be made on an "all or none" basis cannot be reasonably interpreted as requiring that award be made for all line items where: (1) the plain language of the provision says only that one award will be made based on however many items are awarded, and (2) protester's interpretation is directly in conflict with provision detailing the procedure to be followed to determine the number of additive items upon which award would be based.

DECISION

Atherton Construction, Inc. protests the award of a contract to Dale B. Stevens Construction, Inc. under invitation for bids (IFB) No. F42650-95-B-0034, issued by the Department of the Air Force for the repair/alteration of building 1266 at Hill Air Force Base, Utah.

We deny the protest.

The IFB was issued on August 8, 1995, and contemplated a firm, fixed-price contract. The project consisted of minor construction, repair, and equipment components which were set out in the bid schedule in nine line items, three base and six additive. Items 0001 (base), and 0004 and 0005 (additive) detailed the minor construction work to be performed. Item 0002 (base) detailed the repair work to be performed; there were no additive items for repair work. Item 0003 (base) and

items 0006, 0007, 0008, and 0009 (additive) detailed the equipment-related work to be performed.

The IFB included a provision, subparagraph L-507, entitled "AWARD-ALL OR NONE BASIS," which provided:

"Notwithstanding the clause at 52.215-16, "Contract Award", of this solicitation, award shall be made to a single bidder/offeror for all items being awarded. Failure to bid on any item including any option periods will be cause for rejecting your bid/offer as non-responsive."

On the same page, directly below the above provision, the IFB incorporated by reference Defense Federal Acquisition Regulation Supplement (DFARS) § 252.236-7007, entitled "Additive or Deductive Items (DEC 1991)," which provides (in pertinent part):

"(a) The low offeror and the items to be awarded shall be determined as follows--

(1) Prior to the opening of bids, the Government will determine the amount of funds available for the project.

(2) The low offeror shall be the Offeror that--

(i) Is otherwise eligible for award; and

(ii) Offers the lowest aggregate amount for the first or base bid item, plus or minus (in the order stated in the list of priorities in the bid schedule) those additive or deductive items that provide the most features within the funds determined available.

(3) The Contracting Officer shall evaluate all bids on the basis of the same additive or deductive items.

(i) If adding another item from the bid schedule list of priorities would make the award exceed the available funds for all offerors, the Contracting Officer will skip that item and go to the next item from the bid schedule of priorities; and

(ii) Add that next item if an award may be made that includes that item and is within the available funds.

"(b) The Contracting Officer will use the list of priorities in the bid schedule only to determine the low offeror. After determining the low offeror, an award may be made on any combination of items if-

- (1) It is in the best interest of the Government;
- (2) Funds are available at the time of award; and
- (3) The low offeror's price for the combination to be awarded is less than the price offered by any other responsive, responsible offeror."

Consistent with the above provision, on July 20, contracting officials received notice that \$654,279 was available for the project, broken down as follows: (1) \$279,800 for the minor construction component (base item 0001 and additive items 0004 and 0005); (2) \$124,506 for the repair component (base item 0002); and (3) \$249,973 for the equipment component (base item 0003 and additive items 0006 through 0009).

Six bids were received by the September 19 bid opening with results as follows:

	Funds Available	Atherton	Stevens
Item 0001		\$250,000	\$188,000
Item 0004		\$20,000	\$61,000
Item 0005		\$9,000	\$27,000
Subtotal (1, 4, 5)	\$279,800	\$279,000	\$276,000
Item 0002	\$124,506	\$350,000	\$412,000
Item 0003		\$252,225	\$180,000
Item 0006		\$10,775	\$8,000
Item 0007		\$20,000	\$15,000
Item 0008		\$20,000	\$31,000
Item 0009		\$10,000	\$33,000

Subtotal (3, 6, 7, 8, 9)	\$249,973	\$313,000	\$264,000
TOTAL	\$654,279	\$942,000	\$955,000

According to the agency, because each of the three project components had a separate funding limit, each component, its base item and any additives associated with it, was evaluated separately in the following manner:

(1) Minor Construction Component (base item 0001, additive items 0004, 0005) - Aggregate bids for the three items were calculated for all six bidders. Atherton, Stevens, and one other bidder submitted aggregate bids that were within the \$279,800 limit. Stevens and the other bidder were tied for low bid at \$276,000.

(2) Repair Component (base item 0002) - Since the funds available for base item 0002 were substantially lower than all the bids for that item, which ranged from \$275,700 to \$412,000, and item 0002 was a base item and was considered a "must award" item by the agency, the contracting officer requested and received for that item an additional commitment of \$287,494, the amount necessary to bring all offers within the funds available. (The additional funds brought the total amount of funds available to perform the project to \$941,773.)

(3) Equipment Component (base item 0003, additive items 0006 through 0009) - Contracting officials tabulated aggregate totals and found that all aggregate bids exceeded the funds available. The agency thus applied DFARS § 252.236-7007, and found that, within the \$249,973 funding limit, award could be made for items 0003 and 0006, 0007 and 0008, but only to Stevens. All other bidders, including Atherton, had aggregate bids for items 0003 and 0006 through 0008 which exceeded the funding limit.

