

Decision

Matter of: Great Lakes Dredge & Dock Company, LLC

File: B-407502.2

Date: February 13, 2013

Paul R. Hurst, Esq., Steptoe & Johnson LLP, for the protester.
S. DeAnn Lehigh, Esq., Department of the Army, Corps of Engineers, for the agency.
Andrew J. Stephens, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's cancellation of an invitation for bids (IFB) is denied where the agency concerns regarding an ambiguity in the IFB provided a compelling basis for cancellation.

DECISION

Great Lakes Dredge & Dock Company, LLC (GLDD) of Oak Brook, Illinois, protests the post-bid opening cancellation of invitation for bids (IFB) No. W9127S-12-B-0025, which was issued by the Department of the Army, Corps of Engineers, for dredging services. GLDD contends that the Corps did not have a compelling reason to cancel the solicitation and that, as the lowest responsive bidder, it should have been awarded the contract.

We deny the protest.

BACKGROUND

The Corps issued the IFB on August 24, 2012, which sought bids for an indefinite-delivery, indefinite-quantity (ID/IQ) contract for dredging services, with a base period of one year, and one 1-year option. Agency Report (AR) at 1.¹ The dredging was

¹ Citations to the "IFB" in this decision refer to the solicitation issued on August 24, 2012. As discussed below, the Corps issued a revised solicitation on January 8, 2013. Additionally, although not directly relevant here, the Corps initially issued the
(continued...)

to be performed, as required, at the following locations: between Navigation Miles 0 and 444.8 on the McClellan-Kerr Arkansas River Navigation system; between Navigation Miles 10 and 255 on the White River; and in harbors at Rosedale and Greenville, Mississippi. IFB at 1.

The IFB listed nine contract line item numbers (CLINs) for the base year and nine CLINs for the option year. Id. at 4-12. As relevant here, CLIN 0001 was for mobilization/demobilization services in the base year, and CLIN 1001 was for demobilization services for the option year. Id. at 4, 8. The IFB also incorporated the clause at Defense Federal Acquisition Regulation Supplement (DFARS) § 252.236-7004, which provided that the agency would pay 65 percent of the lump sum price for mobilization and demobilization upon completion of the mobilization work, and the remaining 35 percent upon completion of demobilization. Id. at 39.

The Corps received bids from four firms: GLDD, 4H Construction, Inland Dredging Company, LLC, and Orion Marine Construction. AR, Tab 7, Bid Evaluation Documents, at 1. On September 24, the bids were opened, and on September 28, the Corps announced that 4H Construction was the apparent lowest bidder and would be awarded the contract. AR, Tab 2, CO Statement, at 2; AR, Tab 7, Bid Evaluation Documents.

On October 3, GLDD filed a protest with our Office alleging that 4H Construction's bid was materially unbalanced based on its price for CLIN 0001 for mobilization/demobilization in the base year. Upon review, the Corps concluded that 4H Construction's bid was materially unbalanced, and therefore nonresponsive, as its CLIN 0001 price was significantly higher than all other bidders and the government estimate. AR at 1. After concluding that 4H Construction's bid was nonresponsive, the agency canceled the IFB and our Office dismissed GLDD's protest of the award to 4H Construction as academic.

On November 5, GLDD filed a protest with our Office challenging the Corps' decision to cancel the IFB, rather than awarding the contract to GLDD as the lowest

(...continued)

solicitation on May 23, 2012, as a total small business set-aside, and received two bids. Contracting Officer (CO) Statement ¶ 1. After bid-opening, the unsuccessful bidder, 4H Construction Corporation, filed a protest with the Small Business Administration (SBA), arguing the apparent low bidder, A&H Contractors, Inc., was not a small business. Id. ¶ 3; AR, Tab 4c, 4H Construction Protest Letter to SBA. On August 9, SBA sustained the protest. AR, Tab 4f, SBA Size Determination. On August 10, the agency canceled the initial IFB after determining that there was insufficient competition to make an award per Federal Acquisition Regulation (FAR) part 6. CO Statement ¶ 5.

responsive bidder. Protest at 1. On December 6, the Corps submitted its report on the protest; GLDD filed timely comments on the report on December 17.

On January 8, 2013, while the protest was pending at our Office, the Corps issued a revised IFB for the dredging work. As relevant here, the January 8 IFB added a second option year. IFB (Jan. 8, 2013) at 9. More significantly, the January 8 IFB replaced CLIN 0001 for mobilization/demobilization in the base year with separate mobilization and demobilization CLINs for the base year, and added CLINs for demobilization in each of the option years.² *Id.* at 8-9. The January 8 IFB also deleted DFARS § 252.236-7004, which had provided for the 65/35 percent lump sum payments for mobilization and demobilization. The revised IFB explained that the contractor would be paid for demobilization through the demobilization CLIN for the appropriate year, e.g., through the base year CLIN if no options were exercised, or through the CLIN for the final option exercised. *Id.* at 54.

GLDD subsequently argued that the issuance of the January 8 IFB demonstrated that the Corps lacked a compelling basis to cancel the August 24 IFB, for reasons relating to the evaluation quantities for the dredging work. Our Office requested that the Corps and the protester submit additional briefing regarding the January 8 IFB. In this briefing, the agency explained the basis for the revisions in the January 8 IFB.

DISCUSSION

GLDD argues that the Corps improperly canceled the IFB because the agency did not have a compelling reason for its action, as required under the FAR. In its response to the protest, the Corps identified several reasons why it believed that cancellation of the August 24 IFB was proper. As relevant here, the agency argues that the August 24 IFB was ambiguous with regard to the mobilization and demobilization CLINs, and that this defect could result in the government paying twice for demobilization services.³ Agency Supp. Response (Jan. 15, 2013) at 2; Agency Response to GAO Interrogatories (Jan. 24, 2013) at 3. Because we conclude that the defects concerning the mobilization and demobilization CLINs

² Another difference between the August 24 IFB and the January 8 IFB is that the January 8 IFB added a second option year.

³ The Corps identified other bases for cancelling the IFB, and GLDD challenged these bases. Because we conclude that the defects with the mobilization and demobilization CLINs provided a compelling basis to cancel the solicitation, we do not address the other issues.

provide a compelling basis to cancel the solicitation, we do not address the agency's other bases for cancellation.⁴

When an agency issues an IFB and opens bids, award must be made to the bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. Federal Acquisition Regulation § 14.404-1(a)(1). The standard for canceling an IFB after bids have been opened is different from the standard for canceling a request for proposals (RFP) after award; an agency need only demonstrate a reasonable basis to cancel an RFP after award. See Noelke GmbH, B-278324.2, Feb. 9, 1998, 98-1 CPD ¶ 46 at 3. This different standard applies because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed at a public bid opening. United Contracting LLC, B-407417, Jan. 2, 2013, 2013 CPD ¶ ___ at 2. A compelling reason to cancel a solicitation after bid opening exists where material solicitation terms are ambiguous or in conflict. P.J. Dick, Inc. B-259166, B-260333, Mar. 6, 1995, 95-1 CPD ¶ 131 at 4.

The Corps argues that the mobilization and demobilization CLINs in the August 24 IFB required revision because the solicitation was ambiguous as to how the successful contractor would be paid for these services. As discussed above, the August 24 IFB contained CLIN 0001 for mobilization/demobilization, and CLIN 1001 for demobilization. The August 24 IFB also incorporated the following DFARS clause, which specified how mobilization and demobilization costs would be paid:

(a) The Government will pay all costs for the mobilization and demobilization of all of the Contractor's plant and equipment at the contract lump sum price for this item.

(1) Sixty-Five (65%) percent of the lump sum price upon completion of the contractor's mobilization at the work site.

(2) The remaining thirty five (35%) percent upon completion of demobilization.

⁴ As GLDD notes, the Corps did not cite the mobilization and demobilization CLINs as a compelling basis for cancelling the solicitation in its initial report on the protest. The agency first raised this argument in its response to the protester's January 10, 2013, filing concerning the January 8 IFB. Our Office has held that even if an agency's initial bases for cancelling an IFB are not compelling, cancellation is not objectionable if the agency subsequently identifies a compelling basis for the cancellation. Mid Atlantic Commc'ns, B-221277, Mar. 27, 1986, 86-1 CPD ¶ 294 at 4.

DFARS § 252.236-7004; IFB at 39.

The August 24 IFB also provides: “Demobilization will be paid at the completion of the base year if the option year is not exercised. If the option year is exercised, demobilization will be paid upon its completion.” IFB at 53. In contrast, the revised January 8 IFB contained CLIN 0001 for mobilization and CLIN 0010 for demobilization in the base year, and CLINs 1001 and 2001 for demobilization in each option year; the January 8 IFB also did not incorporate DFARS § 252.236-7004.

The Corps argues that the August 24 IFB CLINs created an ambiguity because, for similar dredging contracts, there is typically one mobilization at the beginning of contract performance, and one demobilization at either the end of the base year, or at the end of the option year, if the option is exercised. Agency Supp. Response (Jan. 15, 2013), at 2. The agency argues that under the August 24 IFB, the CLIN structure for mobilization and demobilization created the possibility that the agency would pay twice for a service provided only once. Agency Response to GAO Interrogatories (Jan. 24, 2013) at 3.

We agree with the Corps that the August 24 IFB was ambiguous with regard to the price to be paid for mobilization and demobilization. Specifically, inclusion of CLIN 0001 for both mobilization and demobilization in the base year, as well as CLIN 1001 for demobilization in the option year, creates uncertainty as to whether the contractor would be paid once, or twice, for demobilization. In this regard, as discussed above, DFARS § 252.236-7004 provides that 65 percent of the “lump sum” for mobilization and demobilization will be paid upon completion of mobilization, and the remaining 35 percent of that lump sum amount will be paid upon completion of demobilization. As applied to the August 24 IFB CLINs, it is not clear whether “lump sum” means only the price for CLIN 0001 for mobilization/demobilization in the base year, or the sum of the prices for CLIN 0001 as well as CLIN 1001 for demobilization in the option year.

For example, if the term lump is read to mean that the contractor will be paid the sum of both CLIN 0001 and 1001, and the agency does not exercise the option year, the agency would pay for demobilization twice--once for the portion of CLIN 0001 attributable to demobilization and once for demobilization under CLIN 1001. As another example, if the term lump sum is read to mean only CLIN 0001, then it is not clear how much the agency should pay for demobilization if it exercises the option year. Under DFARS § 252.236-7004(a)(2), the agency is obligated to pay “[t]he remaining [35 percent]”--however, it is unclear whether that amount should

include only CLIN 1001, or that CLIN plus the remainder (35 percent) of CLIN 0001.⁵

GLDD contends that the IFB was not ambiguous and would not result in the government paying twice for demobilization services. In this regard, the protester states that in its performance of prior contracts, it was the practice of the agency to pay 65 percent of the price for the base year mobilization/demobilization CLIN upon completion of mobilization, to exercise the option year, and then pay the full unit price for the demobilization CLIN in the option year. Protester's Supp. Comments (Jan. 28, 2013) at 4. Although the protester contends that the agency could potentially avoid any confusion or ambiguity concerning payment for mobilization and demobilization by following this prior practice, there is no guarantee that the contract here would be performed in the same manner. Moreover, there is no guarantee that the successful bidder under the IFB here would not dispute the method for calculating the method of payment under the contract's disputes clause, given the ambiguities discussed above.

In sum, we conclude that the IFB terms governing the amount to be paid for demobilization are ambiguous and in conflict and, therefore, provide a compelling reason for cancelling the August 24 IFB.

The protest is denied.

Susan A. Poling
General Counsel

⁵ Additionally, although not specifically argued by the Corps, it is also unclear how the agency should calculate the price for mobilization. DFARS § 252.236-7004(a)(2) states that the contractor should be paid a lump sum based on 65 percent of the combined price for mobilization and demobilization. If the agency does not know whether it will exercise the option year, it is unclear whether the mobilization price should include CLINs 0001 and 1001, or only CLIN 0001.