



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ahern & Associates, Inc.

File: B-254907.4

Date: March 31, 1994

Adrian L. Bastianelli III, Esq., and Donald A. Tobin, Esq., Bastianelli, Brown & Touhey, for the protester. Randall C. Allen, Esq., Jonathan D. Shaffer, Esq., and Julie M. Stockton, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for Pevarnik Brothers, Inc., an interested party.

Lester Edelman, Esq., Department of the Army, for the agency.

Paula A. Williams, Esq., and Linda C. Glass, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation provided that bids would be evaluated on the basis of all bid items, including options, agency properly deducted the prices for certain bid items which merely duplicated work to be performed under the option provisions since the evaluation of bids must be based on the actual likely cost to the government.

DECISION

Ahern & Associates, Inc. protests the proposed award of a contract to Pevarnik Brothers, Inc. (PBI) under invitation for bids (IFB) No. DACW69-93-B-0034, issued by the Army Corps of Engineers, Huntington District. Ahern contends that its bid was the lowest received and the proposed award to PBI is inconsistent with the terms of the solicitation.

We deny the protest in part and dismiss it in part.

The IFB, issued on July 23, 1993, and amended several times, calls for the construction of two fabric skin storage buildings for containment of hazardous waste at the Winfield Locks and Dam, Kanawha River, West Virginia. Bidders were required to bid on either alternate A (round, west-end design buildings) or alternate B (flat, west-end design buildings), but could not bid on both alternates. Both alternates required the use of fan and exhaust stacks for ventilation. As amended, the bid schedule requested unit and extended prices for 50 separate line items: (1) common

bid items 1 through 30, (2) alternate A bid items 31 through 36, (3) alternate B bid items 37 through 42, and (4) option A bid items 43 through 50. Option A, bid items 43 through 50 is, among other things, an option for a scrubber system; scrubbers are substitutes for the fan and exhaust stacks.

As amended, the IFB stated that bids would be evaluated and award made to the responsive, responsible bidder submitting the lowest total cost for either the common bid items, alternate A bid items, and option A bid items (i.e., bid items 1 through 30, 31 through 36, and 43 through 50); or, the common bid items, alternate B bid items, and option A bid items (i.e., bid items 1 through 30, 37 through 42, and 43 through 50). The IFB incorporated Federal Acquisition Regulation (FAR) § 52.217-5, which provides that "except when it is determined in accordance with FAR § 17.206(b) not to be in the government's best interest, the government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement"

The IFB contemplated award of a single contract and provided that the agency could award a contract for any line item or combination of line items, and reserved the agency's right to exercise option A at any time but not later than February 28, 1994. It further provided that if the agency elected to exercise option A, common bid items 27 and 28 "[would] be deleted at the unit price bid" because common bid item 27 is duplicative of option A bid item 50 and common bid item 28 is duplicative of option A bid item 49.

The Corps received three bids by the October 13 extended bid opening; all three bids were based on alternate A (round, west-end building design). The bid prices for the two lowest bidders are as follows:

	<u>Ahern</u>	<u>PBI</u>
Common bid items (Items 1-30)	\$1,783,150	\$1,407,669
Alternate A (Items 31-36)	3,973,850	4,327,931
Option A (Items 43-50)	<u>520,000</u>	<u>597,400</u>
Total	\$6,277,000	\$6,333,000

Ahern was declared the apparent low bidder at bid opening based on its total bid price of \$6,277,000. The next day, October 14, PBI notified the Corps by telephone that PBI, not Ahern, was the low bidder and confirmed its position by

letter dated October 15. In that letter, PBI argued that it offered the lowest total bid with or without the option because for purposes of evaluating bidders' prices for the basic requirements plus the option requirements, the Corps was required to deduct the prices for the duplicative work in bid items 27 and 28 from each bidder's total price; otherwise, PBI argued, the government would pay more than the lowest price for the actual work to be performed. PBI maintained that Ahern did not submit the lowest bid for any combination of bid items; Ahern's bid for the common bid items and alternate A was \$5,757,000 versus PBI's lower bid of \$5,735,600; Ahern's bid for the common bid items, alternate A and option A was \$6,037,000 (\$6,277,000 minus \$240,000 for items 27 and 28) versus PBI's bid of \$6,014,600 (\$6,333,000 minus \$318,400 for items 27 and 28).

Prior to receiving a response from the agency, PBI filed a protest with our Office on October 22, alleging that the Corps had miscalculated the bids received and erroneously declared Ahern the apparent low bidder. The protest was withdrawn and we closed our files on October 26, when PBI received the Corps' October 22 letter in which the agency determined that PBI's bid, with or without the option requirements, results in the lowest total evaluated cost to the government and that PBI was the apparent low bidder. Upon learning of the agency's decision to reverse its initial determination and declare PBI the apparent low bidder, Ahern filed an agency-level protest on October 28, and subsequently filed a protest with our Office on November 16.

