119241

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-205246.2, B-205246.3 DATE: August 18, 1982

MATTER OF: Mitchell Construction Company, Inc.
Bill Strong Enterprises, Inc.--Request
for Reconsideration

DIGEST:

1. Prior decision holding that solicitation provision required that award be made to the low aggregate bidder is affirmed.

2. The determination to terminate an improperly awarded contract involves among other things consideration of the seriousness of the procurement deficiency, the degree of prejudice to the integrity of the competitive system and the extent of performance. GAO affirms prior recommendation to terminate contracts awarded under solicitation in view of fact that the preservation of competitive system outweighs the impact of the termination costs of the contractors who have not begun performance.

Mitchell Construction Company, Inc. (Mitchell), and Bill Strong Enterprises, Inc. (BSEI), request reconsideration of our decision in Northeast Construction Company, 61 Comp. Gen. ____ (B-205246, April 1, 1982), 82-1 CPD 293, in which we sustained Northeast's protest against the award of separate contracts to those firms under invitation for bids (IFB) No. F0865-81-B-0174, issued by the Department of the Air Force.

We affirm our prior decision.

The IFB solicited a base bid for replacement of windows (item 0001) and rehabilitation of kitchens and bathrooms (item 0002) in specified housing units and included five deductive bid items decreasing the number of units in which rehabilitation work would be done. Paragraph 10 of the IFB standard form (SF) 22 advised that the Government might accept any item or combination of items. Paragraph 34 called for award to the low aggregate bidder for the first base bid item minus those deductive bid items providing the most work within available funding.

Northeast, the low aggregate bidder, argued that IFB paragraph 22 precluded multiple contract awards because that paragraph defined the term "item" in paragraph 10 as "schedule," and the IFB included only one "schedule," comprised of seven bid items. Northeast insisted that the IFB, which had not included the required clause for evaluation of multiple awards set forth in Defense Acquistion Regulation § 7-2003.23(b) (Defense Acquisition Circular No. 76-26, December 15, 1980), had failed to notify bidders that multiple awards were contemplated.

We held that paragraph 34 of the IFB stated the controlling basis of bid evaluation and award and that paragraph required an aggregate award for the base bid items provided such a bid fell within the funds available for the project. We found that items 0001 and 0002 had constituted the IFB's base bid requirements and that the remaining five deductive bid items pertained only to the rehabilitation of kitchen and bathroom work in item 0002. We concluded that paragraph 10, as modified by paragraph 22, merely preserved the contracting agency's right to award schedules, not items, separately. Moreover, we also concluded that the definition of the term "item" as "schedule" expressly applied only to paragraph 10 of SF 22 rather than to that term as it had been used in the rest of the IFB.

Mitchell, the awardee on item 0001, contends that we were incorrect in finding that paragraph 34 had controlled award. Mitchell asserts that we failed to note that the five bid items listed as deductive bid items were not deductive items for determining the low bidder. According to Mitchell, these items were actually alternate bid items, applicable in lieu of bid item 0002 not as a reduction of bid item 0002. In addition, Mitchell argues that we disregarded the fact that paragraph 34 had been written in the "singular tense" and, consequently, applied only to bid item 0001, not both items 0001 and 0002. In this regard, Mitchell asserts that if the Air Force had intended items 0001 and 0002 to have constituted a base bid as our prior decision suggests, the bid form could have easily provided an additional space to complete a base bid consisting of the totals of items 0001 and 0002.

Mitchell points out that there was, however, no such space in the bid form. In view of the asserted inapplicability of paragraph 34 of the IFB, Mitchell takes the position that paragraph 10, which had provided for multiple awards, remained effective and, thus, not altered by the provisions of paragraph 34.

Mitchell's argument that paragraph 34 of the IFB was inapplicable for determining award disregards our finding that the term "base bid item" in the paragraph consisted of items 0001 and 0002. We pointed out the narrative statement preceding the seven bid items stated that the contractor was to perform all work required to rehabilitate the kitchens and bathrooms in 333 housing units (item 0002) and replace awning windows in 999 units (item 0001). Therefore, we concluded that this conjunctive narrative description of the agency's requirement indicated that the Air Force had not contemplated making multiple awards at the time of issuance of the IFB. Moreover, we disagree with Mitchell's assertion that the five items listed in the IFB as deductive items were actually alternate bid items in lieu of item 0002. These five bid items were clearly deductive in nature ranging from bids on the rehabilitation of kitchens and bathrooms in 312 of the 333 housing units (item 0002AA) to bids on the rehabilitation of kitchens and bathrooms in only 228 of the 312 housing units (item 0002AE).

