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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: TNT Industrial Contractors, Inc.

File: B-288331

Date: September 25, 2001

Scott W. Goodall for the protester.

Daniel J. Dykstra, Jr., Esq., U.S. Army Corps of Engineers, for the agency.

Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Since the evaluation of bids must be based on the actual likely cost to the government for the project, agency properly did not consider “deductive items” as part of the total price where funds were available for the entire project.

DECISION

TNT Industrial Contractors, Inc. protests the intended award of a construction contract to All Cities Enterprises by the Army Corps of Engineers under invitation for bids (IFB) No. DACA05-01-B-0001 for a water treatment plant at Beale Air Force Base in California. TNT contends that the agency failed to evaluate all the line items listed on the IFB pricing schedule as contemplated by the solicitation, and that TNT submitted the lowest aggregate bid, and therefore it should have received the award.

We deny the protest.

The IFB was issued on April 10, 2001 as a competitive set-aside for eligible firms under the Small Business Administration’s (SBA) section 8(a) program.¹ As amended, the IFB required bidders to complete a pricing schedule by entering lump-sum prices for the basic requirements and for each of the four option items of work,

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994), authorizes the SBA to contract with government agencies and to arrange for the performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses.

at contract line item numbers (CLIN) 0001, 0002, 0003, 0004, and 0005, respectively. CLIN 0001, the base bid, covered the construction of a new water treatment plant. Two of the optional CLINs are uncontroversial in this protest: CLIN 0002 covered landscaping extension work and CLIN 0005 covered steel panel fencing work.

The remaining two CLINs are at issue here: CLIN 0003 covered the cost of paving the project, while CLIN 0004 covered the cost of a new storage tank, rather than salvaging one from the existing facility. Referred to in the record as “deductive options,” CLIN 0003 and CLIN 0004 were intended to be exercised to scale back the project in the event that funds were not available for the project.²

The IFB included the standard Evaluation of Options clause, Federal Acquisition Regulation (FAR) § 52.217-5, which provides:

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).³

IFB at 15-16. The IFB also included the Contract Award–Sealed Bidding–Construction clause of FAR § 52.214-19, which provides that the agency will award a

² The purpose of these CLINs was set out in a solicitation amendment as follows:

b. OPTION 0003; Paving. This refers to not paving all the project . . . The contractor would be expected to adjust grading, for the 2-inch loss in paved surfacing. This is essentially a deductive OPTION, from what is shown in the current design, and would involve a credit and be considered a straight substitution in the design, if exercised.

c. OPTION 0004; Automatic Salt Feed System. This actually refers to substituting the designed new Brine Storage Tank, with one salvaged from the existing [water treatment plant]. . . . This OPTION is also considered a deductive OPTION, and may involve a credit and be considered a straight substitution in design, if exercised.

IFB amend. No. 3, at 1.

³ FAR § 17.206(b) provides in part that:

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.

contract for any line item or combination of line items to the conforming bid found to be the most advantageous to the government, considering only price and price-related factors specified in the IFB. IFB at 15.

By bid opening, the Corps had received ten bids, including those of TNT and All Cities, which were the apparent two lowest-priced bids. The breakdown of these bids is as follows:

	TNT	All Cities
Base Bid (CLIN 0001)	\$3,553,636	\$3,482,600
CLIN 0002	20,000	69,100
CLIN 0003 (deductive)	-28,500	33,200
CLIN 0004 (deductive)	-42,000	0
CLIN 0005	9,000	9,000

Agency Report (AR), Tab 3. Funding in the amount of \$3,800,000 was available for the entire project. Following bid opening, the contracting officer determined that because sufficient funds were available for the complete water treatment facility, in accordance with FAR § 17.206(b), it was in the government's best interests to exclude deductive options 0003 and 0004 to determine the low bidder. In this determination, the contracting officer stated:

The option items CLIN 0003 and 0004 are deductive options. If funds were not available for the full basic requirement of the complete water treatment plant, the paving and automatic salt feed system could be replaced by less costly options of no paving and use of the salvaged water storage tank for the demolished plant.

After opening of the bids I have determined that funds are available to award the full project to include paving of all surfaces and use of the newly designed automatic salt feed water storage tank as part of the water treatment plant. While savings could be utilized by exercising the deductive option CLINs 0003 (no paving-only base course) and 0004 (substitution of new tank with salvaged manual-feed tank from existing water treatment plant), it is clearly not in the best interest of the Government to do so when funds are available for a fully modern water treatment plant.

The fact that funds are available for the complete water treatment plant makes the alternative of CLIN 0003 and 0004 unnecessary; therefore they should not be used to determine the low bidder.

AR, Tab 5, Contracting Officer's Memorandum at 1-2. This determination was approved at a level above the contracting officer. Since All Cities' total evaluated bid of \$3,560,700 for the base item plus the two additive options (CLINs 0002 and 0005)

was low when compared to TNT's 3-item total of \$3,582,636, the contracting officer selected All Cities for award.

TNT protests that the agency's decision to exclude the prices for deductive CLINs 0003 and 0004 in determining the low bidder was inconsistent with the IFB terms, which required the agency to add the total price for all options to the total price for the base bid to determine the low bidder, and TNT contends that it was entitled to the award based on its low aggregate bid for all five line items.

We find that the agency acted properly. We recognize that the agency's inclusion of additive and deductive options in the solicitation could be viewed as confusing; any confusion, however, was apparent on the face of the solicitation, and therefore had to be protested before bid opening. 4 C.F.R. § 21.2(a)(1) (2001). Effectively, the deductive options deleted work included within the base bid (CLIN 0001). The result was that calculating the bidders' prices for the maximum amount of work required setting aside the deductive options (CLINs 0003 and 0004), which is what the agency did. There are, in brief, two questions presented by the protest: whether the agency was permitted to award a contract for the maximum amount of work, and whether, in selecting the contractor for such an award, the agency should have considered the CLIN 0003 and 0004 prices. As for the first question, we see no basis in the solicitation, and the protester offers no basis, for prohibiting the agency from awarding a contract for the maximum amount of work (that is, CLINs 0001, 0002, and 0005). To the extent that the protester believes that the agency was required to follow the steps in FAR § 17.206(b) to do that (because it was not considering CLIN 0003 and 0004 prices in its evaluation for award), it followed those steps: it made a "best interests" determination and obtained approval at a level above the contracting officer. Once the agency thus reasonably decided to award a contract for the maximum amount of work, it was required to evaluate prices for that scope of work, which meant that it was prohibited from considering CLIN 0003 and 0004 prices.⁴ See Ahern & Assocs., B-254907.4, Mar. 31, 1994, 94-1 CPD ¶ 236.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ Because the agency properly decided not to consider the prices for the deductive options, we find without merit TNT's complaint that the pricing schedule was defective or otherwise ambiguous because (as is evident from the pricing table set out above) some bidders entered an affirmative dollar amount for those deductive options, while others entered a negative dollar amount. While that might have mattered if the agency were required to consider those CLINs, once the agency reasonably decided not to consider them, their pricing became irrelevant, and could not have prejudiced the protester.