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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-217073; B-218131 DATE: April 9, 1985

MATTER OF: Browning-Ferris Industries of the
South Atlantic, Inc; Reliable
Trash Service Co. of Md., Inc.

DIGEST:

1. Although solicitation was ambiguous for failure to indicate that option prices would be evaluated, award may be based on such an evaluation since government's needs will be met and there is no evidence in the record that other bidders would be prejudiced. Bare conclusion by agency that some potential bidders may have been discouraged from competing because of the ambiguity in the solicitation, standing alone, is not sufficient to support a finding of prejudice.
2. Successful protester's claim for costs of pursuing protest and bid preparation will not be considered unless agency does not make recommended award to protester.

Reliable Trash Service Co. of Md., Inc., protests the cancellation of invitation for bids (IFB) No. F44600-84-B-0057 issued by Langley Air Force Base for refuse collection services. Reliable, the prospective awardee under the canceled IFB, contends that the agency has failed to show any compelling reason for the cancellation. Another bidder, Browning-Ferris Industries of the South Atlantic, Inc. (BFI), argues that award to Reliable

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under the original IFB would be improper. We sustain Reliable's protest and deny BFI's protest.^{1/}

The IFB called for bids for refuse collection services at seven government installations for a total of 4 years, one base year and 3 option years. The base performance period under the contract was to be 1 year, from October 1, 1984 or the date of award, whichever was later, through September 30, 1985. The agency retained the right to extend the contract for the 3 option years.

The IFB did not indicate whether the bidders' option year prices would be evaluated for purposes of making award. The standard clause providing for evaluation of option prices, Federal Acquisition Regulation (FAR), § 52.217-5, 48 C.F.R. § 52.217-5, was set out in the IFB as one of a list of FAR clauses which, if marked with a check, were incorporated in the IFB; the clause, however, was not checked. Nevertheless, the agency evaluated the seven bids received on the basis of their aggregate prices for the base and option years. Reliable was the low bidder on the basis of its aggregate bid for the 4 years.

Before award was made to Reliable, the agency canceled the solicitation. The agency states that it intended to evaluate both base and option year prices, but that the contracting officer inadvertently failed to mark the Evaluation of Options clause to incorporate it in the IFB. The agency argues, and BFI agrees, that the failure to indicate whether option prices would be evaluated created an ambiguity in the IFB which may have misled potential bidders and discouraged them from competing. The agency maintains that in view of the large business

^{1/} BFI filed its protest challenging award to Reliable under the original IFB before the agency canceled the solicitation. Cancellation of a solicitation generally renders academic a protest against award under the solicitation. Petralloy Corporation d/b/a Factech Company, B-212592, Sept. 21, 1983, 83-2 CPD ¶ 354. We conclude, however, that the action originally challenged by BFI--award to Reliable under the IFB--is proper. Therefore, we have considered BFI's protest on the merits along with the agency's position that cancellation was justified.

investment required by the contractor to perform these services, an award on the basis of just the base period was not practicable, and concludes that cancellation of the IFB and resolicitation were justified by the prejudice it maintains was caused to potential bidders by the defect in the solicitation.

Reliable contends that there is no evidence that the seven bidders under the IFB were prejudiced as a result of the agency's failure to incorporate the Evaluation of Options clause. Reliable points out that none of the bidders, except BFI, has claimed that it was misled by the IFB, and questions the reasonableness of BFI's claim of prejudice. Reliable also contends that the agency's conclusion that potential bidders were prejudiced by the defect in the IFB is based on speculation only, and does not constitute the compelling reason required under the FAR, 48 C.F.R. § 14.404-1, to justify cancellation.

We agree with the agency that the IFB was ambiguous because the Evaluation of Options clause was omitted. An IFB must clearly state the basis on which bids will be evaluated for award. Williams Elevator Co., B-210049, Sept. 15, 1983, 83-2 CPD ¶ 327. More specifically, the regulations provide that a solicitation which calls for bidders to submit option prices must state whether the evaluation will include or exclude option prices. FAR, 48 C.F.R. § 17.203(b). Here, due to omission of the Evaluation of Options clause, the IFB failed to indicate how bids would be evaluated--whether based on aggregate prices or the base year price alone.

