



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Charles J. Merlo, Inc.

File: B-277384

Date: July 31, 1997

Timothy A. Sullivan, Esq., Starfield & Payne, for the protester.
William A. Lubich, Esq., Department of the Army, for the agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Where the cognizant funding official advised the contracting officer that funding necessary to award the solicitation's option quantities was expected to be included in future appropriations legislation, or else would be allocated from other available operation and maintenance funds, the contracting officer reasonably determined that funding would be available to exercise the option quantities; under these circumstances, contracting officer properly determined that there was no basis to exclude option quantity pricing from the bid evaluation.

DECISION

Charles J. Merlo, Inc. protests the proposed award of a contract to Mosites Construction Company under invitation for bids (IFB) No. DACW59-97-B-0009, issued by the Army Corps of Engineers for rehabilitation of the Stoneycreek River in Johnstown, Pennsylvania. Merlo contends that the Army performed an improper pricing evaluation.

We deny the protest.

The IFB was issued by the Army Corps of Engineers' Pittsburgh District on April 28, 1997, as part of the Johnstown Channel Improvement flood control/rehabilitation project, and contemplated the award of a fixed-price contract for 42 "Basic Contract Items" and 22 "Awardable Option Items" to be performed over a 2-year period.

Of significance to this protest, the IFB set forth the standard "Evaluation of Options" clause, Federal Acquisition Regulation (FAR) § 52.217-5, which advised bidders that the government would "evaluate offers for award purposes by adding the total price for all options to the total price for the basic" items, unless the government determined in accordance with FAR § 17.206(b) that evaluation of option quantities was not in its best interests. The IFB also advised bidders that "[o]nly the basic contract items . . . will be awarded initially" since the operation

and maintenance (O&M) funding necessary to award the option items was not yet available, but was "expected" to be appropriated by Congress in "future fiscal years."

At the June 18 bid opening, Merlo's price of \$4,732,303 was the lowest of the eight bids received for the basic items; however, Mosites' total bid price of \$6,162,905 for both the basic and option items was the lowest overall.¹

Shortly after bid opening, the contracting officer learned that Merlo intended to file a bid protest if the agency failed to invoke the "best interests" provision set forth in FAR § 17.206(b). That regulation provides, in relevant part:

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 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.

On June 24 and 25, the contracting officer met with several Corps of Engineers officials from the Pittsburgh District to ascertain whether funding for the option items was available. The Assistant Chief, Operations and Readiness Division, of the Pittsburgh District (Assistant Chief)--who is the manager of the Johnstown Channel Improvement project's O&M budget, the source for any option quantity funding--advised the contracting officer that he expected Congress to provide funds for the IFB's optional contract items in both the fiscal year (FY) 1998 and FY 1999 appropriations legislation, as requested by the Army. The Assistant Chief also advised the contracting officer that in the event the option quantity funding was not included in either the FY 1998 or FY 1999 appropriations legislation, or the amount appropriated was insufficient to cover the full option quantity award amount, he would allocate other O&M funds to cover award of the option items.

Based on these assurances, the contracting officer decided that funding for the solicitation's option quantities was reasonably certain, and, consequently, the bid evaluation should include the option item pricing. On June 30, after learning that the Army intended to include option pricing in the bid evaluation--which rendered Mosites the apparent low bidder--Merlo filed this protest.

¹The breakdown of Mosites' and Merlo's bid prices was:

<u>Bidder</u>	<u>Basic Contract Items Subtotal</u>	<u>Optional Contract Items Subtotal</u>	<u>Total Bid Price</u>
Mosites	\$5,052,030	\$1,110,875	\$6,162,905
Merlo	4,732,303	1,431,185	6,163,488

Merlo contends that "it is an abuse of the contracting officer's authority not to make a determination under FAR § 17.206(b)" to exclude option pricing from the bid evaluation because there is no current funding for the option quantities. Without current funding, Merlo maintains, the option quantities will probably not be exercised and, as a result, "the strong possibility exists that an award based on [the overall bid price] will result in the Government spending \$319,727 more for the base bid work" (the difference between Merlo's and Mosites' base quantity bid price) than if award were based only on the base contract item quantity.

As a general rule, a contracting agency is required to include option quantities in its evaluation for contract award where, as here, it has been determined prior to soliciting offers that the government is "likely to exercise" the options. FAR § 17.206(a). However, FAR § 17.206(b)--which, as noted above, was referenced in the IFB's "Evaluation of Options" clause--authorizes an agency not to evaluate option quantities in making an award (even where the solicitation informs bidders or offerors that options will be evaluated) where the agency properly determines that evaluation of options is not in the best interests of the government. See Mobile-Modular Express, Inc., B-250790, Feb. 22, 1993, 93-1 CPD ¶ 159 at 2. However, unless a contracting officer knows with "reasonable certainty" that not all options will be exercised or that evaluation on the basis of all option prices is otherwise not in the government's best interests, the FAR establishes a clear preference for evaluation of bids on the basis of all options. See FAR § 17.206(a); Crowley Co., Inc., B-258967, Feb. 21, 1995, 95-1 CPD ¶ 105 at 4.

In this case we see no basis to object to the contracting officer's determination not to invoke the FAR § 17.206(b) "best interests" exception for excluding option quantities from the bid evaluation. Given the Pittsburgh District Assistant Chief's representations that the Army had both requested and expected funding for the option quantity items to be made available in the FY 1998 and FY 1999 appropriations, as well as this official's alternate assurance--confirmed in an affidavit submitted with the agency report--that other available O&M funds would be utilized in the event the anticipated appropriations did not materialize or did not suffice, the contracting officer could not know with reasonable certainty that funding would be unavailable to award the option quantities. See Federal Contracting, Inc., B-250304.2, June 23, 1993, 93-1 CPD ¶ 484 at 6 (where there were indications from the agency's internal funding documents that additional funding could become available during the 120-day period following award, there was no basis to object to contracting officer's determination to evaluate options).

Merlo speculates in its comments on the agency report that unforeseen "emergencies" may require the Corps to allocate funding for this contract's option quantity items to another contract or flood control project, and thus contends that the Assistant Chief's assurances do not constitute a reasonable basis for the contracting officer's conclusion that option funding will be available. FAR § 17.206(b) does not require the Army to be clairvoyant in forecasting the

availability of option quantity funding. Instead, the regulation's application hinges solely upon a contracting officer's assessment of "reasonable certainty" with regard to the availability of option funding.

Because the contracting officer was advised that funding for the option quantity items would be allocated from future appropriations² or existing O&M funds, and since the Army expects to require the option quantity items, the contracting officer reasonably concluded that there is no present reasonable certainty that not all options will be exercised, or that evaluation on the basis of all options is not in the government's best interest.

The protest is denied.

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²In its comments on the agency report, Merlo argues that there is no reasonable likelihood of sufficient funding for the option quantities since the FY 1998 appropriations legislation does not allocate sufficient funding to cover the amount of the awardee's bid for these items. Since the Army has made it clear that it will also rely on FY 1999 appropriations to fund the option quantity item award, and that the Assistant Chief intends to use other existing O&M funds to cover any amount not included in the appropriations, we find this argument unpersuasive.