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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Greenlee Construction, Inc.

File: B-294338

Date: October 26, 2004

Gary Greenlee for the protester.

Sandra Balmer, Esq., General Services Administration, for the agency.

Paul N. Wengert, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency had no basis to cancel solicitation because, notwithstanding the agency's claim that cancellation was justified because the solicitation allegedly indicated two different methodologies by which to determine the lowest-priced offer entitled to award, the agency was unable to articulate an example or methodology that would, while remaining consistent with the solicitation, establish that the protester's price was not the lowest price received.

DECISION

Greenlee Construction, Inc., a small business, protests the award of a contract to another offeror by the General Services Administration (GSA) under solicitation for offers (SFO) No. GS-04P-04-RBD-0015. Prior to filing the agency report, GSA announced that it intended to take corrective action by terminating the awarded contract and soliciting new offers. Greenlee then amended its protest to object to the cancellation, asserting that the agency lacked a basis to cancel the solicitation and arguing that it was entitled to the award because it had submitted the lowest-priced acceptable offer.

We sustain the protest.

The solicitation, issued on October 28, 2003 as a total small business set-aside, sought "bids" for two main elements: "partition" and "asbestos" within the Atlanta

South Property Management Center.¹ Partition (or “partitioning”) involves various tasks for a range of construction disciplines, while “asbestos” (or “asbestos removal”) involves removal and abatement of asbestos. Contracting Officer’s (CO) Statement at 1. The solicitation anticipated the award of an indefinite-delivery, indefinite-quantity contract for a base year, followed by 2 option years. SFO at 189.

The SFO contained 1,757 line items, each indicating the quantity and unit cost estimate for performing a particular piece of work. SFO amend. 5. Rather than inviting firms to propose prices for the work, the SFO directed interested firms to submit a bid in the form of percentage discounts from (or increases to) the estimated prices in the SFO. Firms were cautioned not to offer separate specialized discounts for any discrete line items; rather, a bid was required to consist of separate percentages for four categories of work: partition work performed during regular working hours,² partition work performed outside working hours, asbestos work performed during regular working hours, and asbestos work performed outside working hours. SFO at 5. Thus, each responsive bid would provide only four separate percentage figures for each of the 3 years—a total of 12 figures.

The SFO also indicated that, for purposes of price evaluation, 75 percent of the work would be assumed to be partition work and 25 percent would be asbestos work. CO Statement at 1; SFO at 187. For the purpose of evaluating prices, the SFO stated that 80 percent of the partition work would be assumed to be performed during regular working hours and 20 percent of the work outside of regular working hours. Of the asbestos work, the evaluation was to be based on 75 percent of the work being

¹ As will be seen throughout this decision, the solicitation uses the terms “bidder” and “bid”—terms usually associated with sealed bidding—interchangeably with “offeror” and “offer,” terms that are frequently used in connection with a negotiated acquisition. In block 2 (type of solicitation) of Standard Form 1442, the selection for “Negotiated (RFP)” has an “X.” SFO at 3. GSA apparently uses SFOs for both negotiated procurements, *see, e.g., Arsenault Acquisition Corp.; East Mulberry, LLC*, B-276959, B-276959.2, Aug. 12, 1997, 97-2 CPD ¶ 74 at 1, and sealed bidding procurements, *see, e.g., Capitol Contractors, Inc.; Baker Roofing Co.*, B-248944, B-248944.2, Oct. 22, 1992, 92-2 CPD ¶ 267 at 3. *See* 48 C.F.R. § 570.102 (2004) (“Solicitation for Offers (SFO) means invitation for bids in sealed bidding or request for proposals in negotiations.”) This decision necessarily reflects the seemingly contradictory language of the solicitation because it is unclear, from the record produced here, what procedures the agency intended to follow for this acquisition.

² Regular working hours were defined as the period from 8:00 a.m. to 5:00 p.m. SFO at 186.

performed during regular working hours and 25 percent of the work being performed outside regular working hours.³ SFO at 186-88.

The SFO stated that “award will be made to the responsive, responsible offeror submitting the lowest total evaluated bid price.” SFO at 187. The SFO described a formula for evaluating the bids and provided an example of the application of the formula. According to the formula, for each category of work, GSA would multiply the proportion of the work (partition vs. asbestos) by the distribution of the work (regular working hours vs. outside working hours) by the sum of the percentages bid for each of the 3 years.⁴ SFO at 187-88.

