P. Ahearn

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bay Decking Company

File: B-239075

Date: July 24, 1990

Thomas J. Touhey, Esq., and Kristopher M. Huelsman, Esq., Dempsey, Bastianelli, Brown & Touhey, for the protester.
Douglas P. Larsen, Jr., Esq., and Lawrence E. Little, Esq., Office of the General Counsel, Department of the Navy, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that competition for requirements contract was unequal because allegedly erroneous advice was given to the protester with respect to an ordering clause, which provided for ordering by the most cost-effective method to the government, is denied where there is no indication in the record that any erroneous advice was given and, in any event, the ordering clause did not affect the agency's already existing ability to order in the most cost advantageous manner.

DECISION

Bay Decking Company protests the award of a contract to Wolverine Blasting, Inc. under request for proposals (RFP) No. N00406-90-R-0175, issued by the Department of the Navy for equipment, labor, and material involved in their annual requirement for nonskid replacement covering on ship decks in the Puget Sound area. Bay Decking alleges that the competition was conducted on a unequal basis, primarily due to allegedly different advice given to offerors on the operation of an ordering clause.

We deny the protest in part and dismiss it in part.

The RFP contemplated award of a fixed-price, indefinite-quantity, indefinite-delivery contract. It requested fixed unit prices for tasks associated with the requirement on the

basis of various subline item square foot areas. It further provided estimated quantities for each subline item.1/ In the evaluation of offers, the subline item unit prices were to be multiplied by the estimated quantities and the extended line items totaled. The RFP provided for a single award to the acceptable offeror whose total offer on all items was most advantageous to the government.

At issue here is clause H-200, entitled "Quantity of Work Ordered on Delivery Order," which was added by amendment No. 0001. It stated that "the quantity of work to be ordered on each individual delivery order will utilize the line items and prices that are most cost effective to the government." Amendment No. 0005, issued at the opening of discussions, provided further elaboration on the clause, stating, "for example, if the government has a requirement for 60,000 square feet of non-skid and it is more economical to place six orders at the line item for up to 10,000 square feet it reserves the right to do so."

Prior to the closing date, Bay Decking objected to the agency that the ordering clause permitted artificial grouping of work and that its operation would ignore cost differences between different area sizes of work. The protester requested that the RFP be amended to state that delivery orders would not be artificially grouped in order to take unfair advantage of price differences in order quantities. The Navy advised Bay Decking that the solicitation would not be changed, and insisted on its right to place delivery orders using the subline item of its choosing.

The Navy received five initial offers. Bay Decking was the initial low offeror at a price of $2,842,670; Wolverine was second low at $2,988,500. Discussions were held and best and final offers (BAFO) were received. Wolverine's BAFO price was low at $1,855,981 and award was made to the firm on March 14, 1990. Bay Decking's BAFO price was third low at $2,311,237. (The second-low offeror proposed a BAFO price of $1,996,030.)

1/ For example, under the task "abrasive blast steel surface(s) in preparation for primer/non-skid," three separate subline item unit prices were requested as follows: (1) areas less than 10,000 square feet, with an estimated quantity of 50,000 square feet, (2) areas greater than 10,000 square feet, with an estimated quantity of 80,000 square feet, and (3) areas greater than 50,000 square feet, with an estimated quantity of 400,000 square feet.

Bay Decking filed an agency-level protest after the RFP closing date, but prior to award, contending it had learned that the Navy did not intend to abide by the ordering clause and that it would break up its requirements into small quantity orders. The agency denied the protest stating that it fully intended to utilize the clause to its maximum benefit during the administration of the contract and that nothing to the contrary was ever contemplated or communicated. Bay Decking's subsequent protest to our Office was timely filed within 10 working days of the agency's denial of the protest.

Bay Decking argues that the competition improperly was conducted on an unequal basis because (1) all offerors were not provided the same advice with respect to the operation of the ordering clause, and (2) the clause was subject to different interpretations, rendering it ambiguous.2/ On the first allegation, Bay Decking asserts that it changed the basis upon which it submitted its offered prices, from actual cost for the estimated quantities to average cost for the work, based on the Navy's advice as to its intention to abide by the ordering clause. However, the protester contends that contrary advice was given to Wolverine--that the Navy in fact intended to break up its requirements into small delivery orders. This method of ordering, the protester contends, would not result in the most cost-effective combination, as required by the clause. As evidence that the Navy did not intend to abide by the clause and that this was communicated to Wolverine, the protester submits the first three delivery orders issued under Wolverine's contract. Two of these delivery orders were issued on March 16 and one on March 21; all had delivery dates of April 30, 1990. While each order encompassed work on a different hangar bay of the same aircraft carrier, the protester contends that instead of issuing three separate orders under the "areas greater than 10,000 square feet" ordering category, the agency should have grouped the work

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2/ As a preliminary matter, the Navy argues that Bay Decking is not an interested party to protest the award under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1990), because the firm is the third-low offeror and would not be in line for award if its protest were upheld. Bay Decking, however, is not merely challenging the award to Wolverine, but is arguing that had it been afforded the same information as Wolverine it could have lowered its price sufficiently to become low. Bay Decking therefore is an interested party to pursue this matter. Lucas Place, Ltd., B-238008 et al., Apr. 18, 1990, 90-1 CPD ¶ 398.

and issued one order under the "areas greater than 50,000 square feet" category; according to the protester, this would have been the most cost-effective combination, as required by the clause. Bay Decking argues that if it had not received erroneous advice from the Navy as to the agency's intention to abide by the clause, it would not have changed the basis for its price calculation and would have maintained its position as the low offeror.

