



United States Government Accountability Office
Washington, DC20548

Decision

Matter of: Marshall Company, Ltd.

File: B-311196

Date: April 23, 2008

Johnathan M. Bailey, Esq., and Theodore M. Bailey, Esq., Bailey & Bailey, PC, for the protester.

Carlton A. Arnold, Esq., Army Corps of Engineers, for the agency.

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DIGEST

Agency's evaluation of option pricing is unobjectionable where the record does not evidence "reasonable certainty" that funding is not available or that options will not be exercised.

DECISION

Marshall Company, Ltd., protests the award of a construction contract to Anthony & Gordon Construction Co. (A&G) under request for proposals (RFP) No. W912QR-06-R-0058, issued by the Army Corps of Engineers. Marshall contends that the agency should not have evaluated the offerors' option prices.

We deny the protest.

The RFP, set aside for historically underutilized business zone (HUBZone) small businesses, provided for award of a fixed-price contract to design and construct a 120,000 square-foot controlled humidity warehouse with a 1,200 square-foot administrative area in Corpus Christi, Texas. RFP at 1. Award was to be made on a best value basis, considering experience, past performance, technical proposal information, management, and price. *Id.* amend. 1, § 114, at 1-9. All of the non-price factors, when combined, were considered equal to price. *Id.* at 2.

The RFP provided for a base period to design and construct the facilities, perform sitework, and install telephone and other “OMAR-funded” items¹; with six separate options for various paving upgrades and a building enlargement. RFP at 5-6. The RFP contained the standard clause “52.217-5 Evaluation of Options (Jul 1990),” which stated:

Except when it is determined in accordance with [Federal Acquisition Regulation (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).

RFP at 13-14. The RFP further required that offerors’ option pricing “be good for 90 days after award of the contract.” RFP at 7.

Marshall and A&G submitted proposals for evaluation. The source selection authority (SSA) rated both proposals “good” under the experience, past performance, and technical proposal information factors, and found there to be “no qualitative difference” between proposals under these factors. A&G’s proposal, however, was found to be superior to Marshall’s under the management factor, where A&G’s proposal received a rating of “good” and Marshall’s proposal received a rating of “satisfactory.” A&G’s proposed price, including all options, was \$9,828,000. Marshall’s proposed price, including all options, was \$81,900 higher at \$9,909,900. The SSA selected A&G’s higher rated and lower priced proposal for award, and Marshall protested. Agency Report, Tab 5, Source Selection Decision, at 2.

Marshall contends that the agency should not have evaluated all of the option prices because the agency did not have a reasonable expectation that it would be able to obtain funding for these options. If all of the options were not evaluated, Marshall asserts, its proposal would have been lower in price and could have been determined to be the best value.

Where, as here, the solicitation includes a provision requiring the evaluation of options, such options must be evaluated “[e]xcept when it is determined in accordance with FAR [§] 17.206(b) not to be in the Government’s best interests” to exercise the options.² FAR § 52.217-5. FAR § 17.206(b) provides that it may not be in

¹ “OMAR” refers to Operations and Maintenance, Army Reserve.

² Although 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 this subpart where, as here, the agency has incorporated into the solicitation FAR § 52.217-5 providing for the evaluation of options. Contractors NW, Inc., B-293050, Dec. 19, 2003, 2003 CPD ¶ 232 at 3 n.2.

the government's best interests to evaluate options "when there is a reasonable certainty that funds will be unavailable to permit exercise of the option."

Here, the contracting officer states that she fully intended to award the options "as future funds become available" and that there was a "reasonable likelihood" that the options would be exercised, as evidenced by a memorandum she prepared three months before award. Agency Report, Tab 4, Contracting Officer's Determination for Use of Option, at 1; Tab 9, Contracting Officer's Affidavit, ¶ 8. In support of these statements, the contracting officer explains that an additional \$2 million has already been made available for options on this project, and she has provided documentation showing "remaining funding authorities and the threshold limits" available for this project. Agency Report, Tab 9, Contracting Officer's Affidavit, ¶ 7; Tab 11, Request Award Construction Funds, at 1.

Marshall asserts, without support, that additional funding is "unlikely" and that, absent more definitive proof by the agency that funding is available, the contracting officer should not have evaluated option pricing. Protester's Comments at 2. However, Marshall misconstrues the burden of proof applicable to this issue. The test is not whether a contracting officer can state with certainty that funds will be available to exercise options. Building Constr. Enters., Inc., B-294784, Dec. 20, 2004, 2004 CPD ¶ 251 at 2; Contractors NW, Inc., supra, at 4. Rather, FAR § 17.206(b) provides that options should be evaluated unless there is "reasonable certainty" that funds will not be available. Charles J. Merlo, Inc., B-277384, July 31, 1997, 97-2 CPD ¶ 39 at 3-4. The record does not show that there was "reasonable certainty" that funding is not available. Thus, we cannot find unreasonable the agency's determination to evaluate option pricing in this case.

The protest is denied.

Gary L. Kepplinger
General Counsel