A corresponding calculation would be performed for each of the three other categories of work (partition work outside working hours; asbestos work during working hours; and asbestos work outside working hours). The resulting four percentages would be added together to arrive at a total percentage.⁵

GSA applied the formula to each of the three bids received. As evaluated in accordance with the formula, the protester bid the largest discount. In each year, the protester bid “NET” (i.e., accepting the government estimate without discount or markup) on partition work, but on asbestos work, it bid a 45 percent discount during working hours, and a 30 percent discount outside of working hours. The awardee’s bid ranged from 1 percent to 6 percent discounts in the base year, and escalated its bid in the option years, to a range from a 2 percent discount to a 3 percent markup in

³ The SFO specified for both partition and asbestos work that 80 percent of the work would be performed during regular working hours and 20 percent of the work would be performed outside regular working hours. SFO at 186. For partition work, the agency has followed this 80/20 split. However, the agency has consistently used a split of 75 percent regular working hours and 25 percent outside working hours for asbestos work—including in the evaluation example in the SFO. SFO at 188. While we note the discrepancy, it does not change the outcome of the decision, and neither party has raised it as an issue.

⁴ It appears that the evaluation of the discounts offered in the 3 separate years should not be the sum of those discounts, but rather their average (assuming the work is spread evenly across the 3 years). Otherwise, under the formula, a firm that proposes a discount of 33.3 percent in each year would be treated, unreasonably, as if it had proposed a 100 percent discount. The agency’s price analysis corrects this flaw in the formula by calculating the price for each contract year separately.

⁵ According to the protester, GSA has used this formula for at least a decade, and the protester has produced abstracts appearing to confirm prior use of the formula in past solicitations. Letter from Protester to GAO (Aug. 20, 2004), exhs. K, L, M; Letter from Protester to GAO (Sept. 27, 2004), encl. (abstract of offers form dated July 19, 1994).

the second option year. For reasons that are not clearly documented in the record, although Greenlee bid the largest discounts, the agency nevertheless made award to Adams-Brown Service, Inc. GSA's letter announcing the award simply identified the awardee's base year percentage discounts, but did not otherwise explain why the protester did not receive the award, given its greater discounts. Protest, exh. E, Letter from Contracting Officer to Protester (July 13, 2004).

The protester filed a protest with our Office on July 19, objecting to the award as contrary to the SFO. Protest at 1. On August 11, prior to the due date for an agency report, GSA requested dismissal of the protest on the grounds that GSA had "decided to take corrective action in this matter" and would "terminate the contract for convenience and re-solicit offers." Letter from Agency Counsel to GAO (Aug. 11, 2004). The protester subsequently objected to the corrective action, arguing that GSA was denying the protester a contract as retribution for what the protester claims was its president's assistance in a federal criminal prosecution against GSA contracting officials allegedly indicted for corruption. The protester maintained that award could—and should—be made to it, as the bidder submitting the lowest price, i.e., the greatest discount. Letter from Protester to GAO (Aug. 12, 2004).

On August 19, the agency responded by explaining that the SFO contained references to the award being made both on the basis of "percentage" and on the basis of "price." The agency argued that while the protester's bid was lowest on the basis of percentages, "the Awardee was far lower than the Protester when prices were calculated." According to the agency, "The Government's savings [by making award to Adams-Brown] using price [to analyze bids] was more than \$120,000,000." Letter from Agency Counsel to GAO (Aug. 19, 2004). We requested that GSA provide a report on these issues.

On September 15, the agency submitted a report to our Office. The agency report provided only two exhibits, a copy of the SFO and an undated price analysis.⁶ According to the contracting officer's statement, prior to award, the agency determined that the SFO references to "price" meant that the agency should analyze bids by looking at the effect of discounts on a sample line item. CO Statement at 2-3. The agency selected a single line item (valued at \$8.63) from the partition work and applied the protester's and the awardee's base-year regular working hours percentages. Id. In the base year, since the protester had proposed to discount only the asbestos work, while the awardee had proposed to discount both the partition and the asbestos work, GSA concluded that, if award were made to Greenlee, the agency "would be paying higher prices for partition—a significant majority of the work—once prices were calculated." Id.

⁶ This document may have been prepared after the protest was filed because, although the agency reports that it received three bids, the document contains analysis of only the awardee's and the protester's bids.

