



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

Decision

Matter Of: Loman & Associates
File: B-253936
Date: October 25, 1993

Patrick Loman for the protester,
Michael J. Farley, Esq., and Kenneth A. Markison, Esq.,
Department of Housing and Urban Development, for the agency.
Katherine I. Riback, Esq., and Paul Lieberman, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Protest that award based on low total price for base plus all option years is inconsistent with solicitation is denied where the solicitation states that bids will be evaluated on that basis, absent a determination to the contrary by a higher-level agency official.
2. Bias or improper motives will not be attributed to contracting officials on the basis of unsupported allegations, inference or speculation.

DECISION

Loman & Associates protests the proposed award of two contracts for field review of appraisals under invitation for bids (IFB) No. DU209-B-93-0043, issued by the Department of Housing and Urban Development (HUD). Loman alleges that the agency improperly took into account proposed option prices in evaluating the low bid.

We deny the protest.

The solicitation was issued on March 1, 1993, and sought bids for field review of appraisals for 16 California counties. Each county was divided into eight areas, and potential contractors were permitted to submit bids for three different types of reviews in any of these eight areas. This protest concerns the proposed award of two contracts for field review of appraisals in the Solano/Napa and Contra Costa areas.

The solicitation provided that award of a contract for the base year would be made to the low bidder as evaluated, pursuant to Federal Acquisition Regulation (FAR) § 52.217-5, entitled "Evaluation of Options," the full text of which was included in the solicitation. This clause provides that "[e]xcept when it is determined in accordance with FAR § 17.106(b) not to be in the [g]overnment's best interests, the [g]overnment will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement." The clause further provides that the evaluation of options does not obligate the government to exercise the options. The solicitation also incorporated by reference FAR § 52.214-6, "Explanation to Prospective Bidders," which provides that any request for an explanation of interpretation of the solicitation must be made in writing early enough to allow a reply to reach all prospective bidders before the submission of their bids, and states that "[o]ral explanations or instructions given before the award of a contract will not be binding."

On March 29, the day before bid opening, the protester called the agency to inquire whether it would consider only the base year, or the base year and the option years in determining the low bid. The protester states that he was not certain, based on the proviso to the "Evaluation of Options" clause, "[e]xcept when it is determined . . . not to be in the [g]overnment's best interest," that the agency intended to base the award on the total price for the base and option years. The protester claims that he was informed by the agency contract specialist that only the base year price would be used to determine the low bid.¹ The agency received seven bids by the March 30, bid opening date. The following five bids were submitted for field review appraisals in the Contra Costa and Solano/Napa area:

¹The contract specialist's version of this conversation, which is supported by his contemporaneous notes, is at odds with that of the protester. As substantiated by these notes, the contract specialist responded to the protester's questions concerning how the low bid would be determined by stating that the base year price and the total of option prices would be added to determine the low bid, and referred the protester to Section M of the solicitation. After answering several questions, the contract specialist told the protester to submit any further questions in writing.

Contra Costa

| <u>Bidder</u> | <u>Base Year</u> | <u>4 Option Years</u> | <u>Total</u> |
|-----------------|------------------|-----------------------|--------------|
| Miller | \$ 19,650.00 | \$ 79,050.00 | \$ 98,700.00 |
| Liska | 20,250.00 | 81,000.00 | 101,250.00 |
| Loman | 19,125.00 | 84,375.00 | 103,500.00 |
| Hayes | 22,500.00 | 94,500.00 | 117,000.00 |
| Hamilton-Simons | 525,000.00 | 2,317,500.00 | 2,842,500.00 |

Solano & Napa

| <u>Bidder</u> | <u>Base Year</u> | <u>4 Option Years</u> | <u>Total</u> |
|-----------------|------------------|-----------------------|--------------|
| Miller | \$ 19,050.00 | \$ 79,350.00 | \$ 98,400.00 |
| Liska | 20,250.00 | 81,000.00 | 101,250.00 |
| Loman | 18,742.50 | 83,175.00 | 101,917.50 |
| Hayes | 22,500.00 | 94,500.00 | 117,000.00 |
| Hamilton-Simons | 525,000.00 | 2,317,500.00 | 2,842,500.00 |

The protester asserts that on April 29, he was verbally informed by the contract specialist that Loman was the low bidder in the geographic areas in which it bid.² On June 15, HUD informed the protester that Dean J. Miller submitted the low bids based on his total base and option year prices, and that he was the proposed awardee for the Solano/Napa and Contra Costa areas. Award has been withheld pending the outcome of this protest.

The agency's price evaluation was proper and consistent with the solicitation. The IFB provided that award would be based on the lowest aggregate price including the option year prices unless a contrary determination not to evaluate options was made under FAR § 17.205(b). This FAR provision requires that the decision not to evaluate options be made at a level higher than the contracting officer. The decision can be made any time prior to award. For example, where funding is no longer available after bid opening for the exercise of an option, award can be made to the low base year bidder. Federal Contracting, Inc., B-250304.2, June 23, 1993, 93-1 CPD ¶ 484. No such determination was made or even contemplated here. Accordingly, the contracting officer, consistent with the IFB provision,

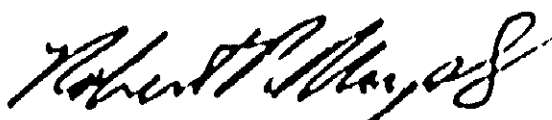
²Again, the contract specialist's version and the protester's version of the conversation differ markedly. The contract specialist states that he told the protester that its bids were low in some areas, but that this did not mean that it would be determined to be the lowest bid after completion of the evaluation process.

determined the low bidder based on total price including option years.

Loman asserts that the contract specialist orally advised that only the base year prices would be used for the purposes of determining the low bidder, and that Loman then relied on this information in preparing its bid. Bidders rely on oral advice at their own risk if the oral advice conflicts with the written terms of the solicitation. Mid South Indus., Inc., B-216281, Feb. 11, 1985, 85-1 CPD ¶ 175. Loman does not allege that he was told that the requisite determination had been made, and the contract specialist clearly had no authority to decide that options would not be evaluated under FAR § 17.206(b). Further, the IFB instructed bidders to submit any questions in writing to the agency in a timely fashion to allow for a written reply to all prospective bidders, and expressly advised that oral advice given before the award of a contract is not binding. Accordingly, we need not determine which versions of the conversations between Loman and the contracting specialist are accurate, since award must be based on the IFB terms, irrespective of allegedly conflicting oral advice. Id.

Loman also contends that the agency was biased in favor of the awardee because he is allegedly a close friend of one of the agency officials. In addition, Loman refers to a number of unsubstantiated agency actions which allegedly occurred between 1988 and 1992, and which are intended to show that the agency has treated Loman unfairly under various other procurements and in administering a Loman contract with HUD. Government officials are presumed to act in good faith; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Triton Marine Constr. Corp., B-250856, Feb. 23, 1993, 93-1 CPD ¶ 171. Loman provides only speculation and conjecture in support of its theory that HUD officials were biased against Loman and in favor of the awardee. This simply does not provide a sufficient basis to find bias on the part of the agency.

The protest is denied.


for James F. Hinchman
General Counsel