



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: N-K Construction Co., Inc.  
File: B-224534  
Date: February 19, 1987

### DIGEST

Contracting agency improperly displaced bidder who was low on all items except optional work in order to make an award to another bidder who only became low if the optional work was included in the evaluation where solicitation effectively indicated that option price would not be evaluated.

### DECISION

N-K Construction Co., Inc. (N-K), protests the Department of the Army's award of a contract to J.A.K. Construction Co., Inc. (J.A.K.), under invitation for bids (IFB) No. DAKF27-86-B-0029 for building repair and renovation at Fort George G. Meade, Maryland. N-K contends that the Army improperly considered the price of an option in its evaluation of bids. We sustain the protest.

The IFB's bidding schedule sought lump sum bids for three items: base bid (repair and renovate the specified building); additive No. 1 (replace an addition on the building); and option No. 1 (interior work in the basement). The schedule also required bids on a price per foot basis for four requirements items: replace floor joists, fascia, wall studs, and roof sheathing. A note following the bidding schedule stated:

"For evaluation purposes, the price of 100 L.F. [linear feet] or 62 S.F. [square feet], as applicable for each of the Requirement Items will be added to the Base Bid and award will be made to the bidder with the lowest total. . . ."

The note also stated that the government "reserved the right to award Option #1 at any time during the construction period of the Base Bid and/or Additive #1."

Eight bids were received at the August 11, 1986, bid opening. N-K and J.A.K. submitted the two lowest total bids on the base, requirements, and additive items:

	<u>N-K</u>	<u>J.A.K.</u>
Base Bid	\$683,364.00	\$742,000.00
Requirements	1,254.60	424.10
Additive	84,500.00	65,000.00
Total	\$769,118.60	\$807,424.10

N-K bid \$225,800 for the option item; J.A.K. bid \$163,000.

The Army, which had \$843,000 in funds available for the contract as of bid opening, held pre-award conferences with N-K on August 19 and 26. At these conferences, N-K orally asserted that it had misinterpreted the IFB because of a change in one of the solicitation amendments and, as a result, had priced \$30,000 worth of work that properly belonged in its base bid in the bid price of \$225,800 for option No. 1. On August 27, N-K wrote the Army to attempt have the bid adjusted by adding \$30,000 to the base bid price and decreasing the price for the option correspondingly, or by "partially award[ing] (\$30,000.00 only) the bid item option #1." Included with the letter was a copy of N-K's worksheets to support its assertion of mistake.

The Army did not treat N-K's letter as a mistake in bid claim. Instead, the Army sought additional funds so that option item could be awarded to N-K.

After the additional funds became available, J.A.K. protested to the Army against award to N-K on the ground that if the option item were included in the evaluation, J.A.K. would be the low bidder. Because J.A.K. bid \$163,000 for the option item, the firm's total bid inclusive of option price would be \$970,424.10, compared to N-K's total of \$994,918.60. The contract was awarded to J.A.K. on September 30 for all items including the option, on the theory that, notwithstanding bidding schedule's statement of the basis of award, an award to N-K was contrary to the provisions of the IFB's Contract Award--Sealed Bidding--Construction clause, Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.214-19 (1985) which requires one award based on the lowest aggregate total bid price.

N-K protests that the selection of the awardee must be based on an evaluation exclusive of the option prices. We agree.

Initially, we point out that the standard solicitation clause stating that award will go to the low aggregate bidder simply means that the low bidder as determined by the invitation's

stated evaluation method is entitled to the contract. It does not establish an alternate, superseding method to that otherwise set out for determining the low evaluated bidder, as the theory behind the Army's award to J.A.K. seems to suggest.

While the use of options in construction contracts is not precluded, FAR, 48 C.F.R. § 17.200, contracting agencies generally use additive and deductive items instead of options in such contracts, if it appears that available funds may be insufficient for all the desired construction features. See Department of Defense Federal Acquisition Regulation Supplement (DFARS), 48 C.F.R. § 236.303(c)(S-70) (1985). Nevertheless, the Army did invite an option price here, and the general rule is that option prices can be used in an evaluation only if the solicitation advises bidders that they will be. See 41 Comp. Gen. 203 (1961). Indeed, we have held that a solicitation is defective if it invites option prices but fails to state whether the evaluation will include or exclude them, since the bidders, unaware of the evaluation basis actually intended, may not have bid on the same basis. Temps & Co., B-221846, June 9, 1986, 65 Comp. Gen. \_\_\_\_, 86-1 C.P.D. ¶ 535.

The only reference in the Army's solicitation to the way the low bid would be determined was the note to bidders following the invitation's schedule that for evaluation purposes extended prices for the requirements items "will be added to the Base Bid and award will be made to the bidder with the lowest total." In our view, the absence of any statement regarding evaluating options exercised at award, the quoted advice in the note, and the further statement in the note that the option would be exercised "during the construction of the" base bid and/or additive item effectively indicated that the price offered for the option item would not be used in evaluating the low bidder. It is inconsistent with that indication to use the N-K and J.A.K. option prices in deciding which firm is entitled to the contract award.

Further, to the extent the Army meant the option work to be considered a second additive item,<sup>1/</sup> the regulations require that the contracting officer determine and record, prior to bid opening, the amount of funds available for the

---

<sup>1/</sup> When additive items are used, the government seeks a base bid price which includes all of the features desired for the particular construction project. The additive items are in effect options exercised at the time of award to increase the scope of work to conform to available funding.

procurement; the low bidder then is evaluated on the basis of the lowest aggregate price for the most features of the work within the recorded amount. The agency, thereafter, may increase funds and additives but only to the extent the low bidder as initially determined remains low. That is, once the low bidder is ascertained based on the funding available before bid opening, that bidder may not be displaced by another bidder when additional funding later is made available. DFARS, 48 C.F.R. § 236.303.<sup>2/</sup> The rules that govern the evaluation of additive items thus preclude using the prices for the option item in the evaluation to N-K's prejudice (if we treat the option item as an additive item), since N-K was the low bidder as determined based on the funding available at bid opening.

Finally, we do not think it relevant that N-K asserted a mistake in its bid at the pre-award conferences. The mistake alleged was the inclusion of \$30,000 in the option item price that properly belonged in the base bid price. The bid on which the evaluation should be based, however--base bid plus requirements plus additive--is low with or without the correction, see FAR, 48 C.F.R. § 14.406-3, and N-K, during the course of this protest, has withdrawn the allegation anyway.

Accordingly, the option item price could not properly be evaluated to determine which bid was low. Since it is clear that the government needs and can afford to buy the option work now, however, in our view it does not make sense to recommend the Army award a contract to N-K at this time and solicit separately for the option work. In these circumstances, by separate letter to the Secretary of the Army, we are recommending that J.A.K.'s contract be terminated for convenience of the government and that a new solicitation be issued, to include what here was designated optional work, with provisions that insure that award is made on the same basis on which firms are advised their bids will be evaluated.

The protest is sustained.

*Milton J. Fowler*  
for Comptroller General  
of the United States

<sup>2/</sup> In contrast, in civilian procurements evaluation and award are based on the circumstances existing at the time of award. Iannuccillo Construction Co. and Acmat Corp., B-192954, Dec. 13, 1978, 78-2 C.P.D. ¶ 411.