As for the second argument, Bay Decking asserts that the pricing patterns of the offers received by the Navy demonstrate that offerors responded to the clause based upon different interpretations. Bay Decking interpreted the ordering clause as rendering the estimates meaningless and therefore necessitating a change in its basis for price calculation. The fact that other offerors did not make a similar change, Bay Decking contends, indicates that all offerors were not operating with the same understanding of the clause. Therefore, the protester argues that the clause was ambiguous and the requirement should be recompeted.

The Navy states that it did not provide Wolverine with a different explanation of the clause than that provided in the solicitation, as amended. Further, the Navy maintains that the clause actually did not provide for a method of ordering any different than the usual method available under a requirements contract, i.e., the manner most cost advantageous to the government. The agency explains that the clause here was intended simply to highlight this fact for offerors.

Moreover, the Navy contends that its actual ordering was not contrary to the clause. According to the agency, it was not required to order by grouping or separating quantities of work solely on the basis of the lowest subline item price for a task; rather, the agency maintains that, as always is the case, it was permitted to consider other factors affecting the total actual cost to the government, such as the availability of shipboard areas for work. The agency states that the delivery orders Bay Decking questions were issued for work in three different aircraft hangar bays at times when all three bays could not be worked on simultaneously. According to the agency, to group the orders under these circumstances, as the protester suggests, would leave the government susceptible to delay claims which, if

successful, would increase the ultimate cost to the government.3/ The Navy concludes that it ordered in the manner most cost-effective for the government after consideration of all potential costs.

We agree with the Navy. First, while Bay Decking speculates that the agency provided Wolverine with different advice on the ordering clause, there is no evidence of that in the record; the record indicates only that the offerors were provided the same clause, and the same explanation of the operation of the clause in amendment No. 0005. Neither is there any indication that any offeror, or the Navy itself, knew how the work would be grouped when actual ordering took place. Bay Decking's unsupported speculation is insufficient to sustain the protest. Electrospace Sys., Inc., B-234006.2, Feb. 13, 1990, 90-1 CPD ¶ 184.

Moreover, we agree with the agency that the clause did not change in any way the manner in which it ordinarily is permitted to order work under a requirements contract. Even without the clause, the government was entitled to order in the most cost-effective manner, after consideration of the least expensive subline item and factoring in considerations such as the availability of work space and the potential for delay claims, as it did here. The ordering clause merely highlighted this government objective and in no way altered the Navy's discretion to administer the contract as it determined all circumstances dictated. The agency's explanation of its smaller quantity ordering to date seems reasonable given its past experience with delay claims under prior contracts for the requirement. (Although it is not apparent why the two delivery orders issued on the same day could not have been combined, doing so would have had no effect on price; the amounts under those orders do not total over 50,000 square feet, the next largest ordering category.)

We also find nothing ambiguous in the language of the ordering clause and are not persuaded that the pricing patterns Bay Decking cites as evidence of an unequal understanding of the ordering clause show anything other than varying business judgments. While Bay Decking believes its pricing pattern was the only appropriate one in light of

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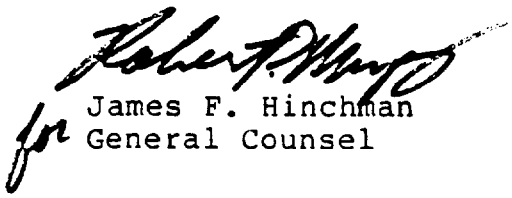
3/ The Navy reports that it in fact experienced delay claims in previous contracts for the requirement from Bay Decking, the incumbent contractor, when the agency attempted to take advantage of the lower price on the higher quantity subline items by grouping work orders, but all shipboard areas were not available simultaneously for work by the contractor.

the addition of the clause, we fail to see why offerors reasonably could not have chosen to price their offers to take advantage of economies of scale, even while recognizing the agency's ability to order in the most cost-effective manner to it. Again, as we agree with the agency that the ordering approach specified in the clause is generally available to the government, we find no basis for assuming that adding the clause here dissuaded offerors from pricing their proposals as they otherwise would.

Finally, Bay Decking contends that ordering in the most cost-effective combination could render the estimates upon which the evaluation was based meaningless. This ground of protest is untimely. Our Bid Protest Regulations require that protests based upon alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation be protested no later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1). Since the ordering clause was added by amendment, Bay Decking's protest filed after award is untimely.

The protest is denied in part and dismissed in part.



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