The fact that a solicitation is deficient in some way does not justify cancellation after bid opening, however, if award under the IFB would meet the government's actual needs and there is no showing of prejudice to other bidders. Richard Hoffman Corp., B-212775.2, Dec. 7, 1983, 83-2 CPD ¶ 656. Here, the agency does not dispute that award under the original IFB based on evaluation of option prices will satisfy the government's actual needs, since Reliable, the prospective awardee, has offered to provide the refuse collection services called for in the IFB.

More importantly, we see nothing in the record to support the agency's conclusion that award under the original IFB would prejudice other bidders. The agency

itself does not contend that any of the seven actual bidders would be prejudiced. We see nothing in the bidding pattern of the seven bidders to suggest that any bidder was misled by the ambiguity in the solicitation into assuming that only base year prices would be evaluated. Three bidders submitted level bids and four submitted escalating bids, with each option year's price increased by a uniform percentage. There thus is no indication that any bid was structured with a low base year price relative to the option year prices, as would be expected if a bidder assumed that only its base year price would be evaluated.

The agency not only fails to argue that any of the bidders were prejudiced, but also disagrees with the claim by BFI--the only bidder which protested award under the IFB--that it was misled by the ambiguity. BFI contends only that it would have submitted different, presumably lower, base year prices had it known that award would be made on the basis of aggregate prices. BFI has offered nothing beyond its bare allegation, however, to explain how the omission of the Evaluation of Options clause reasonably could have affected its base year bid. In fact, we find it more likely that a bidder would offer the lowest possible price for the base year if it thought that price would be the only one evaluated. In our view, BFI's self-serving contention that it would have bid differently is insufficient to support a finding of prejudice. See A to Z Typewriter Co.; Allen Typewriter Co., B-215830.2; B-215830.3, Feb. 14, 1985, 85-1 CPD ¶ 198. In addition, as the agency notes, BFI is the incumbent contractor, having been awarded the two most recent contracts for a total of 5 years. Bids under the IFBs for those two contracts were evaluated using both base and option years prices. Due to its experience as the incumbent contractor, it seems likely that BFI would have assumed that the agency intended to continue its practice of evaluating option year prices.

In cases where we have upheld cancellation of an ambiguous solicitation, the ambiguity affected how the bidders had bid, and award under the solicitation therefore would have resulted in prejudice to some of the bidders. Compare Uni-Con Floors, Inc., B-193016, Apr. 19, 1979, 79-1 CPD ¶ 278 (cancellation is appropriate where IFB is ambiguous regarding whether bidders were to submit separate or lump sum bids and bidders clearly would

have bid differently had the IFB been clear) with A to Z Typewriter Co.; Allen Typewriter Co., supra (award may be made under IFB for requirements contract which failed to state expressly that each unit price would be multiplied by the estimated quantity for evaluation purposes, since no bidder showed it was prejudiced by the ambiguity). Here, the agency does not contend that any of the actual bidders was misled as to its intention to evaluate option year prices, and BFI, the only bidder to claim prejudice, has failed to explain in any reasonable way how its bid was affected by the ambiguity.

We recognize that allowing a contracting agency to make award based on one interpretation of an ambiguous solicitation may be inappropriate in some cases, where it would create the appearance of allowing the agency to manipulate the procurement after the fact and select a contractor on an arbitrary basis. In our view, this case does not present that problem, since making award based on both base and option year prices clearly reflects the agency's actual needs for refuse collection services on a continuing basis and is consistent with the agency's past practice, which was well-known to BFI as the incumbent contractor.

With regard to the contention that potential bidders were misled by the ambiguity in the IFB, BFI maintains that because the Evaluation of Options clause was omitted, it was not clear to other potential bidders that the agency intended ultimately to extend the contract through the 3 option years. Without such an indication of the agency's intent, BFI argues, potential bidders might have been discouraged from bidding on a contract covering the base year only, since the services called for under the IFB require a substantial capital investment.