To demonstrate the validity of its conclusion to our Office, the agency prepared a further price analysis. In its price analysis, the agency applied an estimated annual ordering level of slightly more than one billion dollars⁷ and calculated the price to be paid to the awardee and the protester. That analysis appeared to show that the awardee's bid would result in savings to the government of \$104,661,233.61 over the 3-year maximum term of the contract. However, when our Office reviewed the agency's data, we discovered that GSA's spreadsheet assumed that 99.9804 percent of the cost would be for partition work and only 0.0196 percent for asbestos work (rather than 75 percent and 25 percent, respectively, as specified in the SFO). Agency Report, exh. 2, Breakdown of Price Evaluation, at 3. We then requested that the agency provide a new spreadsheet, redistributing the estimated annual workload on the basis specified in the SFO (75 percent to partition and 25 percent to asbestos).⁸ The agency's corrected spreadsheet shows that the agency would pay \$225,729,148.69 more under the awardee's bid than the protester's.⁹ Agency's Revised Calculation at 4.

In a negotiated acquisition, agencies have broad discretion in deciding whether to cancel a solicitation; they need only advance a reasonable basis for the cancellation.¹⁰ Sunshine Kids Serv. Supply Co., B-292141, June 2, 2003, 2003 CPD ¶ 119 at 2; Encore Mgmt., Inc., B-278903.2, Feb. 12, 1999, 99-1 CPD ¶ 33 at 3. Where it has an adequate basis, an agency properly may cancel a solicitation no matter when the information supporting the cancellation first surfaces or should have been known. Pike Creek Computer Co., B-290329, June 21, 2002, 2002 CPD ¶ 106 at 2.

⁷ As the protester has pointed out, the agency provides no support in the record for this figure. Letter from Protester to GAO (Aug. 20, 2004). The protester also points out that the SFO stated, "Government Cost Range: \$50,000 to \$1,000,000." SFO at 3.

⁸ There is no indication that the 75/25 distribution stated in the SFO does not reflect expected usage. We note that, even at a split of 90/10, the protester's offer would still represent the lowest price.

⁹ Actually, our own recalculation indicates that Greenlee would be \$225,670,948.66 less expensive. The discrepancy results from a typographical error in the agency spreadsheet in the raw cost figure for working hours partition work in the option years for Adams-Brown. Our recalculation used the correct figure (which is shown elsewhere in six locations in the agency's spreadsheet).

¹⁰ As noted above, it is not clear on this record whether the agency intended to use procedures for negotiated acquisition or for sealed bidding. The analysis in this decision is based on the more deferential standard employed for negotiated acquisitions. Since the agency's explanation does not satisfy that standard, it clearly would not meet the "cogent and compelling" standard for cancellation applicable to sealed bidding. Nidek, Inc., B-272255, Sept. 11, 1996, 96-2 CPD ¶ 112 at 3.

Here, we see no basis for GSA's decision to cancel the SFO. The agency has been unable to articulate how the alleged difference between the "price" and "percentage" methodologies supports its position that Greenlee may not have submitted the lowest price under this SFO. The two analyses GSA has provided in the record were both so flawed as to provide no support for the agency's position. First, GSA apparently relied on an analysis applying the offerors' base year discounts to a single \$8.63 item under partition work. That analysis was not representative of the work to be performed because it was based only on base year discounts and ignored the asbestos work required under the SFO. GSA's second analysis relied on a split between the partition and asbestos work that was grossly inconsistent with the split specified in the SFO. Even if we assume that there is a difference between a price-based methodology and a percentage-based one under the SFO, the agency has not furnished a reasonable price analysis to support the conclusion that the protester was not the lowest-priced offeror under either of those methodologies. Since the agency justified cancellation only on a claim that the two methodologies generated different results, and that claim was unsupported, the agency has failed to provide any basis for the cancellation.

The protest is sustained.

We recommend that if the agency has not yet terminated the award to Adams-Brown, as the agency proposed to do in announcing corrective action, it should terminate that contract. If the agency has already canceled the solicitation, it should reinstate the solicitation. In any event, if the agency finds the protester otherwise eligible for award, the agency should make award to the protester as the firm that submitted the lowest-priced offer. We further recommend that Greenlee be reimbursed its costs of filing and pursuing this protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2004). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel