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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Contractors Northwest, Inc.

File: B-293050

Date: December 19, 2003

John C. Black, Esq., Dunn & Black, for the protester.

Richard L. Lambe, Esq., Lambe Law Firm, for Ohno Construction Co., an intervenor.

Ronald S. Marsh, Esq., U.S. Army Corps of Engineers, for the agency.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly awarded contract based on evaluation of base and optional items, where invitation for bids (IFB) informed bidders that optional items would be evaluated and agency had a reasonable expectation that funding would be received in time to exercise the options in accordance with the IFB provisions.

DECISION

Contractors Northwest, Inc. (CNI) protests the award of a contract to Ohno Construction Co. by the Army Corps of Engineers under invitation for bids (IFB) No. DACW67-03-B-0011 for the construction and modernization of the Riley Creek Campground in Idaho.

We deny the protest.

The IFB, issued on June 6, 2003, anticipated award of a fixed-price contract for labor, materials, and equipment to renovate campsites and related facilities. Work was apportioned among contract line item numbers (CLIN) for “base items” (CLINs 001 through 005) and “optional items” (CLINs 006 through 0016). Bidders were instructed to “quote on all items in this [IFB]” and were advised that the evaluation of bids would be based “upon the total price quoted for all items.” The IFB also stated that award would be made on an “all or none” basis. IFB § 00100 at 16. However, the IFB also provided that optional items could be exercised “at any time, or not at all, but no later than 180 calendar days after receipt by the Contractor of notice to proceed.” IFB, Special Clause 1.1(a). The IFB also contained two clauses concerning the evaluation of optional items that are pertinent here:

52.217-4 EVALUATION OF OPTIONS EXERCISED AT TIME OF CONTRACT AWARD (JUN 1988)

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 the total price for the basic requirement together with any option(s) exercised at the time of award.

52.217-5 EVALUATION OF OPTIONS (JUL 1990)

(a) 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 § 00100 at 16. In advance of issuing the IFB the contracting officer did not make a written determination that it was reasonably likely that options would be exercised.

The agency anticipated that the cost of the project would be approximately \$3.1 million. At a pre-bid site visit, however, CNI and other bidders were informed that the total funding available for the project was approximately \$2.4 million. The agency concedes that it did not have sufficient funds in the current fiscal year to cover the entire project, but asserts that this is why it included some work as optional items in the IFB; it had requested additional funds from Congress and anticipated receiving funds sufficient to cover these optional items within 180 days of contract award.

CNI and Ohno submitted bids in response to the IFB. Bids were opened on July 17 and revealed the following prices:

| | CNI | Ohno |
|---------|-------------|-------------|
| Base | \$2,077,375 | \$2,139,790 |
| Options | \$1,562,626 | \$1,263,550 |
| Total | \$3,640,001 | \$3,403,340 |

Contracting Officer's Statement ¶ 9. One day after bid opening (on July 18), a Senate staff person notified the agency that "it looks as if we succeeded in securing" an additional \$2.2 million for the project. AR, Tab 7, E-mail from Senate to agency (July 18, 2003). This amount, together with the funds already programmed for the project (which were now \$1.6 million due to reductions for costs incurred to support the project), exceeded the total anticipated cost to the government. As a result, the

contracting officer asserts that she had “every reason to believe that all options will be exercised within 180 day[s],” as contemplated under the IFB. Agency Report (AR), Tab 15, Memorandum for Record (Sept. 8, 2003). The agency thus considered all base and optional items in determining the low bidder.

On August 6, award was made to Ohno for the base items. CNI filed a timely agency-level protest, contending that award should have been made based solely on the evaluation of the base bids because the agency did not award the optional items, did not have sufficient funds for all of the optional items, and did not make a written determination as to the likelihood of whether the optional items would be exercised. The agency denied the protest on October 6, and CNI protested to our Office.

