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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Glen Mar Construction, Inc.

File: B-410603

Date: January 14, 2015

Joaquin M. Hernandez, Esq., and Jeremy T. Vermilyea, Esq., Schwabe, Williamson & Wyatt, for the protester.
Brett Hanke for Hanke Constructors, an intervenor.
David G. Fagan, Esq., Department of Veterans Affairs, for the agency.
Charles W. Morrow, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency made award to other than the lowest-priced bidder in a sealed bid procurement is sustained where the agency evaluated the bid prices for the base construction project and nine options--which were styled as options but were analogous to additive construction items to be selected at the time of award, or within 120 days of award--even though the record reflects that the agency knew with reasonable certainty that it lacked sufficient funds to purchase all of the additive option items.

DECISION

Glen Mar Construction, Inc., of Clackamas, Oregon, protests the award of a contract to Facility Defense Consultants, Inc. d/b/a Hanke Constructors, of O'Fallon, Missouri, under invitation for bids (IFB) No. VA260-14-B-0412, which was issued by the Department of Veterans Affairs (VA) for construction of a medical center building. Glen Mar argues the agency's evaluation of the bidders' prices was unreasonable because it resulted in award to other than the lowest-priced bidder.

We sustain the protest.

BACKGROUND

The IFB was issued on July 21, 2014, as a service-disabled-veteran-owned small business set-aside, and anticipated award of a fixed-priced contract for construction of a primary care building at the VA Medical Center in Vancouver, Washington. See

IFB at 1, 7 and 30. The contractor will be required to complete the work within 545 calendar days of receiving the notice to proceed. Id. at 18. The IFB, which incorporated Federal Acquisition Regulations (FAR) clause 52.214-19, Contract Award-Sealed Bidding-Construction, provided for award to the lowest-priced responsible bidder. IFB at 5.

As relevant here, the IFB's price schedule required bidders to submit unit prices for 10 line items, which reflected a base bid for the construction of the clinic, and 9 additive options, which reflected additional construction features related to the clinic project that the agency might elect to procure.[1] Id. With respect to the options, the IFB stated "[a]ny one of the . . . options items may be awarded depending on the available funding," and that "[p]ricing shall reflect the full scope of each optional item and shall represent only that line item in the event it is exercised at [the] time of award." Id.

The IFB incorporated by reference FAR clause 52.217-5, Evaluation of Options, which states 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. Evaluation of options will not obligate the Government to exercise the option(s).

IFB at 5; FAR clause 52.217-5.

As relevant here, FAR § 17.206(b) states as follows:

> (b) The contracting officer need not evaluate offers for any option quantities when it is determined that evaluation would not be in the

[1] Line item No. 0001 (base bid) required the contractor to provide all materials, equipment, labor and supervision to construct a new approximately 20,000 square foot building as required by the specifications; line item No. 0002 (option No. 0001) was for interior building signage; line item No. 0003 (option No. 2) was for patient overhead lifts; line item No. 0004 (option No. 3) was for a cover over the crosswalk from the new building to building 19; line item No. 0005 (option No. 4) was for an additional parking lot; line item No. 0006 (option No. 5) was for a staff respite area; line item No. 0007 (option No. 6) was for window blinds to all outside windows; line item No. 0008 (option No. 7) was for a wood ceiling to the lobby/waiting area; line item No. 0009 (option No. 8) was for a campus water cross connection under the new building parking lot; and line item No. 0010 (option No. 9) was for landscaping and irrigation. IFB at 5. The IFB advised that the exercise of options would not add additional days to the project's overall performance period. See id.

> best interests of the Government and this determination is approved at a level above the contracting officer. An example of a circumstance that may support a determination not to evaluate offers for option quantities is when there is reasonable certainty that funds will be unavailable to permit exercise of the option.

FAR § 17.206(b).

The IFB also included FAR clause 52.217-7, which, as tailored in the solicitation, stated as follows:

> The Government may require the delivery of the numbered line item, identified in the Schedule as an option item, in the quantity and at the price stated in the Schedule. The Contracting Officer may exercise the option by written notice to the Contractor within 120 calendar days. Delivery of added items shall continue at the same rate that like items are called for under the contract, unless the parties otherwise agree.

IFB at 5, 19.

The VA issued amendment No. A00002 to address questions posed by prospective bidders, including the following question and answer:

> **Question 4** – Will the price evaluation be based on the total price of base + all options?
>
> **Answer:** The Government[']s intent is to award the base bid and any or all of the option bids at time of award. The Government has no sequence of order of the options at time of award. We may award the Base bid, and option 3, it is the Governments[']s discretion. The entire solicitation is contingent on Funding.

IFB amend. No. A00002, at 2.

The VA received timely bids from six firms, including Glen Mar and Hanke. The bid opening was held on August 20, 2014. The contracting officer determined that the agency had sufficient funds available only to award the base bid requirement, along with additive option 1, for interior signage. See Agency Report (AR)[2] at 2. For the

[2] The VA initially filed a request to dismiss the protest, which contained a substantive response to the protest, as well as the documents cited in this decision. We denied the dismissal request, but advised the parties that we would treat the request as the agency's report on the protest. We also permitted the agency to (continued...)

base bid and all additive options, Hanke submitted the lowest bid of $9,036,214, and Glen Mar submitted the second-lowest bid of $9,039,186. Glen Mar's price for the base bid and option 1 was $7,962,932, while Hanke's price for the same work was $8,004,923. Supp. AR, attach A., Bid Abstract, at 1. Although Glen Mar's price for the base bid and additive option 1 was lower than Hanke's price for these line items, the agency selected Hanke's bid for award because its price for the base bid and all additive options was lower. Id. The VA awarded the contract to Hanke on October 8, noting that the value of the contract was $8,004,923. AR, exh. A, Award Letter, at 1. This protest followed.

DISCUSSION

Glen Mar contends that the award to Hanke was improper for two reasons. First, the protester argues that the award was inconsistent with the IFB because the VA evaluated bids based on the price for all of the additive options, rather than only the options the agency intended to exercise at time of award. Second, the protester argues that the agency's price evaluation was unreasonable because it was based on the price for additive options that the agency knew it did not have the funding to exercise. With regard to both arguments, Glen Mar notes that its bid was lower than Hanke's for the base bid and option included in the award.

For the reasons discussed below, we agree with the VA that the solicitation provided for evaluation of the prices of the additive options that were not exercised at the time of award, and that any ambiguity concerning the terms of the solicitation was a patent defect that was not challenged prior to the time for receipt of bids. We therefore dismiss the protester's first argument on this basis. We also conclude, however, that the agency's price evaluation improperly included the price of options which, the record shows, the agency knew with reasonable certainty that it would not have sufficient funds to purchase. For this reason, the agency was unable to identify which firm submitted the lowest-priced bid. We therefore sustain the protester's second argument.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Alluviam LLC, B-297280, Dec. 15, 2005, 2005 CPD ¶ 223 at 2. An ambiguity exists if a solicitation term is susceptible to more than one reasonable interpretation that is consistent with the solicitation, when read as a whole. Poly-Pacific Techs., Inc., B-293925.3, May 16, 2005, 2005 CPD ¶ 100 at 3. A patent

(...continued)
supplement its report, and the protester to file additional comments on that supplemental report.

ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Where a patent ambiguity in a solicitation is not challenged prior to the submission of bids, we will dismiss as untimely any subsequent challenge to the meaning of the solicitation term. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2014); Simont S.p.A., B-400481, Oct. 1, 2008, 2008 CPD ¶ 179 at 4.

First, as discussed above, the IFB requested bids that included prices for 10 line item numbers, which corresponded to the base bid for construction of the clinic building, and 9 additive options for additional construction (to be exercised at award or within 120 days of award). IFB at 5. As also discussed above, the solicitation included FAR clauses 52.217-5 and 52.217-7.[3] Where a solicitation contains FAR clause 52.217-5, the agency must evaluate the base bid and all options unless the agency finds that funds will not be available. See Marshall Co., Ltd., supra; Building Constr. Enter., Inc., B-294784, Dec. 20, 2004, 2004 ¶ 251 at 2 (absent showing that there is reasonable certainty that funds will not be available an agency must evaluate option prices, where the solicitation provides for their evaluation). With regard to FAR clause 52.217-7, the solicitation provided that the agency could require delivery of line items identified in the solicitation schedule as options, by written notice within 120 days from award. IFB at 5, 19.

