The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Carter Chevrolet Agency, Inc.

File: B-228151

Date: December 14, 1987

DIGEST

1. Agency decision to use negotiation procedures in lieu of sealed bidding procedures, to acquire fleet vehicles is justified where the contracting officer determines that there is not a reasonable expectation of receiving more than one offer on a significant percentage of the solicitation groups and that discussions are necessary to define the terms of each offer.

2. A method of award clause is not ambiguous when, read together with the solicitation's pricing schedule, the language is susceptible to only one reasonable interpretation.

3. The decision to evaluate the offered cost of dealer delivery of trucks, and not to evaluate the cost of consignee delivery, is reasonable where dealer delivery will be ordered 97 percent of the time and the government is unsure how many and which vehicles will be ordered based on consignee delivery (which is included as an unevaluated option).

DECISION

Carter Chevrolet Agency, Inc., protests the General Services Administration's (GSA) negotiated procurement of light trucks for its Fleet Management Division and for other agencies under request for proposals (RFP) No. FCAP-G7-81234-SN-9-15-87, issued on August 6, 1987. Carter contends that the vehicles in Groups XIV and XV of the RFP should be procured by sealed bidding procedures. Carter also alleges that the solicitation's evaluation factors for award are ambiguous and unnecessarily restrictive.

We deny the protest.

The RFP was divided into 15 Groups of sedans, station wagons and light trucks, each representing a specific vehicle classification identified according to federal standard

specifications. These Groups in turn were comprised of subgroups of line items. Carter bid on subgroups of Groups XIV and XV, for which firms had to enter unit and total prices for line items of definite quantities of light trucks. The unit price included a separately listed universal transportation cost, and the price of additional systems and equipment such as air conditioning and radios. Prices were also requested for special options not included in the unit price, such as special paint, consignee delivery, California equipment, high altitude equipment, and if available, safety-related equipment like passive restraints and anti-lacerative glass. All unit prices were to include the cost of dealer delivery. The solicitation did not require offerors to submit technical proposals.

The method of award clause initially stated that award would be made for Group XIV in the aggregate, and for Group XV on a line item basis, to the low acceptable offeror either on the vehicles alone or on the vehicles and the extended warranty, whichever was in the best interest of the government. However, with regard to the vehicles offered by Carter, GSA had modified that clause to exclude extended warranties from the evaluation factors for award, and to provide for them as a special option. The low offeror's separate option items and safety equipment prices also were to be evaluated for price reasonableness, although that evaluation would not affect the selection decision.

Carter first argues that under the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253 (Supp. III 1985), and its implementing regulations, Federal Acquisition Regulation (FAR), 48 C.F.R. § 6.401 (1986), sealed bidding is to be used where, as here, award will be based only on price-related factors. In this regard, Carter contends that GSA has issued detailed specifications that precisely state the quantities and characteristics of the vehicle requirements. The protester contends further that GSA could address bidder qualifications in a preaward survey, could refine the specifications through amendments based on prebid conferences or bidders' requests for clarification, and does not need to conduct discussions since no technical issues are to be addressed.

In response, GSA states that the use of negotiation is appropriate in this procurement, which covers 19,349 vehicles of many different types, because its experience over the past 4 years has demonstrated that the agency needs the flexibility to conduct discussions to address offerors' frequent and various exceptions to the specifications, issues concerning statutory price limitations, and model year changes. The expected exceptions generally concern delivery time; product availability time;

specifications such as engine sizes, gross vehicle weight rating, cab/axle length, and tire sizes; invoice requirements; and model year changes. In addition, GSA asserts that its experience demonstrated that because of the small number of manufacturers and dealers capable of bidding for this requirement, there was a strong possibility that there would be only one offeror for several of the groups of vehicles.

