McArthur
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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Foley Company

File: B-245536

Date: January 9, 1992

Seth Price, Esq., and Connie H. Buffington, Esq., Shapiro, Fussell, Wedge & Smotherman, for the protester.
Robert S. Marconi, Esq., Stanislaw, Ashbaugh, Chism, Jacobson & Riper, for an interested party.
Siri C. Nelson, Esq., Mary S. Byers, Esq., Craig R. Schmauder, Esq., and Tracy Gruis, Esq., Office of the Chief of Engineers, for the agency.
C. Douglas McArthur, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where bids, including option prices, exceeded the available funding and requiring activity declined to make additional funds available to exercise the option because the work was no longer needed, the contracting activity, in accordance with the solicitation provision for evaluation of options, reasonably determined that evaluation of options would not be in the best interest of the government.

DECISION

Foley Company protests the award of a contract under invitation for bids (IFB) No. DACA67-90-B-0021, issued by the Corps of Engineers for building of jet fuel storage/dispensing support facilities at Malmstrom Air Force Base (AFB) in Montana. The protester argues that the agency did not evaluate the option item as provided for by the solicitation, and that it is the low bidder based on an evaluation which includes the option item.

We deny the protest.

On February 23, 1990, the agency issued the solicitation for a firm, fixed-price construction contract as follows: contract line item number (CLIN) 0001, all work for a KC-135R jet fuel storage/dispensing fuel facility, exception work under CLINs 0002-0004; CLIN 0002, all work for existing utility crossings not shown on drawings; CLIN 0003, instal

supply and return systems, 140 lateral feet; CLIN 0004, install supply and return systems, 80 lateral feet. A Department of Defense-imposed construction moratorium resulted in postponement of bid opening; during that time, the agency issued 12 amendments to the solicitation, incorporating various changes to the statement of work and other general contract clauses.

On July 10, 1991, the agency issued amendment -0010 to the IFB, establishing a bid opening date of August 23, 1991, and revising the bid schedule to delete original CLINs 0003 and 0004 and to provide for optional CLIN 0003, all work for lateral valve pit No. 7, hydrant pits Nos. 22 and 23, and fuel line connecting lateral pits Nos. 6 and 7.[1] The IFB as amended contained the standard clause at Federal Acquisition Regulation (FAR) § 52.217-5 (FAC 90-3) advising offerors as follows:

> "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. . . ."

The amended solicitation provided for award to the responsible bidder whose price was most advantageous to the government, considering only price and the price-related factors specified in the solicitation.

The agency received five bids. The protester bid $5,245,700 for the two base items but $517,000 for optional CLIN 0003, for a total of $5,762,700 including options. Morgan and Oswood Construction Co., Inc., the eventual awardee, submitted a lower bid for the base items--$5,217,200--but a higher bid--$563,800--for the optional item, for a slightly higher evaluated bid total of $5,781,000. The agency initially determined that the protester was the low bidder, but since all bids exceeded the $5.7 million available for the project, the agency contacted Malmstrom AFB, to ensure that the Air Force would provide the additional funds needed.

On August 29, the Air Force advised the contracting specialist orally that it no longer needed the optional work and would not be providing the additional funding needed due to "mission changes," confirming this information by teletype the next day. On September 5, the contracting officer

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[1]Amendments -0011 and -0012 contained changes to the statement of work not relevant to the issues in this protest.

prepared a determination and finding in accordance with FAR § 17.206(b) (FAC 90-4), that it was no longer in the government's best interest to evaluate bids including the optional item, since the requiring activity no longer had a need for the work. The Commanding Officer of the Seattle District, which had issued the solicitation, concurred with this determination and finding, and approved the contracting officer's recommendation to award a contract to Morgan and Oswood for the base items. The agency awarded a contract to Morgan and Oswood, and this protest followed.

The protester argues that the solicitation requires the agency to award a contract based on evaluation of the option item as well as the basic items; to support a decision not to evaluate option prices, the agency must execute a determination that evaluation of the option is not in the best interest of the government, in accordance with FAR § 17.206(b). Such a determination must be reasonable, and the protester argues that in the instant case, there is no factual basis for the agency's determination; the protester submits evidence to show that rather than the agency's needs decreasing, base realignments have increased the agency's needs. Since issuance of Amendment -0010 on July 8, the protester contends, based on news reports, that the Air Force has decided to assign an additional five tankers to Malmstrom AFB, in addition to the eight to be assigned when the agency issued the solicitation, for a total of 13 additional tankers. Foley also contends that a fluctuation in the agency's needs, or uncertainty as to the availability of funds to perform the work does not justify an agency's decision not to evaluate options in determining the low price for the purpose of award.