Glen Mar argues that, notwithstanding the inclusion of these clauses, the VA was required to evaluate only those options it intended to exercise at the time of award. The protester cites the IFB, which stated the following in the price schedule:

> Option items – Any one of the following option items may be awarded depending on available funding.
>
> * * * * *
>
> Pricing shall reflect the full scope of each optional item and shall represent only that line item in the event it is exercised at the time of award.

[3] FAR subpart 17.2 states that these clauses shall be used for "option solicitation provisions and contract clauses." FAR § 17.200. This FAR subpart, however, does not apply to "contracts for (a) services involving the construction, alteration, or repair (including dredging, excavating, and painting) of buildings, bridges, roads, or other kinds of real property." Id. Our Office has nonetheless held that an agency is bound to follow the procedures of this subpart where, as here, the agency has incorporated into the solicitation FAR clause 52.217-5 providing for the evaluation of options. See Marshall Co., Ltd., B-311196, Apr. 23, 2008, 2008 CPD ¶ 78 at 2 n.2; Contractors NW, Inc., B-293050, Dec. 19, 2003, 2003 CPD ¶ 232 at 3 n.2.

IFB at 5.

The protester also notes that the question and answer issued by the VA in IFB amendment No. A00002 stated that "The Government[']s intent is to award the base bid and any or all of the option bids at time of award." IFB amend. No. A00002, at 2.

We agree with Glen Mar that the IFB created the potential for confusion as to whether the VA intended to evaluate bids based on the price of the base bid and any options that were exercised at the time of award, or based on the price of the base bid and all of the options. Specifically, while the language discussed above indicated that the agency intended to award the base bid and other options at the time of award, the solicitation also included FAR clauses which stated that the agency would evaluate all option prices, and reserved the agency's right to exercise options in the price schedule up to 120 days after award.

We conclude, however, that any such conflict was obvious on the face of the solicitation. In this regard, the question and answer provided to bidders by the VA squarely raised the question as to whether "the price evaluation [will] be based on the total price of base + all options?" IFB amend. No. A00002, at 2. The agency's response did not clearly resolve the issue, as the agency merely advised that "[t]he Government[']s intent is to award the base bid and any or all of the option bids at time of award," and did not specifically address how the price evaluation would be conducted. Id. Moreover, the response did not specifically address whether the agency could, in light of FAR clause 52.217-7, subsequently exercise any options that were not included in the award.

On this record, we conclude that even if the solicitation was ambiguous as to the basis upon which the agency would evaluate bidders' prices, any such ambiguity was patent. We therefore dismiss the protester's challenge as untimely. See Simont S.p.A., supra. As set forth below, however, the record here shows that at the time of award, the agency knew with reasonable certainty that it would not have sufficient funds to exercise all, or even most, of the additive optional items identified in this solicitation. As a result, the agency could not reasonably continue with the plan, stated in its solicitation, to include the price for all of the options in determining the lowest-priced bidder.

When an agency uses the sealed bidding procedures of FAR part 14, the agency must award the contract to "the responsible source whose bid conforms to the solicitation and is most advantageous to the Federal Government, considering only price and the other price-related factors included in the solicitation." 41 U.S.C. § 3702(b); see also John C. Grimberg Co., B 284013, Feb. 2, 2000, 2000 CPD ¶ 11 at 3 (noting that 41 U.S.C. § 3702 requires "that a determination of the low bid must be measured by the actual work to be contracted for; otherwise award cannot be said to have been made to the lowest bidder.") As discussed above, if an agency

includes FAR clause 52.217-5 in a solicitation, the agency must evaluate the price of all options unless "it is determined in accordance with FAR § 17.206(b) not to be in the Government's best interests." FAR clause 52.217-5; Marshall Co., Ltd., supra, at 2. The FAR explains that, "[a]n example of a circumstance that may support a determination not to evaluate offers for option quantities is when there is reasonable certainty that funds will be unavailable to permit exercise of the option." FAR § 17.206(b). Our Office has held that where an agency includes FAR clause 52.217-5 in a solicitation, it should not base its price evaluation on options that the agency knows with "reasonable certainty" it will not exercise. Kruger Constr., Inc., B-286960, Mar. 15, 2001, 2001 CPD ¶ 43 at 5; Charles J. Merlo, Inc., B 277384, July 31, 1997, 97-2 CPD ¶ 39 at 3.