Under CICA, agencies are required to obtain full and open competition and to use the competitive procedure or combination of competitive procedures best suited to the circumstances of the procurement. 41 U.S.C. § 253. The fact that a contract award will be based on price and other price-related factors is not dispositive of whether sealed bidding procedures should be used; the agency also must judge whether time permits their use, whether it is necessary to conduct discussions with the responding sources, and whether there is a reasonable expectation of receiving more than one bid. 41 U.S.C. § 253; FAR, 48 C.F.R. § 6.401. The determination regarding which competitive procedure is appropriate essentially involves the exercise of business judgment by the contracting officer. Essex Electro Engineers, Inc., 65 Comp. Gen. 242 (1986), 86-1 C.P.D. ¶ 92.

We do not think GSA acted improperly in this case. The record demonstrates that GSA did not have a reasonable expectation of receiving more than one offer on a significant percentage of the vehicle groups based on the agency's past experience with prior years' solicitations for the same requirement, and on the small number of potential offerors. Specifically, for the 1986 solicitation GSA received only one offer on 5 of the 13 Groups awarded on a per-Group basis and on 8 of the line items awarded in the fourteenth Group.1/

Moreover, we see no basis to object to the contracting officer's determination that it would be necessary to hold discussions to ensure that the numerous and far-ranging exceptions usually taken by all offerors to the specifications or pricing requirements were addressed. A sealed bid procurement would not allow for discussions, and all such offers would be nonresponsive. See FAR, 48 C.F.R. § 14.404-2.

Contrary to Carter's argument, we do not think that a prebid conference and preaward survey would adequately substitute

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1/ For the solicitation at issue, GSA received only 1 offer on 4 of the 14 Groups awarded on a per-Group basis and on 2 of the line items in Group XV.

for negotiation, since neither would accomplish GSA's purpose. A prebid conference is used to explain complicated specifications to bidders. FAR, 48 C.F.R. § 14.207. A preaward survey, as part of a responsibility determination, focuses on an offeror's ability to perform and involves matters such as financial resources, experience, facilities, and performance record. See The Saxon Corp., B-221054, Mar. 6, 1986, 86-1 C.P.D. ¶ 225. In contrast, the purpose of the negotiation process is to develop through discussions, if necessary, the contractual terms themselves and thereby to define and frame the terms of a firm's offer. Id. Here, since the specifications were varied, rather than just complicated, and it reasonably could be expected that offerors would propose numerous variations from the specifications for many of the vehicles, we cannot object to GSA's position that discussions were necessary.

Carter cites our decision in ARO Corp., B-227055, Aug. 17, 1987, 87-2 C.P.D. ¶ 165, which we affirmed in Defense Logistics Agency--Request for Reconsideration, B-227055.2, Oct. 16, 1987, 67 Comp. Gen. ___, 87-2 C.P.D. ¶ 365, as support for its position that GSA was required to use sealed bidding rather than negotiation. There, we found that an agency's decision to negotiate for items, requesting competitive proposals instead of sealed bids, was not proper when based solely on the agency's need for price discussions since the record did not show such discussions were necessary. The circumstances of this procurement are not similar to those in ARO, however. Here, as discussed above, GSA did not have a reasonable expectation of receiving more than one offer on a significant percentage of the solicitation, and also reasonably anticipated that discussions would be required to develop the terms of the contract. Thus, ARO does not support Carter's position.

Carter also contends that the evaluation factors for award are ambiguous in that the method of award clause does not clearly state that award will be made to the low offeror and that special options will not be evaluated. GSA argues that the method of award clause is not ambiguous because, read with the whole solicitation, it is not subject to more than one interpretation as to award or the evaluation of special options. Moreover, GSA asserts, the protester has submitted offers under solicitations containing the same method of award clause since 1984, and has received awards under those solicitations, without questioning the method of award during negotiations.

