The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ballantine Laboratories, Inc.--Request for Reconsideration
File: B-224232.2
Date: January 23, 1987

DIGEST

Procuring agency may consider prices for option quantities in the award evaluation where solicitation provides for such consideration and agency has made the determination required by section 17.206 of the Federal Acquisition Regulation.

DECISION

Ballantine Laboratories, Inc. (Ballantine), requests reconsideration of our decision in Ballantine Laboratories, Inc., B-224232, Dec. 4, 1986, 86-2 C.P.D. ¶ ___, in which we dismissed as untimely filed Ballantine's protest concerning award of a contract to Wavetek San Diego, Inc., under invitation for bids (IFB) No. DAAB07-86-B-N094, issued by the United States Army Communications-Electronics Command, Fort Monmouth, New Jersey. The IFB was the second step in a two-step sealed bid procurement for the multiyear acquisition of signal generators. We dismissed as untimely Ballantine's objections to the solicitation's multiyear and option provisions, holding that its protest of alleged improprieties in a solicitation for two-step sealed bidding was untimely where the alleged improprieties were apparent prior to bid opening, but the protest was not filed with the contracting agency or our Office until after bid opening.

On the basis of material presented in the reconsideration request, we have considered the merits of Ballantine's objection to the inclusion of options in the evaluation factors for award. As discussed below, however, we deny the protest.

Ballantine asserts that it was not aware that the inclusion of options in the evaluation factors for award was improper until it received a letter from the Army after award of the contract to Wavetek stating that the option quantities were

not a part of the known requirements. Specifically, the letter, in response to an inquiry from Ballantine about the proper use of multiyear contracting, stated that:

> "The known requirements for solicitation DAAB07-86-B-N094 are 900 units, First Program Year; 900 units, Second Program Year; and 1800 units Third Program Year. In addition, there is a 200 percent option for each program year. The option quantities are not a part of the known requirements."

Ballantine contends that since only 3600 units were known requirements, evaluating offers based on 10,800 units (total units including the 200 percent option quantity) violates section 17.206 of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 17.206 (1985). Ballantine argues that the cited FAR section provides for the award evaluation to include known requirements only, not "anticipated" requirements. Since the impropriety alleged by Ballantine is based on information discovered after award, and was raised within 10 days of its discovery, it is timely and will be considered.

FAR § 17.206(a) provides that the contracting officer may consider the option quantity in the award evaluation for a firm-fixed-price contract provided:

> "that an authorized person at a level above the contracting officer determines, before the solicitation is issued, that-(1) there is a known requirement that exceeds the basic quantity to be awarded but (i) the basic quantity is a learning or testing requirement, or (ii) due to the unavailability of funds, the agency cannot exercise the option at the time of award; provided, that in this latter case there is reasonable certainty that funds will be available thereafter to permit exercise of the option; and (2) competition for the option quantity may be impracticable once the initial contract is awarded. This determination shall reflect factors such as substantial startup or phase-in costs, superior technical ability resulting from performance of the initial contract, and long preproduction leadtime for a new producer."

Documentation submitted by the Army shows that the Acting Deputy for Contracting approved the contracting officer's justification for including the option quantity prices in the evaluation for award.[1] The justification stated that:

> "There are known and anticipated requirements which exceed the basic quantity to be awarded but due to the unavailability of funds, the option cannot be awarded at the time of award of the basic quantity. However, there is a reasonable certainty that funds will be available thereafter to permit exercise of the option . . . Realistic competition for the option quantity is impracticable once the initial contract is awarded . . . Hence it is in the best interest of the government to evaluate options in order to eliminate the possibility of a "Buy-In."

The Army reports that the 200 percent option quantity was designated to cover the following anticipated requirements:

> Foreign Military Sales-25 percent (900 units)
> Other service requirements-100 percent (3600 units)
> National Guard and Reserve Units-20 percent (720 units)
> War Stock-30 percent (1080 units)
> Basis of Issue Plan correction factor-25 percent (900 units)

In arguing that the award evaluation should have included the evaluation of "known" option requirements only, not "anticipated" requirements, Ballantine attempts to draw an artificial distinction between "known" and "anticipated" requirements. However, options by their nature include foreseeable, or anticipated, requirements. See FAR, 48 C.F.R. § 17.202 (1985). We have previously recognized that agencies may use estimated quantities for evaluation purposes when they cannot predict the exact quantities that may be required, in order to provide some basis for bidding. See WEMS, Inc., B-222553, June 6, 1986, 86-1 C.P.D. ¶ 533. While the Army's letter to Ballantine may have been more artfully drafted, it is clear from the Army's documentation that the Army had foreseeable requirements for the option quantities here, but due to the unavailability of funds, the option quantities could not be awarded at the time of award of the basic quantity. An

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[1] Section 925 of the Defense Acquisition Improvement Act of 1986, Pub. L. 99-591 (1986) (to be codified at 10 U.S.C. § 2301(a)(7)), in effect for sealed bid solicitations issued after April 30, 1987, requires options not to be evaluated unless the head of the agency determines there is a reasonable expectation that the options will be exercised.

authorized person above the level of the contracting officer made the requisite determination to consider the option quantity in the award evaluation.

We note that Ballantine also objects to the Army's reference to options in terms of percentages in its documentation justifying the use of options. Ballantine argues that since FAR, 48 C.F.R. § 17.205 (1985), requires the contracting officer to justify in writing the "quantities" under option, the use of percentages is inappropriate. However, we think that the Army's reference to a 200 percent option quantity clearly translates into 200 percent of the base quantity of 3600 units, or 7200 units. Moreover, we point out that FAR, 48 C.F.R. § 17.204(f) (1985), specifically provides that contracts may express options for increased quantities of supplies or services in terms of a percentage of specific line items.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel