



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Massaro Company; Poerio Inc.

File: B-280772.2; B-280772.3

Date: December 4, 1998

Joseph A. Massaro, Jr., Esq., for Massaro Company; and Keith L. Baker, Esq., and Jeffrey E. Weinstein, Esq., Eckert Seamans Cherin & Mellott, for Poerio Inc., the protesters.

Kenneth B. MacKenzie, Esq., and Charlma Quarles, Esq., Department of Veterans Affairs, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency did not have a compelling reason to cancel solicitation after bid opening based upon allegedly ambiguous pricing requirements, where the solicitation, when read as a whole, is susceptible to only one reasonable interpretation regarding how bidders were to structure their bids.

DECISION

Massaro Company and Poerio Inc. protest the cancellation after bid opening of invitation for bids (IFB) No. 9810 A/E, issued by the Department of Veterans Affairs (VA) for the environmental improvement of three inpatient units at the VA Medical Center, Pittsburgh, Pennsylvania. The protesters contend that, contrary to the agency's stated reason for canceling the IFB, the solicitation's pricing terms were not ambiguous; the protesters seek reinstatement of the canceled IFB.

We sustain Poerio's protest and deny Massaro's protest for lack of prejudice.

The IFB, issued on June 1, 1998, required bidders to provide prices ("figures") for two bid items (items I and II, described below) and three alternates (described as minor additions or deletions to the IFB's performance requirements); a unit price for mine grouting also was required. The IFB provided, at § 01010, ¶ 1.2.A., the following descriptions:

STATEMENT OF BID ITEM(S)

ITEM I, GENERAL CONSTRUCTION: Work includes general new construction, alterations, walks, grading, paving, drainage, mechanical and electrical work, elevators, necessary removal of existing structures and construction and certain other items.

ITEM II, ASBESTOS ABATEMENT: Work includes abatement of asbestos in the area of the work as well as in other selected areas, including the work described in ALTERNATE 2 below.^[1]

Amendment No. 2 to the IFB, issued on July 1, included the following clarification:

Although the VA has asked for the price of the Asbestos Abatement work to be listed separately (ITEM II - ASBESTOS ABATEMENT . . .) on the bid form, all asbestos abatement work is included in a single prime contract that will be the responsibility of the General Contractor.

Nine bids were received at bid opening on July 15. Poerio's total bid of \$11,401,500 (\$10,687,000 for bid item I, plus \$714,500 for bid item II) was the apparent low bid received. Massaro's total bid, calculated by the agency to be \$11,586,000 (\$10,886,000 for bid item I, plus \$700,000 for bid item II), was the apparent second low bid received.

After bid opening, the president of Massaro notified the contracting officer that the firm's item I (general construction) price represented Massaro's total bid price, since it included Massaro's item II (asbestos abatement) price. Massaro explained to the contracting officer that, prior to bid opening, the firm was unclear about how to price items I and II--i.e., whether the item I and II prices were to represent different portions of the overall work, so that the bidder's total price for all work under the solicitation was the sum of the prices bid for items I and II; or whether the price for item I should represent the bid for all work included under the solicitation, with the price provided for item II merely identifying the portion of the item I price related to asbestos abatement. According to Massaro, it asked an individual at the office of the VA's architect for the project for direction. Massaro states that the individual instructed Massaro to structure its bid, as it ultimately did,

¹The "work described" in alternate No. 2 refers to the abatement of asbestos floor tile located at the third floor. Alternate No. 2 prices were bid as a "deduct" of total bid prices, since this alternate is described as a deletion of work from the overall performance requirements.

by including the price for the item II work in the firm's item I price. Massaro then listed its break-out price for the asbestos abatement work as its item II price.²

The contracting officer requested work papers from Massaro to support the firm's claim as to its intended total bid price. Massaro submitted undated work papers, allegedly produced by computer on the day of bid opening. After concluding that the work papers demonstrated the inclusion of \$700,000 for asbestos abatement in a total bid price of \$10,886,000 (which was the amount of Massaro's item I price), the contracting officer determined that Massaro's intended total bid was, in fact, \$10,886,000, and that it displaced Poerio's bid as the apparent low bid for award.

On August 10, Poerio filed a protest with our Office contending that the agency improperly allowed Massaro to submit work papers after bid opening to support its alleged intended bid. In response to that protest, the VA reported that it was canceling the IFB due to the solicitation's ambiguous pricing terms. The agency reported that, although it believed the initial IFB was unambiguous in requiring separate prices for the item I and item II work, the IFB's pricing requirements were rendered ambiguous upon the issuance of amendment No. 2. (That amendment, as quoted above, stated that although separate prices were requested for each of the two items, "all asbestos abatement work is included in a single prime contract that will be the responsibility of the General Contractor.") On September 16, in light of the cancellation of the solicitation, we dismissed the Poerio protest as academic.

Massaro and Poerio, on September 14 and September 21, respectively, filed the current protests against the agency's cancellation of the IFB. Both protesters contend that the IFB is not ambiguous; each protester contends that it should receive the award under the reinstated IFB.

An agency generally may cancel an IFB after bid opening and expose prices only if there is a compelling reason to do so. Federal Acquisition Regulation § 14.404-1(a)(1); Shetland Properties of Cook County Ltd. Partnership, B-225790.2, July 1, 1987, 87-2 CPD ¶ 2 at 2. Whether cancellation is warranted on the basis of ambiguous or inadequate specifications is a decision of the contracting agency, whose determination will not be disturbed by our Office unless it is shown to be arbitrary, capricious, or not supported by substantial evidence. Canadian Commercial Corp./Ballard Battery Sys. Corp., B-255642, Mar. 18, 1994, 94-1 CPD ¶ 202 at 4; City Wide Press, Inc., B-231469, Aug. 10, 1988, 88-2 CPD ¶ 127 at 2-3. A term in a solicitation is ambiguous if it is susceptible to more than one reasonable

²The record shows that the individual identified by Massaro as the source of that instruction was not one of the two individuals (one of whom was the contracting officer) identified in the IFB as authorized contacts for information about the solicitation.

interpretation when read in the context of the solicitation as a whole. TUMI Int'l, Inc., B-235348, Aug. 24, 1989, 89-2 CPD ¶ 174 at 2; Energy Maintenance Corp., B-223328, Aug. 27, 1986, 86-2 CPD ¶ 234 at 4.

Both protesters contend that the IFB was not ambiguous--each protester, however, has a very different interpretation of the pricing requirements at issue. Poerio contends that, since the bid schedule set out two separate and distinctly described work requirements, as two separate bid items for which bidders were required to provide separate prices, Massaro's interpretation that the IFB required a total bid price for item I and a break-out price for item II is unreasonable. We agree.

Here, the solicitation, when read as a whole, allows only one reasonable interpretation for the prices required from the bidders. First, the cover page of the solicitation (Standard Form 1442) identifies two separate bid items for the acquisition, "general construction" and "asbestos abatement." Each of the two bid items is identified on that page as a free-standing item for acquisition by the agency--specifically, there is no indication that one of the two identified bid items is encompassed by the other. Second, the IFB's performance requirements, set out in § 01010 (quoted above), expressly define "general construction" and "asbestos abatement" as distinct, separable work efforts; again, each bid item description follows the separate title and item number associated with each of the two separate work categories. The stated item I (general construction) description simply does not encompass the separately stated item II specialized work requirements in the area of asbestos abatement. Third, the bid schedule itself clearly separates the two bid items: there is one space for the bidder's price for the general construction work, and a separate space for the price for the asbestos abatement work. Finally, amendment No. 2 reiterated that "separate" prices were required for these two distinct components of the total work required by the IFB. Contrary to Massaro's and the agency's contentions, the fact that bidders were advised by amendment No. 2 that one prime contract would be awarded, to include both the item I and item II work requirements, simply does not provide any reasonable basis for a bidder to conclude that its item II price should be included in its item I price.

In short, throughout the IFB, and on the bid schedule itself, two distinct work efforts were identified, each requiring its own separate pricing information. The IFB, as issued and as amended, never indicated that a bidder's asbestos abatement (item II) price was to be expressed as a break-out price that was included in its item I price. Massaro's interpretation of the IFB's required pricing structure simply is not reasonable.³

³Massaro's essential concern appears to be that the firm was instructed, by an individual in the office of the architect for this VA project, to set out its bid pricing structure as it did--with Massaro's item I price representing a total bid amount, and
(continued...)

The agency canceled the IFB only after it determined that both Poerio's and Massaro's varying interpretations of the IFB's pricing terms were reasonable. Since we have determined that Massaro's interpretation was not reasonable, and that the IFB was not ambiguous, we conclude that the VA did not have a compelling reason to cancel the IFB after bids had been exposed. TUMI Int'l, Inc., *supra*, at 5. While both protesters challenge the cancellation, which we agree was improper, only Poerio was prejudiced by the improper cancellation since its bid was properly found low, and there was no basis to accept Massaro's claim that it intended to bid a total of only \$10,886,000. Since Massaro's bid was not low, it was not prejudiced by the improper cancellation; given the lack of prejudice, we deny Massaro's protest. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 103 F.3d 1577, 1581 (Fed. Cir. 1996).

In sum, we sustain Poerio's protest and recommend that the IFB be reinstated and award made to Poerio, if otherwise appropriate, as the firm that submitted the lowest bid. We also recommend that Poerio be reimbursed the reasonable costs of filing and pursuing its protest against the improper cancellation of the solicitation, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1998). Poerio should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Poerio's protest is sustained; Massaro's protest is denied.

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³(...continued)

its item II price merely representing a break-out portion of that item I amount. Massaro, however, unreasonably followed this oral instruction at its own risk. The alleged oral advice here--besides representing a wholly unreasonable reading of the solicitation requirements--was unauthorized and nonbinding. As Massaro knew from the terms of the IFB, any bidder desiring an explanation or interpretation of the IFB terms was required to submit a request in writing to the appropriate individuals identified in the IFB, allowing sufficient time for a reply to reach all prospective bidders before submitting their bids; bidders were expressly instructed that oral explanations or instructions before award would not be binding. IFB § 00100, ¶ 5.