BSEI, the awardee on item 0002, also contends that our prior decision was based on improper interpretation of the terms of the IFB. In BSEI's opinion, any reading of the IFB should have led a bidder to the clear and concise language of paragraph 10, which gave the Government the option to accept any single bid item or combination of bid items unless otherwise precluded by the IFB. BSEI goes on to assert that paragraph 22's substitution of the word "schedule" for the word "item" means that IFB items 0001 and 0002 were redesignated as "schedule" No. 0001 and "schedule" No. 0002. BSEI therefore claims that the IFB had given the contracting agency the right to make either an award of "schedule" No. 0001 or "schedule" No. 0002, or a combination of both, depending upon which combination of bids was the most advantageous to the Government, price and other factors considered.

With respect to paragraph 34 of the IFB, BSEI contends that "schedule" No. 0002, the rehabilitation of kitchens and bathrooms, was the only "schedule" containing deductive bid items. Consequently, BSEI argues paragraph 34 means only that the low bidder under "schedule" No. 0002 would be the bidder offering the low aggregate amount for the first or base bid item of "schedule" No. 0002 and that paragraph 34 did not apply to "schedule" No. 0001.

The multiple award provisions of paragraph 10 were applicable only if the IFB did not otherwise preclude multiple awards. Since paragraph 34 specifically stated that the low bidder for award would be the responsible bidder having the "low aggregate amount," we feel that BSEI's emphasis on paragraph 10 is inappropriate. Further, we cannot accept BSEI's position that because item 0002 had been the only item with deductive items, paragraph 34 pertained only to item 0002. As stated above, the award to the low aggregate bidder in paragraph 34 pertained to the first or base bid, which, in turn, pertained to both bid items 0001 and 0002 together.

BSEI also asserts that our prior decision appeared to have accepted Northeast's position that the IFB included only one schedule and, thus, failed to give proper effect to paragraph 22 of the IFB, which had given the Government the right to make award of any or all schedules of any bid. According to BSEI, the only way to give each item a viable application is to logically assume a possible award of a "schedule" 0001 (replacing windows) and an independent award of "schedule" 0002 (rehabilitation of kitchens and bathrooms). However, as pointed out in our prior decision, the IFB contains only one "Bidding Schedule." Therefore, we see no basis for BSEI's argument that bid items 0001 and 0002 should have constituted two separate schedules.

In our prior decision, we noted that because the Air Force had stated that it intended items 0001 and 0002 of the IFB to be severable, a resolicitation of the procurement on a basis that permits multiple awards would normally have been the appropriate course of action. However, in view of the fact that all bids had

been exposed, that the difference between the aggregate award basis and the item award basis was $11,210 on a $2,298,400 aggregate bid, that resolicitation of the same work on a different award basis would create an auction atmosphere, and that award on an aggregate basis would meet the Government's needs as well as an award on a multiple basis, we recommended that the awards to Mitchell and BSEI be terminated for the convenience of the Government and that award be made to Northeast, instead of resoliciting the procurement.

BSEI charges that the recommendation in our prior decision did not take into account termination costs. BSEI alleges that, although Mitchell's termination costs are not in BSEI's possession, a $25,000 figure is easily supportable. BSEI further alleges that it will have approximately $35,000 in termination costs. Consequently, BSEI contends that the resulting costs from the termination of the awards will be at least six times the $11,210 figure referenced in our prior decision.

The Air Force states that in response to our prior decision, it took immediate action to terminate the contracts for convenience. In response to termination notifications it issued, the Air Force states that Mitchell and BSEI submitted termination claims with a minimum combined value of $71,394.78 and a possible maximum value of $214,234.78, if BSEI's claim for anticipated profits were allowed. Although the claims have not been audited by the Air Force, the agency states that much of the $71,394.78 represents valid termination costs to the two contractors. The agency indicates that it stands ready to implement any decision that may be forthcoming from our Office. However, final termination action is being held in abeyance until this decision is rendered.