Here, the VA states that the budget for the entire primary care building construction project was $9.3 million. Decl. of Agency Chief of Projects and Operations (Oct. 31, 2014) ¶ 6. Included within this budget was $7,870,000 for construction, $1.03 million for design and impact, and $400,000 for contingency. Id. The VA explains that at the time of award, based on unused design and impact funds, the agency had $7,996,000 available for construction, as well as $400,000 for contingency, which potentially could be used for additional construction costs depending on the volume of contract changes during construction. Id. ¶ 8. In summary, the Chief of Projects and Operations explains that the agency "had a potential $8,396,000 available in construction in contingency costs for this operation." Id. As set forth above, Hanke's bid for the base construction and all nine additive options was $9,036,214, while Glen Mar's bid for the base construction and all nine additive options was $9,039,186. As a result, the VA faced a shortfall of more than $600,000 to procure additive options that ranged in prices (from Hanke and Glen Mar) from $20,003 to $23,032 (option 6, window blinds for all outside windows) to $333,938 to $372,161 (option 3, a cover for the crosswalk from the new building to a nearby building). Despite this shortfall, the agency asserts that it was reasonable to evaluate price by adding the price for the base bid and the prices for all options. We do not agree.

We conclude that the VA did not have a reasonable basis for using the base construction price, and the bid price for all nine additive options to conclude that Hanke was the lowest-priced bidder, as required by FAR part 14 and the IFB, and sustain the protest on this basis. As the record reflects, the agency knew with reasonable certainty that it did not have the funding to award all of the options. As stated above, the Contracting Officer determined that the VA only had funds available to award the base bid and option 1. AR at 2. Although the agency states that it had the potential to use an additional $400,000 to award one or some of the remaining options if the contingency funds became available, Decl. of Agency Chief of Projects and Operations (Oct. 31, 2014) ¶ 9, the agency knew that this additional money would not be sufficient to award all of the remaining options. Accordingly, the agency selected a bidder for award based on the prices of options the agency knew with reasonable certainty it could not exercise. See Kruger Constr., Inc.,

supra. In so doing, the agency relied upon an evaluation scheme which made it impossible for the agency to determine which bid offered the lowest price to the government. See Associated Healthcare Sys., Inc., B-222532, Sept. 2, 1986, 86-2 CPD ¶ 246 at 2 (when using sealed bidding procedures, an award must be based on the lowest cost to the government measured by the actual and full scope of work to be awarded). To the extent the agency believed it might be able to spend an additional $400,000 on the additive options, the VA should have prioritized the remaining options, up to the $400,000 amount, and included the prices for those options in its price evaluation.[4]

RECOMMENDATION

We recommend that the VA conduct a new price evaluation to determine which bidder submitted the lowest price for the base construction and those additive options the agency reasonably believes that it has the funding to exercise. The agency should then identify the lowest-priced responsible bidder based upon that review. In the event the agency concludes that Glen-Mar, or some other bidder, offered the lowest-priced bid for the work the agency might actually purchase--given the funding constraints it faces--the agency should make award to that bidder. In the event the bid submitted by Hanke is no longer found to be the lowest-priced bid, its award should be terminated.

We also recommend that the agency reimburse Glen Mar its costs associated with filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d) (2014). The protester's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. Id. at § 21.8(f).

The protest is sustained.

Susan A. Poling
General Counsel

[4] We recognize, as the VA argues, that an agency is not required to be clairvoyant in forecasting the availability of option quantity funding, Building Constr. Enters., Inc., B-294784, Dec. 20, 2004, 2004 CPD ¶ 251 at 3, but where, as here, the agency knew with reasonable certainty--at least by the time of award--that it would not be able to exercise all nine additive options, it could not reasonably use the price for all of the options to determine the lowest bidder here.