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**Comptroller General  
of the United States**

Washington, D.C. 20548

**Decision**

**Matter of:** Golden North Van Lines, Inc.

**File:** B-238874

**Date:** July 17, 1990

Michael E. Kreger, Esq., Perkins Coie, for the protester.  
Gregory H. Petkoff, Esq., Office of the General Counsel,  
Department of the Air Force, for the agency.  
Guy R. Pietrovito, Esq., Andrew T. Pogany, Esq., and  
James A. Spangenberg, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

**DIGEST**

1. The failure of an invitation for bids, which requested option prices, to state whether the evaluation of bids would include or exclude option prices is an apparent solicitation impropriety which should have been protested prior to bid opening; however, the General Accounting Office will consider the untimely protest under the significant issue exception to the timeliness rules where consideration of the protest is in the interest of the procurement system.
2. Evaluation of bids under invitation for bids, which failed to state whether the evaluation of bids would include or exclude the evaluation of option prices, is improper.

**DECISION**

Golden North Van Lines, Inc. protests the award of a contract to Trans-World Moving Systems, Inc., under invitation for bids (IFB) No. F65501-90-B-0001, issued by the Department of the Air Force for packing, containerization and drayage of personal property at Elmendorf Air Force Base, Alaska. Golden contends that the Air Force improperly evaluated option prices when the IFB did not inform bidders that options would be evaluated.

We sustain the protest.

The IFB, as originally issued, contemplated the award of a requirements contract for three schedules of packing and drayage services: outbound services (schedule I), inbound services (schedule II), and intra-city area moves (schedule

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III), for a period of 1 year. Bidders were informed that bids would be evaluated on the basis of a total aggregate price for all items within an area of performance under a given schedule and that the government reserved the right to make multiple awards for each schedule.

Subsequently, the Air Force amended the solicitation to require bids for 2 option years for each schedule.<sup>1/</sup> However, the IFB and amendment failed to state whether the option prices would be evaluated in determining the low bid.<sup>2/</sup> In this regard, the standard "Evaluation of Options" clause, set out at FAR § 52.217-5 (FAC 84-37), was contained in section M of the IFB, but the agency failed to check the box incorporating this clause into the solicitation. The IFB, however, did incorporate the standard clause, set out at FAR § 52.217-9 (FAC 84-56), which reserved to the agency the right to extend the contract through the option years.

The Air Force received 10 bids in response to the IFB. Golden, the incumbent contractor for schedules I and II, was the low bidder for the base year services under schedule I. Trans-World, however, was the low bidder under schedule I, if option prices were evaluated. Golden and Trans-World bids for schedule I were as follows:

	<u>Golden</u>	<u>Trans-World</u>
Base Year	\$ 318,885	\$ 320,185
Option 1	\$ 336,227	\$ 327,640
Option 2	\$ 353,042	\$ 338,130
<u>TOTAL</u>	<u>\$1,008,154</u>	<u>\$ 985,955</u>

At bid opening, the agency stated it would evaluate bids by adding all option prices to the base year price. Golden filed an agency-level protest objecting to the agency's evaluation of option prices in determining the low bid. The Air Force initially sustained Golden's agency-level protest and determined that it would only evaluate the base year prices. The agency subsequently reversed its decision and concluded that it would be in the government's best interest to evaluate the aggregate price for base and option years.

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<sup>1/</sup> Prior procurements of these services did not include options or request option prices.

<sup>2/</sup> A solicitation, which calls for bidders to submit option prices, must state whether the evaluation will include or exclude option prices. Federal Acquisition Regulation (FAR) § 17.203(b) (FAC 84-42).

Award of the schedule I services was made to Trans-World on March 6, 1990, and Golden protested that award to our Office on March 9.<sup>3/</sup> Specifically, Golden argues that the IFB is defective because it did not inform bidders whether option prices would be evaluated. The protester also contends that it reasonably assumed that option prices would not be evaluated and accordingly priced its bid to its prejudice.

As pointed out by the Air Force, Golden's protest of the failure of the amended solicitation to inform bidders whether option prices would be evaluated in determining the low bidder concerns an apparent solicitation ambiguity which Golden was required to protest before bid opening. Consequently, Golden's agency-level protest and subsequent protest to our Office, on this basis, are untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1).<sup>4/</sup> See Temps & Co., 65 Comp. Gen. 640 (1986), 86-1 CPD ¶ 535. We may, in a given case, invoke the significant issue exception to our timeliness rules when, in our judgment, the circumstances of the case are such that our consideration of the protest would be in the interest of the procurement system. Adrian Supply Co.--Recon., 66 Comp. Gen. 367 (1987), 87-1 CPD ¶ 357. The exception is strictly construed and used sparingly to prevent our timeliness rules from being rendered meaningless. Carlisle Tire and Rubber Co., B-235413.2, Aug. 18, 1989, 89-2 CPD ¶ 152.

