DECISION

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

30308

FILE: B-216737 DATE: January 29, 1985

MATTER OF: Walsky Construction Co.

DIGEST:

Where solicitation permitted multiple awards on any combination of eight separate schedules and did not prohibit "all-or-none" or similarly restricted bids, agency erroneously rejected bid conditioned on award of combination of schedules resulting in minimum dollar amount where award of schedules meeting this minimum resulted in lowest overall cost to government, even though one of the schedules awarded was not the lowest bid.

Walsky Construction Co. (Walsky) protests the award of schedules, "A," "B," "C" and "G" to other bidders under invitation for bids (IFB) No. DACA85-84-B-0053 issued by the Army Corps of Engineers (Corps). Walsky contends that its bid, which conditioned award on receipt of a minimum total schedule price of $500,000, was improperly rejected.

We sustain the protest.

The IFB, which was for paving roads and streets at Fort Wainwright, Alaska, contained eight separate schedules. The IFB stated that: "Award will be made to the low responsive bidder or bidders on schedules A through H together, separately, or in any combination thereof, whichever is in the best interest of the Government." Walsky submitted a bid for all eight schedules with the qualification that its bid was "based on an award of enough items to equal at least $500,000." Three other bidders submitted unrestricted bids on all eight schedules. Walsky's bid was low for schedules "B," "C," "G" and "E." The aggregate amount of Walsky's bid on these four schedules was $490,474. On schedule "E," Walsky's bid was $57,342, compared to the next low bid of $140,000, and Walsky alleged mistake. We note that this price differential was of sufficient magnitude to put the contracting officer on constructive notice of the possibility of mistake, and to necessitate verification by Walsky. However, because Walsky was low on schedules with a total value of less than the $500,000, the Corps determined not to award any schedules to Walsky. Instead, the Corps awarded schedules "A" and "G" to Harbor Contractors Inc. (Harbor), schedules "B," "C," "F," and "H" to Seley Incorporated (Seley), and schedules "D" and "E" to Shannon Construction Company (Shannon). These constituted the low bids for the individual schedules in question, once Walsky's bid was eliminated from consideration, for an aggregate price of $1,148,840.

Walsky protests that this was not the lowest price available to the government. Walsky points out that the lowest price total of $1,092,165.28 would result from award to Walsky of schedules "A," "B," "C" and "G," award of schedules "D" and "E" to Shannon, and award of schedules "F" and "H" to Seley. This combination would meet Walsky's $500,000 minimum, and result in a total price of $56,674,72 less than the combination awarded by the Corps.

The Corps agrees that the combination of schedule awards proposed by Walsky would meet Walsky's bid limitation and result in the lowest price to the government. It also concedes that if the bid is governed by the principles which apply to "all-or-none" bids, Walsky should receive the award as it proposes. However, the Corps believes that Walsky's restriction for a minimum amount involves a case of first impression and requests our determination as to the propriety of award to Walsky.

We believe that Walsky's minimum limitation does not preclude acceptance of its bid. The limitation falls within the express language of the award provision, since nowhere else in the solicitation is there any restriction on the use of "all-or-none" or similarly restricted bids. The condition is also within the contemplation of the Federal Acquisition Regulation, § 14.404-5, which expressly provides that unless the solicitation provides otherwise, a bidder may condition award on receipt of all or a specified group of items. Moreover, our Office has specifically upheld the propriety of such bid conditions. In 42 Comp. Gen. 415, 416 (1963), we stated that:

> "The stipulation by bidders of limitations on the acceptance of items in a bid to various combinations or maximum or minimum dollar amounts is not unusual in Government procurements. As with a related form of qualified bid, the all or none bid, we have consistently taken the position that such limitations are effective in the absence of a specific provision in the invitation to the contrary. See 35 Comp. Gen. 383, 385."

We have also approved, in the absence of solicitation provisions to the contrary, the conditioning of award on the receipt of particular combinations of schedules (Golden Gate Disposal Company, B-180164, Mar. 12, 1974, 74-1 C.P.D. ¶ 130); on the receipt of a minimum percentage of schedule awards (Beta Systems Inc., et al., B-184413, Feb. 18, 1976, 76-1 C.P.D. ¶ 109); and on the receipt of a maximum dollar amount (Orvedahl Construction, Inc., B-213408, Apr. 10, 1984, 84-1 C.P.D. ¶ 405).

In all of these cases where award on a restricted combination or threshold of schedules is provided for by the bidder, it is an obvious corollary that the low overall cost to the government is the relevant award criterion, as is required under 10 U.S.C. § 2305(c) (1982). To obtain this result, it is permissible to include award of schedules or items for which other bidders have submitted lower prices, even where the solicitation states that award will be made by item. Steel King Industries, Inc., B-209239, May 5, 1983, 83-1 C.P.D. ¶ 473.

The Corps has indicated that minimal contract performance has occurred, and that performance is currently in abeyance because of winter weather conditions. If Walsky is found responsible, we recommend that the award to Harbor of schedules "A" and "B," and the award to Seley of schedules "C" and "G" be terminated for convenience. Award for these four schedules should be made to Walsky.

Since this decision contains a recommendation that corrective action be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations, and to the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

The protest is sustained.

Milton J. Socolar
for Comptroller General
of the United States