In order for language to be ambiguous, it must be susceptible to two or more reasonable interpretations. See Syracuse Safety-Lites, Inc., B-222640, July 1, 1986, 86-2 C.P.D. ¶ 3. We do not find the language of the method of

award clause to be ambiguous. The only reasonable interpretation of the solicitation, considering both the evaluation method and the pricing schedule, is that award would be made to the low offeror determined by considering vehicle unit prices that did not include the prices of special options. Special option prices in the pricing schedule are highlighted with the words, "BELOW PRICED OPTIONS ARE NOT INCLUDED IN VEHICLE UNIT PRICE." The clause clearly states how the low aggregate or line item offeror would be determined and that the review of special options would be conducted after determination of the low offeror for the Group or the line item.

Carter also argues that the method of evaluating special options for price reasonableness is not consistent with the conclusion that special options will not be evaluated at all for purposes of award, since it is not clear whether the low offeror could be denied award if any of its option prices were determined to be unreasonable. We do not agree with Carter. GSA has structured the RFP so that unit prices include all options for which the agency has a firm requirement, and the solicitation states that the offeror submitting the lowest unit price will receive award. Therefore, the low offeror would not be denied the award because of its special option prices; GSA instead simply may choose not to order special options in the event that the agency finds the offeror's special option prices to be unreasonable.

Carter's last contention is that dealer delivery should be broken out as an unevaluated, separately priced option for Groups XIV and XV, and that consignee delivery should not, since consignee delivery is included in the base price by virtue of the f.o.b. destination clause in the RFP. Dealer delivery involves the delivery of a vehicle to a dealer in the vicinity of the user and includes inspection and servicing at the dealer. Consignee delivery involves delivery to the ultimate user and includes inspection and servicing, with the exception of washing the vehicle and packaging easily breakable components (such as antennas) inside the vehicle for later installation. In addition, consignee delivery shifts the risk of loss or damage to the vehicle from the government to the offeror while the vehicle is in transit to the ultimate user. Carter concludes that the inclusion of dealer delivery in the unit price, and the designation of consignee delivery as a special option, is redundant, and unfairly favors manufacturers over dealers. The reason for this, according to Carter, is that offerors that are independent dealers must pay the manufacturer an additional charge for dealer delivery.

GSA responds that approximately 97 percent of the vehicles covered by the solicitation are ordered with dealer

delivery. Consignee delivery, on the other hand, is only required for approximately 3 percent of vehicles ordered. GSA concludes that since consignee delivery may cost an offeror more than dealer delivery, the government, by paying for it as part of any unit price, would be paying an unnecessary premium for something that rarely would be needed. Moreover, GSA asserts, since its needs are essentially reflected in dealer delivery, the fact that the evaluation scheme for delivery places Carter at a competitive disadvantage as compared to manufacturers is not objectionable.

The inclusion here of an f.o.b. destination clause in the solicitation does not mean that consignee delivery is included in the base price of the vehicle, essentially because consignee delivery expressly is a separately priced option not to be included in the unit price. Under FAR, 48 C.F.R. § 47.305-11, the government may provide specifically for the option to direct deliveries of all or part of the contract quantity to destinations or consignees other than those specified in the solicitation and provide an equitable adjustment to the contractor depending on whether the exercised option results in an decrease or increase in transportation costs. The use of the consignee delivery option in the solicitation at issue merely provides a predetermination of that equitable adjustment, whether it be an additional charge, or a credit that would provide an opportunity for the government to obtain a better price on the vehicles.

As to whether the evaluation of dealer delivery, and not consignee delivery, unfairly favors manufacturers over dealers, the determinative consideration on the propriety of a challenged method of evaluation is whether it reasonably relates to the government's minimum needs. Schnorr-Stafford Construction, Inc., B-227323, Aug. 12, 1987, 87-2 C.P.D. ¶ 153. Here, the government's need is for 97 percent of vehicles ordered to be delivered to a local dealer, and with GSA unsure as to exactly how many and which vehicles will be ordered with consignee delivery, we see nothing unreasonable in evaluating only dealer delivery to establish the cost to the government of contracting with the various offerors.

The protest is denied.

for Seymour Efros
James F. Hinchman
General Counsel