Here, Air Force contracting officials found our decisions in this area conflicting, and had difficulty deciding whether or not to make award under the IFB even though the solicitation was defective. As a result, we believe that it is important to consider Golden's protest in order to clarify the principles that govern when an agency fails to specify whether option prices will be evaluated. As discussed below, an IFB that fails to inform bidders how their bids

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<sup>3/</sup> Performance of Trans-World's contract has not been suspended based upon the agency's determination that performance of the contract is in the best interest of the government. 31 U.S.C. § 3553(d)(2) (1988); 4 C.F.R. § 21.4(b) (1990).

<sup>4/</sup> Under our Bid Protest Regulations, we will consider a protest, which was initially filed with the procuring agency, if both the initial agency-level protest and the subsequent protest to our Office were timely filed. 4 C.F.R. § 21.2(a)(3). To be timely filed with the agency, a protest of an alleged solicitation impropriety which is apparent prior to bid opening must be filed prior to that date. 4 C.F.R. § 21.2(a)(1).

will be evaluated is materially defective and is not a proper vehicle for award. A procuring agency should not make an award under such a defective solicitation, except under narrow circumstances not present here.

The Air Force first argues that bidders, including Golden, were informed at a pre-bid conference that option prices would be evaluated in determining the low bid. Golden replies that bidders were not informed that options would be evaluated but were only told that the agency was considering the amendment of the solicitation to add option years. In this regard, Golden has submitted the affidavit of its president, who attended the pre-bid conference and who states that he was not aware that the Air Force intended to evaluate option prices.

The record does not show that bidders at the pre-bid conference were informed that option prices would be evaluated. In fact, the amendment, adding the option years, had not been yet issued at the time of the pre-bid conference. The agency's minutes of the conference, in pertinent part, state only that "[i]t was asked if we were considering options, I said yes." We think that the only reasonable interpretation of this statement is that the agency was weighing the possibility of adding option years. Furthermore, the contracting officer, in denying Golden's agency-level protest, stated that:

"During the pre-bid conference the prospective bidders present were told that the solicitation would be amended to include option years. There were no questions concerning the evaluation at that time or after the amendment was issued. Nor were any questions submitted prior to bid opening."

This account only establishes that bidders were told that the "solicitation would be amended to include option years," and the subsequent amendment so provided. We conclude from this record that bidders were not informed, and Golden did not know, that the agency would evaluate the option prices.

The Air Force next argues that bidders were sufficiently apprised that option prices would be evaluated because the IFB contained the clause, set out at FAR § 52.217-9, which reserved to the agency the right to extend the contract through the option years, and because the IFB did not contain the clause, set out at FAR § 52.217-3, which would inform bidders that option prices would not be evaluated. The Air Force contends that since bidders were not informed that option prices would be excluded from the evaluation and

since bidders were requested to price the option years, that bidders were on notice that the government intended to evaluate the option prices.<sup>5/</sup>

We do not agree. The agency's reservation of the right to exercise options does not place bidders on notice that the agency intends to evaluate option prices. To the contrary, an agency may retain the right to exercise options without evaluating option prices in making the initial award. See FAR § 17.203(b). The IFB, while not including the clause that informed bidders that option prices would not be evaluated, also did not include the clause that would inform bidders that option prices would be evaluated. See FAR § 17.208 (FAC 84-49). The FAR provides that a solicitation which calls for bidders to submit option prices must state whether the evaluation will include or exclude option prices. FAR § 17.203(b). Accordingly, we find that the IFB, which failed to advise bidders as to whether option prices would be evaluated, is materially defective and is not a proper vehicle for award. See Temps & Co., 65 Comp. Gen. 640, supra; General Eng'g and Mach. Works, B-223929, Oct. 27, 1986, 86-2 CPD ¶ 477.

