



Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

**Matter of:** Crowley Company, Inc.

**File:** B-258967

**Date:** February 21, 1995

Michael J. Allen for the protester.  
Lester Edelman, Esq., and Hal J. Perloff, Esq., Department  
of the Army, for the agency.  
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

### DIGEST

Where solicitation stated that bids would be evaluated based on prices for all options, agency may deviate from that formula only where there is reasonable certainty that not all options will be exercised or that such an evaluation is otherwise not in the government's best interest.

### DECISION

Crowley Company, Inc. protests the methodology used for the evaluation of bids under invitation for bids (IFB) No. DACA63-94-B-0218, issued by the Army Corps of Engineers. Crowley contends that the agency improperly included a clause in the solicitation stating that bids would be evaluated on the basis of the prices for all periods, including options, and improperly failed to decide, after bid opening, that option prices should not be considered in determining the low bid.<sup>1</sup>

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

<sup>1</sup>In its protest, Crowley also asserted that the apparent low bid was unbalanced. The agency responded to that assertion in its report to our Office. Because Crowley did not address the issue in its comments on the agency report, we treat it as abandoned. See Hampton Rds. Leasing, Inc., B-244887, Nov. 25, 1991, 91-2 CPD ¶ 490.

The solicitation, which seeks bids for the replacement of the security system around the weapons storage area at Dyess Air Force Base in Abilene, Texas, was originally issued on May 24, 1994.<sup>2</sup> The solicitation included a base bid and five options; the latter covered items such as installation of turnstile gates and a service maintenance agreement for the entry control point gates. The government estimate for the contract, including all options, was \$914,423.

The contracting officer determined that there was a reasonable likelihood that the options would be exercised. Accordingly, pursuant to Federal Acquisition Regulation (FAR) § 17.208(c), the solicitation included 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 interests, the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the option(s)."

The solicitation also stated that the agency reserved the right to exercise the options, "either singularly or in any combination for up to 120 calendar days after award of the Base Bid without an increase in the Offeror's Bid Price."

At bid opening on June 23, Crowley's price of \$1,345,000 was the lowest of the six bids received. Because all bids exceeded the amount of funds available, the contracting officer decided on July 14 to reject all the bids, cancel the solicitation, revise the specifications, and issue the revised specifications as a new solicitation. This was done by notice issued on August 2.

On that date, the contracting officer also determined again that there was a reasonable likelihood that the options would be exercised, although, due to the limited funds available, it could not be determined whether the options would be exercised at the time of award. The amended IFB retained FAR § 52.217-5. The government estimate was revised to \$964,500, including all options.

Of the five bids at bid opening on August 16, Crowley's was low for the base bid, at \$1,130,000; the next low bid for the base bid was \$1,149,188; the third low bidder, Sullivan Enterprises, bid \$1,171,000--\$41,000 more than Crowley for

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<sup>2</sup>As explained below, the solicitation as initially issued bore a different solicitation number.

the base bid. When all options were included in the calculation, however, Sullivan's bid of \$1,218,800 was low; Crowley's bid, which was \$200 higher, was next low. Because the bids were all substantially higher than the government estimate, the agency reviewed that estimate for reasonableness and accuracy. As a result of this review, the estimate was increased to \$1,296,188.

Crowley asserts that, on October 6, the contracting officer's representative advised the firm that the contract would be awarded to Sullivan if adequate funds became available. This protest followed on October 13. In November, the Corps of Engineers learned that the Air Force intended to request additional funding to cover the base bid and all options. No award has yet been made.

Crowley argues that the agency acted improperly in retaining FAR § 52.217-5 in the amended solicitation, since the agency had no reasonable basis to believe that additional funding would be secured or that available funding would be adequate to permit the exercise of the options. In this regard, Crowley notes that the revisions made to the specifications were minor and did not significantly reduce the government's estimate of the cost of performance. Crowley also contends that the contracting officer acted unreasonably in not invoking the exception to FAR § 52.217-5, which is set out at FAR § 17.206(b):

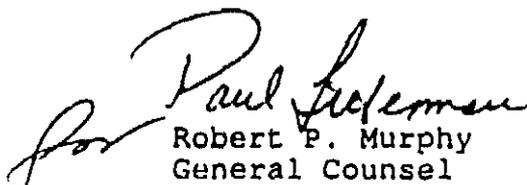
"The contracting officer need not evaluate offers for any option quantities when it is determined that evaluation would not be in the best interests of the Government and this determination is approved at a level above the contracting officer. An example of a circumstance that may support a determination not to evaluate offers for option quantities is when there is a reasonable certainty that funds will be unavailable to permit exercise of the option."

We dismiss as untimely Crowley's argument that the agency was required to delete FAR § 52.217-5 when it amended the IFB terms on August 2. A protest based upon an alleged solicitation impropriety which is apparent prior to bid opening must be filed before bid opening. 4 C.F.R. § 21.2(a)(1) (1994). The challenged provision states the government's intention to take all option prices into account in determining the low price bid. Crowley was aware that the agency could not make award under the initial IFB because all bids exceeded available funding, and it argues that the amendments subsequently made to the IFB specifications had only a minimal impact on bidders' costs. These two facts together constitute the basis for Crowley's challenging the retention of the clause in the IFB, and

Crowley was plainly aware of them prior to the August 16 bid opening.<sup>3</sup> Accordingly, if Crowley believed that it was improper for the agency to retain FAR § 52.217-5 in the IFB, it was required to file a protest raising that allegation prior to August 16.

Crowley has not demonstrated that the agency acted improperly in not invoking the exception, pursuant to FAR § 17.206(b), which permits evaluation of less than all options, notwithstanding the inclusion of FAR § 52.217-5 in a solicitation. Once the latter clause is properly included in a solicitation, the FAR establishes a preference for evaluation of bids on the basis of all options unless the contracting officer knows with "reasonable certainty" that not all options will be exercised or that evaluation on the basis of all option prices is otherwise not in the government's best interest. Federal Contracting, Inc., B-250304.2, June 23, 1993, 93-1 CPD ¶ 484. Here, the record indicates the possibility that additional funding will be obtained, which may permit the agency to exercise all options. Crowley has not provided any reason why the agency cannot properly consider all option prices if, prior to award, it obtains adequate additional funding. We therefore find unobjectionable the agency's position that there is no present reasonable certainty that not all options will be exercised, or that evaluation on the basis of all options is otherwise not in the government's best interest.<sup>4</sup>

The protest is dismissed in part and denied in part.

  
 Robert P. Murphy  
 General Counsel

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<sup>3</sup>Although Crowley argues that it had no basis to protest prior to August 16 because the agency might have obtained additional funding for all options (which had not, in fact, occurred), Crowley has not explained why the availability of additional funding would have led to revision of the IFB specifications rather than award under the IFB as initially issued.

<sup>4</sup>We note as well that the exception set out in FAR § 17.206(b) may be invoked at any point up to the time of award. Federal Contracting, Inc., supra. Since award has not yet been made, the agency is correct in pointing out that this protest ground could be considered premature.