We disagree. Prior to 1988, the FAR stated that an agency could provide for evaluation of options for award of a firm, fixed-price contract, such as the instant case, only with approval at a level higher than the contracting officer. See 48 C.F.R. § 17.206 (1987). If approval was received, the solicitation clause for evaluation of options included in the solicitation stated that award would be based on a total price for the basic requirement and all options. Apart from the instance where the basic and option prices were materially unbalanced, the relevant FAR clauses contained no provision for the contracting officer to reject an offer whose combined basic and option price was low. See 48 C.F.R. § 52.217-5 (1987).

The FAR Subpart 17.2 was revised in 1988, to require, rather than permit, evaluation of options where the contracting officer determined that the government was "likely" to exercise the option; the revised FAR further provided that, despite a solicitation provision for evaluation of options, the agency could decide not to evaluate options where it was

determined at a higher level that evaluation "would not be in the best interest of the Government." 48 C.F.R. § 17.206 (1988) (same language as current FAR § 17.206 (FAC 90-4)). The FAR now provides that a solicitation calling for bidders to submit option prices must explicitly state whether the evaluation will include or exclude option prices; an IFB that does not contain one of these clauses is materially defective. Golden N. Van Lines, Inc., 69 Comp. Gen. 610 (1990), 90-2 CPD ¶ 44. The instant solicitation contained FAR § 52.217-5, providing for evaluation of options; this provision allows the agency discretion, however, not to consider options in determining the low price for award purposes, where it has been determined at a higher level in accordance with FAR § 17.206(b) not to be in the government's best interest to do so.[2] It is therefore clear where the agency has made such a determination and the determination has a reasonable basis, that the contracting officer need not consider options in determining the low price for award purposes. There is no language limiting the time when such a determination may be made, and we conclude that a determination not to evaluate options for the purposes of award may reasonably be made at any time prior to award.

We find the determination made here by the agency was reasonable. The agency was concerned whether bids received would come within the $5.7 million available for the project, resulting in the decision to break out work originally included in CLIN 0001 as a separate option line item under CLIN 0003. Based on the information available prior to receipt of bids, the agency believed, based on previous bids for this type of work, that it would receive bids including options under the programmed amount, that the government was therefore likely to exercise the option, and that the solicitation should therefore provide for evaluation of options. It was not until the agency received bids in excess of the available amount, and the Air Force declined to provide the additional funding needed, that the agency learned that exercise of the option was unlikely. Although the agency concedes that base realignments will

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[2]From the facts of the case, it appears that the clause, FAR § 52.217-4 (FAC 90-3), for evaluation of options to be evaluated at the time of award, would have been the appropriate clause to use. Since that clause also allows for the determination to be made under FAR § 17.206(b), it makes no difference to our conclusion here which clause the agency used. While FAR Subpart 17.2 by its terms does not apply to construction contracts, we conclude that the agency is bound to follow the procedures of FAR § 17.206(b) once, as here, it incorporates either clause providing for evaluation of options.

result in the assignment of additional aircraft to Malmstrom AFB, the agency represents that fewer airplanes will be added than originally anticipated. The agency states that news reports, which the protester relies upon to show that more planes will be assigned to the base, are purely speculative. The reduction in needs and resources resulting from base realignment decisions have made the Air Force reluctant to commit the additional funds required for CLIN 0003. FAR § 17.206(b) provides, as an example of a circumstance that may support a determination not to evaluate offers for option quantities, the situation where there is a reasonable certainty that funds will be unavailable to permit exercise of the option. In view of the Air Force's refusal to provide the additional funds necessary to award the option quantity and its determination that the optional work is no longer required, we find that the Corps of Engineers' determination not to evaluate option prices for award was reasonable and in accordance with the solicitation.

While the protester asserts that the agency's determination was politically motivated, we find no evidence in the record of improper motivation in the decision not to evaluate options. Since we find that the determination was consistent with the solicitation and had a reasonable basis, we deny the protest.

for James F. Hinchman
General Counsel