Ahern argues that under the terms of the amended solicitation, the low bid was to be determined by adding the total price of the basic requirements (i.e., the sum of all common bid items and alternate bid items A or B) to the total price of the option requirements and, based on that evaluation scheme, its total bid price of \$6,277,000 is lower than PBI's bid price. The protester asserts that there was nothing in the solicitation which informed bidders that for purposes of determining the low bidder the prices offered for bid items 27 and 28 would be deducted from the "bottom line total" of bid items 1 through 50. Ahern supports its argument by noting that the amended bid schedule contained a blank space at the end for bidders to insert a total bid amount for the common bid items, plus either alternate A or B, plus the option bid items. In addition, the protester points out that, in pertinent part, Note 1 at the end of the amended bid schedule states: "NOTE 1: If the Government elects to exercise the option for Items 43 thru 50, Items 27 and 28 in the Common Bid Items will be deleted at the unit price bid"

This language, Ahern maintains, simply advised bidders of the mechanics of exercising the option after contract award and has nothing to do with evaluating bids. On this basis, the protester insists that in deducting the prices for bid items 27 and 28 in evaluating the bids received, the agency confused the bid evaluation criteria with the method for determining the amount of final contract payment upon completion of the project.

Solicitations must be construed in a manner which is reasonable and which gives effect to all of their provisions. See Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379. Here, the only reasonable interpretation of the two IFB provisions, Section M and Note 1, is that those provisions require award to be based on the lowest total evaluated price for the actual work to be performed. The IFB clearly stated that the work called for in bid items 27 and 28 is duplicative of the work called for in bid items 49 and 50 and bidders were specifically advised that the Corps would require either the work under bid items 27 and 28 or under bid items 49 and 50, not both. In fact, Ahern acknowledges that common bid items 27 and 28 duplicates option A bid items 49 and 50.

While Section M of the IFB could have been clearer, we think the protester's argument, that the deductions were to be made only for purposes of determining final contract payment if the option were exercised, is misplaced, since the evaluation of bids must be based on what the actual likely cost to the government will be and the cost of each element of work may be taken into account only once. See Associated Healthcare Sys., Inc., 65 Comp. Gen. 823 (1986), 86-2 CPD ¶ 246; Tennessee Valley Serv. Co., B-188771, July 20, 1977, 77-2 CPD ¶ 40, aff'd, B-188771, Sept. 29, 1977, 77-2 CPD ¶ 241.

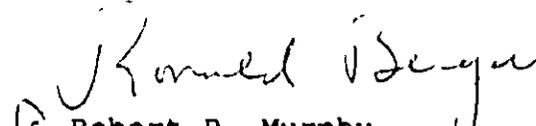
Thus, consistent with the IFB provisions, the contracting officer determined the low bidder based on total price, including the option bid items minus the duplicative bid items 27 and 28. Under these circumstances, we find that the agency's price evaluation was proper and consistent with the solicitation. See Loman & Assocs., B-253936, Oct. 25, 1993, 93-2 CPD ¶ 245. As noted previously, PHI's evaluated bid price including the option is \$6,014,600 compared to Ahern's evaluated bid including the option of \$6,037,000. That being so, the protester's bid was not low.

Finally, Ahern alleges that prior to submitting its bid, agency personnel orally advised it that the low bidder would be determined based on the sum of all of the common bid items, the applicable alternate bid items (A or B), and the option items, and that Ahern relied on this information in preparing its bid. We see nothing inconsistent with this

advice and the solicitation. Again, as discussed above, we do not think the solicitation required evaluation of the same items twice. In any event, assuming the oral advice given was inconsistent with the agency's method of evaluation, bidders who rely on oral advice do so 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. The IFB cautioned bidders that all requests for explanation or interpretation of the solicitation should be in writing and expressly stated that oral advice given before the award of a contract was not binding. Ahern's allegation that it relied on this oral advice to its detriment does not provide a valid basis for protest.

We also will not consider Ahern's allegation that the IFB's amended evaluation scheme as interpreted by the agency encourages unbalanced bidding and is therefore defective. This allegation, raised for the first time in its comments on the agency report, is untimely. A protester may not introduce a new issue in its comments that it could have raised in its initial submission to our Office. Our Regulations do not contemplate the unwarranted piecemeal presentation of protest issues. See Remtech, Inc., 70 Comp. Gen. 165 (1991), 91-1 CPD ¶ 35. Since Ahern did not raise this argument in its initial protest and has offered no reason for the delay, we will not consider this protest argument.

The protest is denied in part and dismissed in part.


Robert P. Murphy
Acting General Counsel