We recommended award to Northeast in our prior decision without a discussion of the feasibility of terminating the contracts because neither contractor received notice from the Air Force to proceed with the work, and we assumed that the effect of the terminations would be negligible.

Generally, the determination of whether an improperly awarded contract should be terminated involves the consideration of several factors, including the seriousness of the procurement deficiency, the degree of prejudice to other offerors or the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, and the impact of a termination of the procuring agency's mission. See System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159. With respect to the effect of termination costs on the determination whether to terminate a contract, we have expressed the opinion that the preservation of the integrity of the competitive system may outweigh the cost to the Government of termination. See, e.g., Stott Briquet Company, Inc., A Division of Lakehead Industries, B-194144, July 31, 1979, 79-2 CPD 65; Datapoint Corporation, B-186979, May 18, 1977, 77-1 CPD 348. Similarly, we have stated that in the absence of any indication of a substantial adverse impact on the mission of the procuring agency, the preservation of the integrity of the competitive system outweighs the possible administrative inconvenience and disruption which might accompany the corrective action. See Las Vegas Communications, Inc., B-195966, July 22, 1980, 80-2 CPD 57.

BSEI claims $142,840 in gross profit lost from any termination by the Air Force. However, the law is clear that settlement of a termination for convenience does not include anticipated profits. See Nolan Brothers v. United States, 405 F.2d 1250 (Ct. Cl. 1969). Even in cases where the Court of Claims believed that the Government had wrongfully canceled contracts, recovery of anticipated profits was not allowed. See Defense Acquisition Regulation § 7-602.29(a) (1976 ed.) and John Reiner & Co. v. United States, 325 F.2d 438; Brown & Son Electric Co. v. United States, 325 F.2d 446 (Ct. Cl. 1963). BSEI does suggest that it will be able to recover for lost profits under breach of contract because the IFB had included an incorrect termination for convenience clause. The Air Force informs us, though, that the IFB did contain the proper termination for convenience clause. Therefore, the agency asserts that BSEI is limited to the contractual remedy provided by the IFB.

Of the $71,394.78 in other projected termination for convenience costs given by Mitchell and BSEI, $53,127.90 are for allocated overhead and the obtaining of performance and payment bonds. Mitchell also claims $2,032.90 in bid preparation costs and $2,036.98 in legal fees incurred in response to Northeast's protest. While recognizing that Mitchell and BSEI can recover a portion of their costs in obtaining performance and payment bonds, Northeast challenges the companies' right to recover the full cost of the bonds on the grounds that the Air Force's notice of termination was issued before any notice to proceed with the contract work. Consequently, Northeast argues that the sureties for the bonds had no risk and that their charges to Mitchell and BSEI should be commensurate with this fact. As to the claims for overhead, Northeast asserts that without contract billings resulting from contract work that has actually proceeded, there cannot be overhead costs to the extent claimed by Mitchell and BSEI. Finally, Northeast argues that bid preparation costs and legal fees incurred in response to a protest are not legally recoverable under a termination for convenience action.

In any event, even assuming that a substantial portion of $71,394.78 in claimed termination costs can be recovered by Mitchell and BSEI, we think that the preservation of the integrity of the competitive system outweighs the effect of claims termination costs on this $2.3 million dollar procurement. In our prior decision, we emphasized that the award of a contract pursuant to advertising statutes must be made on the same terms that were offered to all bidders. In this regard, we stated that because paragraph 34 of the IFB had clearly advised bidders that an aggregate award was contemplated, any award made under the IFB must have been made to the low aggregate bidder notwithstanding that such an award would cost the Government more than multiple awards would have cost. See Com-Tran of Michigan, Inc., B-200845, November 28, 1980, 80-2 CPD 407.

Therefore, we affirm the recommendation in our prior decision that the contract awards to Mitchell

and BSEI be terminated for the convenience of the Government, and that an award be made to Northeast.

for Milton J. Socolar
Comptroller General
of the United States