The Air Force contends, citing Browning-Ferris Indus. of the South Atlantic, Inc.; Reliable Trash Serv. Co. of Md., Inc., B-217073; B-218131, Apr. 9, 1985, 85-1 CPD ¶ 406, that even if the IFB was defective, award could be made based upon the evaluation of option prices, because the government's needs would be met and no bidder, including the protester, would be prejudiced. In Browning-Ferris, we found improper the agency's cancellation of an IFB after bid opening where the record established that the solicitation would meet the government's needs and that bidders clearly were not prejudiced by the invitation's failure to state whether options would be evaluated. In finding no prejudice to the bidders, we were persuaded by the particular facts of that case: that the bidding pattern showed that no bidder was misled, that the agency did not contend that any of the seven actual bidders had been prejudiced, and that the

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<sup>5/</sup> This argument, which was raised in the agency's legal memorandum to its report, is inconsistent with the contracting officer's stated position that the solicitation is patently ambiguous but that bidders were not prejudiced thereby.

explanation of the one bidder which did claim prejudice was not reasonable.<sup>6/</sup>

As discussed above, our decision in Browning-Ferris rested upon our after-the-fact finding of no prejudice to bidders-- something that will rarely be clear to agencies when an IFB defect comes to their attention. The proper approach when agencies fail to specify whether option prices will be evaluated is discussed in Temps & Co., 65 Comp. Gen. 640, supra and General Eng'g and Mach. Works, B-223929, supra, which state that no award can be made under a solicitation that does not indicate whether or how options will be evaluated. This rule recognizes that there is such a substantial likelihood of prejudice that an award would not be in the best interests of the government. In this case, it is clear that resolicitation was the proper course when the Air Force became aware of the problem. The Air Force was not presented with evidence that no bidder was prejudiced; to the contrary, Golden has offered evidence that it was prejudiced.<sup>7/</sup>

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<sup>6/</sup> Browning-Ferris, the one bidder which protested the prospective award under the solicitation in Browning-Ferris, et al., B-217073; B-218131, supra, did not contend that, had it known that award would be made on the basis of aggregate prices, it would have submitted lower option year prices. Instead, it argued that it would have submitted a lower base year bid. We found this assertion illogical--it is much more likely that, if a bidder believes that only base year bids will be evaluated, the bidder will offer the lowest possible bid price for the base year. We also concluded that, since the prior procurements had provided for the evaluation of option prices, Browning-Ferris, the incumbent contractor, would likely have assumed that the agency intended to continue its practice of evaluating option year prices.

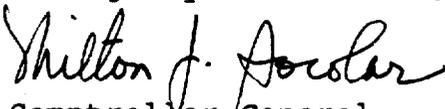
<sup>7/</sup> The protester's president states in his affidavit that Golden, based upon its interpretation of the solicitation, priced its bid to offer a low base year price and relatively higher option years prices. He further states that Golden would have priced its option years more competitively if it had known that its option prices would be evaluated against the option prices of its competitors rather than against the possibility that the agency would exercise the options at a later date. The difference between Golden's and Trans-World's base year bids was less than .5 percent while the difference between the two bidders' aggregate bids for base and option years was approximately 2 percent. Given the  
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Accordingly, we sustain the protest.

Ordinarily, where an agency improperly awards a contract under an IFB, we would recommend that the agency terminate the contract for the convenience of the government and either resolicit the supplies or services or make award to the appropriate bidder. In this regard, since the agency did not suspend performance of Trans-World's contract based upon its determination that performance was in the best interest of the government, we make our recommendation without regard to any cost or disruption from terminating, recompeting or reawarding of the contract. See 4 C.F.R. § 21.6(c).

We recommend that the Air Force refrain from exercising options under the contract and resolicit the required schedule I services for performance at the expiration of the base year contract. As noted above, Golden's protest is clearly untimely. If Golden had protested prior to bid opening rather than making its own assumptions regarding the meaning of the ambiguous IFB, the solicitation defect could have been cured to allow equal competition for the requirements. Golden only protested after it ascertained that award would be made to another bidder, thereby contributing to the fact that the base year requirements have been substantially performed. Under the circumstances, we are not recommending that the award for the base year be disturbed, only that the options not be exercised. See Haz-Tad, Inc.; Hazeltine Corp.; Taridan, Ltd., 68 Comp. Gen. 92 (1988), 88-2 CPD ¶ 486.

Since we find that the agency's actions violated the FAR and sustain this protest, the protester is entitled to recover its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). Golden should submit its claim for its protest costs directly to the agency. 4 C.F.R. § 21.6(e).

*for*   
Comptroller General  
of the United States

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closeness in bidding and Golden's sworn statement, Golden may have been the low bidder for both the base and option years, had Golden known that option prices would be evaluated, and consequently it was prejudiced.