Vickers

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gartrell Construction, Inc., U.S. Floors, Inc.

File: B-237032; B-237032.2

Date: January 11, 1990

DIGEST

1. Where invitation for bids contains an item representing the base bid and several deductive items and at the time of bid opening no funds are available for award, under the standard "Additive or Deductive Items" clause, low bidder is the firm which bid the lowest price for the least amount of work on the base bid less all deductive items.

2. Allegation that agency manipulated amount of funding available to displace protester as low bidder is denied where record shows that contracting officer recorded amount of available funds prior to bid opening and funding amount has not changed.

DECISION

Gartrell Construction, Inc., and U.S. Floors, Inc., both protest award to any other firm under invitation for bids (IFB) No. DACA83-89-B-0268, issued by the United States Army Engineer District, Honolulu, Hawaii. Gartrell contends that the agency manipulated the funds available after bid opening and misinterpreted the solicitation's method of award clause to displace Gartrell as the low bidder. U.S. Floors contends that Gartrell's bid is materially unbalanced.

We deny Gartrell's protest and dismiss U.S. Floors' protest as academic.

The IFB was issued on August 14, 1989 for interior repairs for 640 military family housing units at Schofield Barracks in Hawaii. The base bid item was for the total quantity of 640 units. Two deductive items were also to be priced by the bidders, each reducing the quantity by 220 units.

Therefore, award could be made, based on the funds available, for either the entire 640 units, 420 units or 200 units. The latter quantity would result if award was made for the base bid item and both deductive items (640 minus 220 minus 220 = 200 units).

The IFB contained the "Additive or Deductive Items" clause found at section 252.236-7082 of the Department of Defense Federal Acquisition Regulation Supplement (DFARS). It reads, in pertinent part:

> "The low bidder for purposes of award shall be the conforming responsible bidder offering the low aggregate amount for the first or base bid item, plus or minus (in the order of priority listed in the schedule) those additive or deductive bid items providing the most features of the work within the funds determined by the Government to be available before bids are opened. . . . After determination of the low bidder as stated, award in the best interests of the Government may be made to that bidder on its base bid and any combination of his additive or deductive bid for which funds are determined to be available at the time of the award, provided that award on such combination of bid items does not exceed the amount offered by any other conforming responsible bidder for the same combination of bid items."

Eight bids were opened on September 13, and Gartrell submitted the low base bid (640 units) of $1,538,000 and U.S. Floors submitted the second low base bid in the amount of $1,585,000.

According to an affidavit submitted by the bid opening officer, after bids were opened, he read aloud a memorandum from the contracting officer dated September 13, stating "that no funds were available at the time of bid opening."

Since Gartrell was initially considered to be the low bidder, it was asked to verify its bid since the government estimate was $2,726,511, which it did on September 14. Following Gartrell's verification of its bid, the contract specialist concluded that the standing of the bidders had been improperly determined under the "Additive or Deductive Items" clause. Based on the clause, he decided that since no funds were available for award at bid opening and the schedule included deductive items, the low bidder should be the firm which offered the lowest price for the least amount of work, which here would be the base bid less the two

deductive items (200 units). This caused U.S. Floors, which bid $530,000, to be considered the low bidder since Gartrell's price for the 200 units was $769,000.

Gartrell initially protested to our Office that it had been improperly displaced as the low bidder because the Army had manipulated the amount of funds available after bid opening. This argument is based in part on the protester's allegation that bidders were not informed at bid opening that funds were not available for the requirement.

First, we find no evidence that the agency "manipulated" the amount of funds available. There is no requirement that funding limitations be disclosed to bidders prior to bid opening. See Sammy Garrison Constr. Co., Inc., B-215453, Nov. 21, 1984, 84-2 CPD ¶ 545. The regulations merely require the contracting officer, prior to bid opening, to determine and record the amount of funds available for the project. DFARS § 236.303(c)(S-70). This amount is controlling for determining the low bidder. Here, the record includes a memorandum signed by the contracting officer stating that it was prepared prior to bid opening and declaring that "no construction funds are available for award of the subject project. . . ." We have been informed that there has been no change in the status of the funding and at the present time no funds are available. The agency, however, has advised our Office that in the near future it expects to obtain funding for an award.

We therefore do not have any basis upon which to conclude that there has been any change or manipulation of the amount of funding in order to influence the determination of the low bidder. The reason for the change in the identity of the low bidder was the agency's application of the "Additive or Deductive Items" clause, which Gartrell contends was misapplied.

Gartrell argues that the low bidder must be determined based on the amount of the base bid. The protester states that additive or deductive items are to be considered only within the funds determined to be available and since no funds are currently available, the price of the base bid must be determinative.

We disagree. We are aware of no prior decision which interprets the standard "Additive or Deductive Items" clause in a solicitation where there is a base bid item and only deductive items. However, we have held that where insufficient funds are available to cover the base bid, the award should be made only to the bidder offering the lowest price on the least amount of work if additional funds later

become available. In those cases, involving additive items, this resulted in award to the low bidder for the base bid only. See Connie Hall Co., B-223440.2, Nov. 18, 1986, 86-2 CPD ¶ 576; Sammy Garrison Constr. Co., B-215453, supra; Utley-James, Inc., B-198406, June 16, 1980, 80-1 CPD ¶ 417. We think the same principle should apply here. Under this IFB, the "least amount of work" under the "Additive or Deductive" Items clause is the base bid less the deductive items and the low bid is U.S. Floors' at $530,000.

In our view, this is the only result which makes sense in the context of a case where there were no available funds at bid opening. It simply would not be reasonable to construe the clause as the protester urges so that the low bidder would be determined on the base bid, which under this particular solicitation does not represent the least amount of work that could be awarded.

Gartrell contends this result is improper because it is inconsistent with the result of an evaluation under the prior procurement for the repair services where the agency used solely the base bid to determine the low bidder under the same circumstances as exist now. The protester says it was displaced as the low bidder at the time. The agency has conceded that it erroneously applied the "Additive or Deductive Items" clause under the prior procurement. As noted above, we find the agency has acted properly here. The fact that the agency may have made a mistake in the past surely does not obligate the agency to repeat the error. Barnes Electric Co., Inc., B-228651, Oct. 2, 1987, 87-2 CPD ¶ 331.

Gartrell argues in the alternative that since funding was not available at the time of bid opening, the IFB should be canceled and the requirement readvertised. Although a contracting agency has broad discretion to cancel an invitation, there must be a compelling reason to do so after bid opening because of the potential adverse impact on the competitive bidding system. Tapex American Corp., B-224206, Jan. 16, 1987, 87-1 CPD ¶ 63. Here, the agency has received reasonably priced responsive bids and, as noted earlier, the agency has the expectation of obtaining funding for at least some of the work. Therefore, we do not find the contracting officer was obligated to cancel the solicitation.

While we concluded that U.S. Floors is indeed the low bidder under the second deductive item, even if funds become available for either 420 or 640 units U.S. Floors may not be awarded those items since it is not the low bidder on any other combination under the IFB. See Utley-James, B-198406, supra.

Gartrell's protest is denied.

Since U.S. Floors is in line for award, its protest of Gartrell's bid as unbalanced is not for consideration and is dismissed as academic.

James F. Hinchman
General Counsel