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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: N-K Construction Co., Inc.--Reconsideration and Claim for Protest Costs
File: B-224534.2, B-224534.3

Date: April 24, 1987

DIGEST

1. Decision that contracting agency improperly evaluated option prices to determine low bidder under solicitation that effectively indicated such prices would not be evaluated is affirmed on reconsideration since it has not been shown to be legally or factually wrong.

2. Protest costs may be paid where protester would have been found low if bids had been evaluated properly but General Accounting Office recommends recompetition with revised bid evaluation method instead of award to the firm.

DECISION

This decision responds to two submissions: (1) a request by J.A.K. Construction Co., Inc., that we reconsider our decision in N-K Construction Co., Inc., B-224534, Feb. 19, 1987, 87-1 C.P.D. ¶ ___, in which we sustained N-K's protest of the contract award to J.A.K. under Department of the Army invitation for bids (IFB) No. DAKF27-86-B-0029; and (2) a request by N-K for the costs of filing and pursuing the protest.

We affirm our decision, and we find N-K entitled to the claimed costs.

Prior Decision

The IFB was for building repair and renovation at Fort George G. Meade, Maryland. The bidding schedule sought lump sum bids for three items: base bid (repair and renovate the specified building); additive No. 1 (replace an addition on the building); and option No. 1 (interior work in the basement). The schedule also required bids on a price per foot basis for four requirements items: replace floor joists, fascia, wall studs, and roof sheathing.

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N-K submitted the low total bid, $769,118.60, for the base, requirements and additive items, with J.A.K. second low at $807,424.10. The Army, which had $843,000 in funds available for the contract at bid opening, was prepared to award N-K the contract. When additional funds became available to pay for the option item, however, the Army awarded a contract for all items to J.A.K., since the firm's total bid, inclusive of $163,000 bid for the option, was $970,424.10, compared to N-K's total, inclusive of $225,800 bid for the option, of $994,918.60.

We sustained N-K's protest that the selection of the awardee should have been based on an evaluation exclusive of the option prices. We stated the general rule that option prices can be used in an evaluation only if the solicitation advises bidders that they will be, and we noted three elements of the Army's solicitation which effectively indicated that the price offered for the option item would not be used in evaluating the low bidder. The first was the fact that the IFB did not include any statement regarding evaluating options exercised at award. The second was that the only reference in the solicitation to the way the low bid would be determined did not mention option prices; a note to bidders following the invitation's schedule stated that for evaluation purposes extended prices for the requirements items "will be added to the Base Bid and award will be made to the bidder with the lowest total." The third element was a further statement in the same note that the option would be exercised "during the construction" of the base bid and/or additive item.

Reconsideration Request

J.A.K. challenges our finding that it would be inconsistent with the IFB to evaluate the option prices. J.A.K. points out that the note following the bidding schedule stated that award would be based on the base and requirements bids and did not mention the additive item, yet the additive prices in fact were evaluated; J.A.K. argues that if the additive item could be considered, so could the option prices. Second, J.A.K. argues that the Federal Acquisition Regulation (FAR) does not require a statement in a construction contract solicitation that options will be evaluated, so that a bidder cannot rely on the absence of such a statement as an indication that option will not be evaluated. J.A.K.'s third point is that the bidding note that the option would be exercised "during the construction" permitted the government to exercise it at any time before the completion of the work, including prior to the award. J.A.K. suggests that even N-K knew this might happen, as evidenced by the fact that N-K, before the additional funds became available, urged the Army to include the option work in N-K's anticipated contract.

J.A.K.'s arguments do not persuade us to reverse our decision. As to the firm's first point, bids indeed must be evaluated on the basis set out in an invitation, and we recognize that the invitation in this case mentioned only the base and requirements bids as evaluation factors. The Army therefore should not have considered the additive item prices in comparing the bids. We did not object to the evaluation on that basis, however, because it did not prejudice J.A.K. The reason is that, unlike the situation with the option item prices, evaluating the additive prices did not affect the bidders' standing, that is, N-K's total bid was lower than J.A.K.'s on any evaluation basis exclusive of the option prices. The total bids including the additives, as set out above, were $769,118.60 for N-K and $807,424.10 for J.A.K.; N-K's total base and requirements bid only was $684,618.60, compared to J.A.K.'s total base and requirements bid of $742,424.10. (N-K's base bid alone also was lower than J.A.K.'s: $683,364.00 vs. $742,000.00.) Indeed, Department of Defense Federal Acquisition Regulation Supplement (DFARS), 48 C.F.R. § 236.303 (1985), permits the evaluation and award of an additive in a military procurement if there are sufficient funds available at bid opening or, if funds only later become available, so long as such evaluation does not change the original bidding results.

J.A.K.'s second point is that because the FAR does not require a statement in these types of contracts that option prices will be evaluated a bidder could assume they would be considered. We do not agree. Essentially, the option item was no different from the additive item except that it could be exercised during the construction period. As we explained in our prior decision, if the option had been labeled an additive it could not have been evaluated to cause J.A.K. instead of N-K to be the low bidder because of the DFARS provision at 48 C.F.R. § 236.303. We do not think the rules should change just because the item was labeled an option instead of an additive.

Finally, we continue to view the IFB note about when the option will be exercised as an indication that exercise will occur, as the note says, "during the construction" of the other work, not at award. The fact that N-K may have urged the Army to exercise the option at award does not establish that N-K knew the option would be evaluated, but instead suggests that N-K knew it was entitled to the contract as the low bidder under a proper evaluation according to the IFB's selection scheme.

To prevail in a request for reconsideration, a firm must show that our prior decision was legally or factually wrong. Bid Protest Regulations 4 C.F.R. § 21.12 (1986). J.A.K. has not done so.

Claim for Costs

Although we sustained N-K's protest, finding that the option item price could not properly be evaluated to determine which bid was low, we did not recommend award to the firm. The reason was that it was clear the government needed and could afford to buy the option work, and it did not make sense to award N-K a contract and solicit separately for the option work. We therefore recommended that J.A.K.'s contract be terminated for the convenience of the government and that a new solicitation be issued, to include what had been designated optional work, with provisions that insure award is made on the same basis on which firms are advised their bids will be evaluated.

N-K argues that it should be reimbursed the costs of filing and pursuing the protest. We agree. Regardless of what happens on resolicitation, our sustaining N-K's protest furthered the purpose of the requirement in the Competition in Contracting Act of 1984, 41 U.S.C. § 253a(b)(1) (Supp. III 1985), that an agency ensure offers in a sealed bid procurement are evaluated consistent with the solicitation's statement of the factors the agency expects to consider in selecting an awardee. See 31 U.S.C. § 3554(c)(1) (Supp. III 1985); Tandem Computers, Inc., B-221333, Apr. 14, 1986, 65 Comp. Gen. ___, 86-1 C.P.D. ¶ 362.

Our prior decision is affirmed in response to J.A.K.'s reconsideration request. N-K should submit its claim for protest costs directly to the Army. 4 C.F.R. § 21.6(f).

for Milton J. Socolar
Comptroller General
of the United States