Contracting officials also tabulated a running total of line item prices (rather than prices broken down by the three base items) for all three components according to two sequences: (1) 0001 through 0009 in numerical order, and (2) 0001, 0004, 0005, 0002, 0003, 0006, 0007, 0008, and 0009, i.e., ordered by base bid grouping, each with its additives. Both yielded the same result when evaluated against the revised total funding (\$941,773), i.e., no award could be made for all line items, but Atherton and Stevens had running totals through item 0008 which were within the available funds. Although the results of this method differed slightly from the other method in that Atherton's bid was within available funds for items 0001 through 0008, Stevens's bid was low for the eight items--\$922,000, compared to \$932,000 for Atherton. Based on all these findings, contracting officials concluded that award should be made to Stevens as the low bidder. On September 26, award was made to Stevens, based on

items 0001 through 0008, for \$922,000. Had award been based on all items, 0001 through 0009, Atherton's total bid, \$942,000, would have been lower than Stevens's bid of \$955,000.

Atherton argues that bids were improperly evaluated because the amount of funds available for award was not determined prior to bid opening, as required by DFARS § 252.236-7007, but was increased after bid opening to \$941,773, and that bids were evaluated against that figure.¹

The award was proper. The agency's approach to determining the low bid for the proper combination of items appears to have been properly based on methodologies under which the agency could not manipulate the funds available to ensure award to a particular firm. In this regard, the funds available amount was established before bid opening, and the only increase in available funding (for item 0002) was based on the amount necessary to bring all offerors (as opposed to a certain offeror) within the funding limit. This hardly can be said to have favored Stevens over Atherton. Aside from this funding increase, the agency evaluated the bids based strictly on the order of the items (*i.e.*, item 0001 and its additives first, item 0002 second, and item 0003 and its additive, in order, last), and the revised total funds available.

In any case, where, as here, the IFB contains the "Additive or Deductive Items" clause, and the funds available prior to bid opening are insufficient to cover even the lowest base bid, award should be made only to the bidder offering the lowest price on the least amount of work, in this case, the base bid, if additional, sufficient funds subsequently become available. See Connie Hall Co., B-223440.2, Nov. 18, 1986, 86-2 CPD ¶ 576; Utley-James, Inc., B-198406, June 16, 1980, 80-1 CPD ¶ 417; Gartrell Constr., Inc., U.S. Floors, Inc., B-237032; B-237032.2, Jan. 11, 1990, 90-1 CPD ¶ 46. After additional funds are obtained, award may include additive items, so long as no other responsible bidder has submitted a lower bid on the same combination of items. Connie Hall Co., *supra*; Utley-James, Inc., *supra*.

Since all base bids were higher than the original amount of funds available, \$654,279, only the base bids should have been considered in the award decision. Since Stevens submitted a lower base bid (\$780,000) than Atherton (\$852,225), and the total funds available after additional funds were obtained (\$941,773) were

¹The basic purpose of the "Additive or Deductive Items" clause requirement that bids be evaluated based on the funds available at bid opening is to ensure that after bids are exposed the contracting agency cannot manipulate the amount of funds available to select enough additives to ensure award to a particular firm. H.L. Martz Constr. Corp., B-213320, Dec. 27, 1983, 84-1 CPD ¶ 29.

sufficient to cover Stevens's lowest bid for items 0001 through 0008, Atherton is incorrect that it was entitled to the award instead of Stevens. Although Atherton argues generally that its bid represented the best value to the government because for only \$10,000 more (the difference actually is \$20,000) the government could have had performance of all items, this misses the point. Since all base bids exceeded the funds available and Atherton's bid on the base items was not low, award to Atherton would have been improper.²

Atherton also argues that clause L-507 required award of all items, and that it thus was in line for award based on its low bid for all nine line items. This argument is without merit. The plain language of the clause states only that "award shall be made to a single bidder/offeror for all items being awarded"; it does not state that all items will be awarded. Indeed, such an interpretation is directly contrary to the inclusion of additive items in the IFB; by definition, and as described in the DFARS § 252.234-7007 provision incorporated in the IFB, the additive items were only to be awarded based on the funds available. See Utley-James, Inc., supra.

Atherton maintains that contracting officials have manipulated the evaluation process to avoid making award to Atherton. As discussed, however, Stevens was the correct awardee based on a funding limitation that was clearly established prior to bid opening, so there were no means by which officials could have manipulated the award. Contracting officials have denied Atherton's contention, and the protester has offered no evidence that contracting officials acted in bad faith. Prejudicial motives will not be attributed to contracting officials on the basis of unsupported allegations, inference, or supposition. Stabro Labs., Inc., B-256921, Aug. 8, 1994, 94-2 CPD ¶ 66.

The protest is denied.

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²Actually, Stevens's bid on the base items was \$5 higher than another bid. (The bidder has neither protested nor intervened in Atherton's protest.) However, the analysis here is valid for purposes of addressing Atherton's claim of entitlement to the award.