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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: H.M. Philo
File: B-244935
Date: December 4, 1991

Thomas M. Finrow, J.D., Esq., for the protester.
Arthur F. Thibodeau, III, Esq., and Paul M. Fisher, Esq.,
Department of the Navy, for the agency.
Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protest that agency improperly terminated for convenience a contract awarded to the protester and awarded contract to the next low bidder is denied where record shows that the protester's bid should have been rejected because the protester, in verifying its bid price, indicated that it had not bid on the basis required by the solicitation.

DECISION

H.M. Philo protests the action of the Department of the Navy in terminating for the convenience of the government a contract awarded to Philo for repair and alterations to Building 560 at the Naval Construction Battalion Center under invitation for bids (IFB) No. N47408-90-B-B487, and the subsequent award of a contract to Tri-Con Construction.

We deny the protest.

The IFB was issued on October 1, 1990, and requested bids for the demolition, repair, and alteration of existing architectural, mechanical, plumbing, security, and telephone systems within a two-story cast-in-place concrete building. A portion of the work consisted of the removal and disposal of asbestos and asbestos containing materials, specifically tile and pipe insulation. The Navy issued four amendments to the IFB. Because some prospective bidders, including the protester, expressed concern that the specifications lacked detail as to the quantity of asbestos to be removed and disposed of, the agency issued amendment No. 0004 on December 7. Amendment No. 0004, consisting of 32 pages,

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including the certification of procurement integrity required by Federal Acquisition Regulation (FAR) § 3.104-10, provided the following:

"For bidding purposes it shall be assumed that all building construction materials within the asbestos control areas, except as defined below, are contaminated with asbestos and shall be demolished, removed and disposed of in accordance with 29 C.F.R. § 1926.58, 40 C.F.R. 61-Subpart A and 40 C.F.R. § 61-Subpart M, and the requirements specified herein."

The amendment further required the contractor to provide the contracting officer with certification that the asbestos control areas no longer contained materials containing asbestos prior to the contracting officer's providing authorization for demolition.

The Navy received eight bids by the December 17 bid opening. Philo submitted the apparent low bid at \$300,000. The government estimate was \$396,985.¹ Based on amendment No. 0004, the government estimate was increased by \$36,000. All bidders except Philo expressly acknowledged amendment No. 0004. However, Philo submitted a second document at bid opening which included an executed procurement integrity certificate (and other representations and certifications which were not part of amendment No. 0004) and requested the agency to include the certifications with its bid. Since the procurement integrity certificate was included as a part of amendment No. 0004 and was signed and dated by the protester, the contracting officer considered this to be an acknowledgment of the entire amendment.

Because of the discrepancy between the low bid and government estimate, Philo was asked to verify its bid. During the bid verification process, the protester, in response to the government's concerns about the solicitation requirement that all building construction materials within asbestos control areas be treated for bidding purposes as asbestos-contaminated, indicated that it could not estimate the amount of asbestos-containing materials to be removed but that it understood from amendment No. 0004 that there might be asbestos in all areas of the building.

In its written bid confirmation, the protester specifically stated that its bid "does not include removal of all debris or potential asbestos" in the asbestos control area. The protester further provided that "asbestos containing material other than tile & pipe insulation will be under

¹The other bids ranged from \$316,295 to \$525,000.

section 01011 3.3.5 [of the solicitation]." This solicitation section specifies the procedures to be followed if the contractor encounters asbestos-containing materials not identified in the specifications as containing asbestos. The section provides for an equitable adjustment under the changes clause for the removal and disposal of such materials. According to documents furnished by the Navy, its personnel understood the protester to be acknowledging that for bidding purposes it was supposed to include costs for removing all building construction materials in the asbestos control areas on the assumption that the materials were contaminated with asbestos, but as also asserting that in actual performance it intended to test any materials not specifically designated as containing asbestos, and then dispose of any nonasbestos materials under ordinary disposal procedures. The Navy believed that this approach was permitted under the IFB terms. The Navy thus accepted the protester's explanation and award was made to Philo on February 1, 1991.

After the award to the protester, subsequent discussions between the protester and the contracting officer indicated that the protester's bid had not been priced in accordance with the amendment. The protester indicated that it intended to remove asbestos-containing pipe and tile insulation identified in the specifications in accordance with the applicable asbestos removal regulations, rather than all building materials, and that any other asbestos removal performed would require a price adjustment. The Navy then terminated Philo's contract for the convenience of the government on the basis that Philo's initial verification did not permit acceptance of its bid. After verifying that Tri-Con, the next low bidder, had prepared its bid in accordance with amendment No. 0004, the Navy made award to Tri-Con on June 4. Philo subsequently protested to our Office the termination for convenience and the award to Tri-Con.

As previously stated, a part of the work covered by this solicitation includes the removal and disposal of asbestos and asbestos-containing materials. The solicitation provided that the asbestos work included the demolition and removal of piping insulation located within the walls scheduled for demolition and the cleanup and removal of a wide assortment of debris existing within the asbestos control area. In response to prospective bidders' concerns that the specifications lacked detail as to quantity of asbestos to be removed and disposed, and that it was difficult to price the asbestos removal work, the Navy issued amendment No. 0004, which required bidders for bidding purposes to assume that all material in the asbestos control areas were contaminated with asbestos, requiring removal and disposal of materials in these areas in

accordance with applicable regulations. The amendment thus required bidders to base their bid prices on the assumption that all materials in the asbestos control areas contained asbestos and would require more costly removal procedures.

In verifying its bid, the protester stated that its bid did not include removal of all debris or potential asbestos in the asbestos control areas, and that if asbestos-containing material other than tile and pipe insulation were found, it would be disposed of at an extra cost. We think these statements indicate that the bidder had not included in its bid price the cost of removing all materials from the asbestos control areas in accordance with the asbestos disposal regulations. Accordingly, we agree that the agency could not have reasonably concluded that the protester had prepared its bid in accordance with amendment No. 0004.

Had the agency properly understood the basis on which the protester had bid, the proper course of action would have been bid rejection pursuant to FAR § 14.406-3(g)(5), which provides for the rejection of an obviously erroneous bid, after attempts to verify the bid price, if the price is far out of line with other prices bid or the government estimate, or, as is applicable here, there is other evidence that acceptance of the bid would be unfair to the bidder or to other bona fide bidders. See Martin Contracting, B-241229.2, Feb. 6, 1991, 91-1 CPD ¶ 121.

While the protester attempts to justify the acceptability of its bid and verification by arguing that there is a distinction between asbestos-containing material and asbestos-contaminated material and maintains that the amendment referred to only asbestos-contaminated materials, the regulations concerning the demolition, removal, and disposal of asbestos materials make no such distinction. The applicable regulation, 40 C.F.R. part 61, subpart M (1991), defines the term asbestos-containing materials as follows:

"As applied to demolition and renovation operations, this term also includes regulated asbestos-containing material waste and materials contaminated with asbestos including disposable equipment and clothing."

Thus, we see no basis for the distinction argued for by the protester.

Accordingly, since the bid properly should have been rejected, we have no basis to object to the termination of Philo's contract. Therefore, the protest is denied.


for James F. Hinchman
General Counsel