We find this argument unpersuasive. The IFB included a standard clause, set out in FAR, 48 C.F.R. § 52.217-9, which reserves to the agency the right to extend the contract through the option years. By including this clause in the IFB, the agency gave bidders a clear indication of its intent to consider extending the contract beyond the base year.^{2/} Omission of the Evaluation of

^{2/} The FAR clause contemplates that the contract will specify a date by which the agency will notify the contractor that it has decided to exercise the options. As BFI notes, the solicitation does not specify such a date. We regard this as a minor deficiency which does not cast doubt on the agency's expressed intention to retain the right to extend the contract through the option years.

Options clause cannot reasonably be interpreted to make the agency's intent ambiguous, since evaluating option prices for purposes of the initial base year award is not a prerequisite to later exercising the options. To the contrary, the agency may retain the right to exercise options without evaluating option prices in making the initial award. See FAR, 48 C.F.R. §§ 17.203(b), 17.206(a), 17.208(a), (c). Thus, we believe that potential bidders whose incentive for competing was the possibility that the contract would be extended through the option years could not reasonably have concluded, based on the omission of the Evaluation of Options clause, that the agency was unlikely to exercise the options.

In any event, there is nothing in the record to indicate that any potential bidders refrained from bidding because of the ambiguity in the IFB caused by the omission of the Evaluation of Options clause. Although the agency states that there was prejudice to potential bidders, it has not explained in any way who the potential bidders might be or how they might have been prejudiced. While prejudice to potential bidders can be sufficient to justify cancellation, in our view the finding of prejudice must be based on more than the agency's bare speculation that some potential bidders may have been misled in some unspecified way. Cf. Jackson Marine Co., B-212882, B-212882.2, Apr. 10, 1984, 84-1 CPD ¶ 402 (agency reasonably concluded that potential bidders may have been discouraged from bidding under defective IFB where only two bids were received in response to 21 invitations sent out by agency); Doug Lent, Inc., B-209287.2, June 21, 1983, 83-2 CPD ¶ 9 (agency reasonably determined that potential bidders were prejudiced by defective specification in light of protest filed by a potential bidder who was precluded from competing because of defective specification).

Here, the agency has not elaborated at all on the rationale for its conclusion that potential bidders would be prejudiced. In our view, basing cancellation of the IFB on such a conclusory finding by the agency, standing alone, effectively would nullify the requirement for a showing of prejudice, since, in all cases involving deficient solicitations, some potential bidder conceivably might have been misled or otherwise prejudiced. The requirement for a showing of prejudice to support an

agency's decision to cancel is based on the serious consequences of canceling a solicitation after bid opening. Such a cancellation tends to discourage competition because it results in making all bids public without award, which is contrary to the interests of the low bidder, and because rejection of all bids means that bidders have expended resources in preparation of their bids without the possibility of acceptance. See GAF Corp.; Minnesota Mining and Manufacturing Co., 53 Comp. Gen. 586, 591-592 (1974), 74-1 CPD ¶ 68.

We find that the agency has not shown that award under the original IFB would fail to meet the government's needs or would result in prejudice to other bidders. We therefore conclude that award under the original IFB based on the bidders' aggregate prices for the base and option years would be proper. By separate letter to the contracting agency, we are recommending that the IFB be reinstated and award be made to Reliable as low bidder, if that firm's bid is found responsive and the firm responsible.

In view of our conclusion that award under the IFB is proper, we sustain Reliable's protest against cancellation of the IFB and deny BFI's protester against award to Reliable.

Reliable also claims the costs of preparing its bid and pursuing the protest under section 21.6(d) of our Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1985)). Our regulations provide, however, that we will not award such costs to a successful protester where we recommend that the contract be awarded to the protester and the protester receives the award. Bid Protest Regulations, § 21.6(e). Here, we recommend that, if otherwise proper, award be made to Reliable. Consequently, we will not consider Reliable's claim unless that firm does not receive the award.

for *Harry D. Van Cleave*
Comptroller General
of the United States