



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Peak Incorporated
File: B-245412.3; B-245753
Date: January 30, 1992

Mark J. Stone, Esq., and J. Randolph Ashburn, III, Esq., Katz & Stone, for the protester.
Leonard A. Sacks, Esq., for The Driggs Corporation, an interested party.
Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.
Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly canceled defective solicitation containing line item price limitation language which, while clear on its face, was placed in the solicitation in a misleading manner, so that 9 of 12 bidders failed to adhere to the limitation.

DECISION

Peak, Incorporated protests the cancellation of invitation for bids (IFB) No. FWS010-91-020 (FWS 020) by the Fish and Wildlife Service, Department of the Interior for a construction project at the National Wildlife Visitor Center, Laurel, Maryland and the resolicitation of the work in part through an amendment to IFB No. FWS010-91-025 (FWS 025), with the remaining work to be procured under a future solicitation. Peak contends that the agency did not have a compelling reason, as is required, to cancel the IFB after the bids had been opened.

We deny the protests.

The agency issued IFB 020 on May 28, 1991. Amendment 1, issued on June 28, included a section entitled Measurement and Payment, which provided at paragraph 1.1.1 that the "contract shall be bid and paid for on a lump sum and unit price basis," and explained in numerous sub-paragraphs how bids were to be composed. It also added paragraph 2.1, describing the General Requirements and Conditions bid item, which covered the mobilization of personnel, equipment, and

supplies at the project site in preparation for the work on the project, including the establishment of the contractor's offices, the contracting officer's representatives' office, storage buildings and other facilities, and all other costs of the labor and operations which must be performed prior to the beginning of the other work items under the contract and during the course of the contract.

Under paragraph 2.1.2, which is entitled "Payment," a half-page paragraph with six indented sub-paragraphs explained that partial payments for the General Requirements and Conditions bid item would be made once a month as work progressed. Four indented sub-paragraphs followed explaining the payment scheme. For example, when 5 percent of the original contract amount is earned, 25 percent of the amount bid for this item, less all previous payments will be made; when 10 percent of the original contract amount is earned, 50 percent of the amount bid for this item, less all previous payments will be made. Following another sub-paragraph defining the term "original contract amount," the last indented sub-paragraph in this partial payment section of the amendment further specified that:

"The total amount of this bid item shall not exceed 5% of the total bid for the base bid not including the General Requirements and Conditions. The partial payments as described above shall be subject to the retainage withheld as specified."

The bid schedule called for base bid entries, consisting of lump sum or extended prices on 54 line items. The first line item, to be bid as a lump sum, was "General Requirements and Conditions."

Twelve bids were received. After bid opening, the agency asked The Driggs Corporation, the apparent low bidder, to verify its bid of \$962,268 and, after determining that Driggs was responsible, awarded the contract to Driggs on August 16. By letter dated August 27, Peak protested this award to our Office on the basis that Driggs had not complied with the 5 percent limitation imposed by paragraph 2.1.2 on the General Requirements and Conditions' line item. Peak contended that Driggs' \$78,020 bid on this item was 10.69 percent of \$730,034, which was Driggs' base bid, minus its bid for General Requirements and Conditions.

After reviewing the bid, the agency agreed that Driggs failed to comply with this limitation, determined that Driggs' bid was nonresponsive and canceled its contract. The agency intended to award to Peak but Driggs protested the cancellation of its contract to our Office, arguing that paragraph 2.1.2 is ambiguous. Based on the fact that "nine out of twelve bidders failed to comply with the solicitation language limiting the bid amount for Line Item 1," the agency determined that the specification was ambiguous and that it would be in the best interests of the government not to make an award under FWS 020. Accordingly, the agency canceled solicitation FWS 020 and decided to amend FWS 025 to include certain preliminary work originally called for under FWS 020, and to solicit the remaining work under a reissued solicitation at a later date.² Peak protested this decision to our Office, claiming that the agency erroneously concluded that the 5 percent limitation is ambiguous.

The agency maintains that FWS 020 was properly canceled because it contains an ambiguity that may have led offerors to respond to the solicitation based on different assumptions regarding the 5 percent requirement. The agency concluded that the limitation is ambiguous because most of the bids failed to comply with the limitation.³ The agency argues that it reasonably determined to cancel FWS 020 and to resolicit in order "to maximize competition and correct the lack of understanding of the bidders"

Under Federal Acquisition Regulation (FAR) §§ 14.404-1(a)(1) and (c)(1), while an agency may not reject all bids after bid opening and cancel the IFB absent a compelling reason to do so, ambiguous specifications may constitute such a compelling reason. However, a solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. Herman Miller, Inc., 70 Comp. Gen. 287 (1991), 91-1 CPD ¶ 184. To be reasonable, an interpretation must be consistent with the solicitation read as a whole and in a manner that gives effect to all its provisions. Id. Here,

¹Our Office dismissed Peak's original protest as academic on September 16.

²Driggs withdrew its protest in response to this action by the agency.

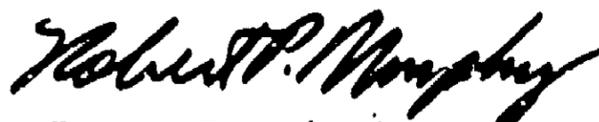
³In its report on the protest, the agency states that only 2 of the 12 bidders understood the limitation imposed by paragraph 2.1.2. Earlier, as noted above, the agency had concluded that three bidders complied with the requirement, and it is clear from the bid abstract that three bidders were responsive to this limitation.

the price limitation language, standing alone, is clear on its face, describing a simple required mathematical relationship between two items on the bid.

Nevertheless, while the provision was not ambiguous standing alone, 9 out of 12 bidders were apparently unaware of the provision. The failure of most bidders to recognize the limitation is understandable from the manner in which the provision was introduced in the solicitation. As discussed above, the provision was the last indented sub-paragraph of a paragraph dealing with partial payments. Both its length and the fact that it contained a percentage figure and the words "partial payments" as did the other sub-paragraphs, made it at a glance appear to be additional information about partial payments. Such a limitation would ordinarily be set forth in the bid schedule itself. While offerors are expected to read and be familiar with the terms of solicitations for federal government contracts, we believe that the placement in the case constituted a solicitation defect that unfairly misled most of the bidders, with the result that only one-fourth of the bidders were responsive to the requirements of the solicitation. See generally Progressive Forestry Servs., Inc., B-242834, June 5, 1991, 91-1 CPD ¶ 534; Shifa Servs., Inc., 70 Comp. Gen. 502 (1991), 91-1 CPD ¶ 483.

Accordingly, we find that the IFB is defective and, as a result, the agency correctly concluded that cancellation of FWS 020 and resolicitation was necessary to obtain full and open competition for the agency's needs. See Alden Electronics, Inc.--Recon., B-224160.2; B-224161.2, Mar. 12, 1987, 87-1 CPD ¶ 277. We find the decision to cancel consistent with FAR § 14.404-1(c)(10), which provides for the cancellation of an IFB after bid opening if such an action is clearly in the public's interest.

Accordingly, the protests are denied.


for James F. Hinchman
General Counsel