Citing FAR § 52.217-4, included in the IFB, CNI first argues that the agency could not evaluate optional items because they were not awarded with the contract. This argument has no merit, given that the IFB expressly provides in a special clause that optional items may be exercised within 180 days of contract award and includes FAR § 52.217-5 informing bidders that evaluation would include both base and optional items and that the options need not be exercised at the time of award.¹

CNI next argues that optional items cannot be considered under FAR § 52.217-5 because the contracting officer did not make a written determination prior to the issuance of the IFB that there is a reasonable likelihood that the options will be exercised, as required by FAR § 17.202(a).² See also FAR § 17.208(c). Although it is true that a written determination is required prior to the issuance of the IFB, we do not find the lack of a contemporaneous writing to be fatal to the application of this clause in the evaluation.³ See Federal Contracting, Inc., B-250304.2, June 23, 1993,

¹ CNI’s assertion that it interpreted the IFB to mean that evaluation would be based on base bids only if optional items were not awarded with the contract is belied by the fact that it knew from the pre-bid site visit that this would not occur because sufficient funding was not immediately available for optional items to make award of these items at the same time. To the extent that it was confused by the assertedly ambiguous IFB, it was required to protest the terms of the IFB prior to bid opening in order to be considered timely under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(1) (2003).

² 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 § 17.208 once, as here, it incorporates either clause (FAR §§ 52.217-4 or 52.217-5) providing for evaluation of options. See Foley Co., B-245536, Jan. 9, 1992, 92-1 CPD ¶ 47 at 4 n.2.

³ CNI is incorrect in its belief that absent a written determination in advance of the IFB, the agency must utilize the “fall back” provision of FAR § 52.217-4. As stated above, both clauses require a determination in advance of the IFB whether options will be exercised. See FAR § 17.208(b) and (c). In this case, the contracting officer

(continued...)

93-1 CPD ¶ 484 at 4 (post-protest affidavit sufficient to establish that determination had been made).

Here, the contracting officer did make a determination that there was a reasonable likelihood that options would be exercised after award. As she stated in a post-award memorandum for the record:

Use of option items was necessary since there would not be sufficient funds to award the whole project at once but I expected that the Base Items and at least part of the Option Items could be awarded initially, and that more funds would be received in [Fiscal Year 2004] to allow award of most if not all of the remaining option items. I truly believed that there was more than a “reasonable likelihood” that the option items would be exercised and that I was acting in the best interest of the Government.

AR, Tab 19, Memorandum for Record (Nov. 11, 2003); see AR, Tab 15, Memorandum for Record (Sept. 8, 2003). The protester has not shown that the contracting officer’s determination to evaluate all options was unreasonable.

Where, as here, the IFB properly 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. FAR § 52.217-5. As noted above, the agency received confirmation the day after bid opening that an additional \$2.2 million would likely be appropriated, which would cover the cost of the entire project. Given this expectation of additional funding, the agency determination to make award based on evaluation of base and optional items was reasonable. The agency need not have all funds currently available for optional items in order to evaluate them for award. See Charles J. Merlo, Inc., B-277384, July 31, 1997, 97-2 CPD ¶ 39 at 3-4; Federal Contracting, Inc., supra, at 5-6. Although CNI points to a series of pre-award communications between agency personnel discussing the fact that only \$1.6 million was currently available to fund the project (which is less than even the base bid), these communications reflect only the agency’s discussion about how the basic

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determined options would not be awarded with the contract, but would be exercised after award, thus invoking the provision of FAR § 52.217-5.

contract could be funded and do not demonstrate that future funding was not going to be available, as anticipated.⁴

We deny the protest.

Anthony H. Gamboa
General Counsel

⁴ As discussed in these communications, the agency anticipated invoking a “continuing contracts” clause as authorized by Section 10 of the River and Harbor Act of September 22, 1992, 33 U.S.C. § 621 (2000). This clause, which was included in Ohno’s contract, provides that “payment of some portion of the contract price is dependent upon reservations of funds from future appropriations.” The clause further affirms that “[i]t is expected that Congress will make appropriations for future fiscal years from which additional funds together with funds provided by one or more non-federal project sponsors will be reserved for this contract.” AR, Tab 10, Contract, at 2.