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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Staab Construction Corp.

File: B-298454

Date: September 26, 2006

Carl A. Sinderbrand, Esq., Axley Brynelson, LLP, for the protester.
Mark G. Garrett, Esq., Department of Agriculture, for the agency.
Nora K. Doolin, Esq., and James Spangenberg, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

An agency is not required to award items for which prices were solicited under an invitation for bids (IFB), where there was no language in the IFB that required the award of all bid items and there was only sufficient funding to award one item.

DECISION

Staab Construction Corporation protests the U.S. Department of Agriculture's (USDA) proposed award to Miron Construction, Co. of only one of the two base bid items requested under IFB No. 05-3K15-06, for the construction of a New Nutrient Management Research Laboratory (NMRL) and an Animal Holding Facility (AHF).

We deny the protest.

The IFB's bid schedule contained six item numbers. Item No. 1 was a base bid item for the construction of the NMRL and Item No. 2 was a base bid item for the construction of the AHF. The other four bid items were additive items: Item Nos. 3, 5 and 6 were additive items for the AHF construction and Item No. 4 was an additive item for the NMRL construction. The IFB did not request a total aggregate bid price. The IFB stated the estimated cost of construction for the project as \$15,000,000 to \$17,000,000.

The IFB required bidders to provide a "lump sum" bid for each of the bid items, including the additives. The IFB incorporated the clause at Federal Acquisition Regulation (FAR) § 52.214-19, which states in pertinent part, "The Government may accept any item or combination of items, unless doing so is precluded by a restrictive limitation in the solicitation or the bid." The IFB also incorporated the clause set

forth in Agricultural Acquisition Regulation (AGAR) § 452.236-70, which states in pertinent part:

The low bidder for purposes of award shall be the conforming responsible bidder offering the low aggregate amount for the first or base bid item, plus or minus (in the order priority listed in the schedule) those additive or deductive bid items providing the most features of the work within the funds determined by the Government to be available before bids are opened.

* * * * *

In any case all bids shall be evaluated on the basis of the same additive or deductive bid items, determined as above provided. The listed order of priority need be followed only for determining the low bidder. After determination of the low bidder as stated, award in the best interest of the Government may be made on the selected first or base bid item and any combination of additive or deductive items for which funds are determined to be available at the time of the award, provided that award on such combination of bid items does not exceed the amount offered by any other conforming responsible bidder for the same combination of bid items.

The IFB was amended seven times. The first amendment to the solicitation followed a pre-bid conference and site visit and incorporated the meeting notes from the pre-bid conference. Item 21 of the meeting notes stated, “USDA’s intent is to award both base bids.” IFB amend. 1, attach. 2, at 3. None of the other amendments are relevant to this protest.

On June 20, the five bidders’ sealed bids were opened. We summarize the bids received as follows:

	<u>Miron</u>	<u>Odyssey International</u>	<u>Staab</u>	<u>Oscar J. Boldt Construction</u>	<u>TCI Architects E C Inc.</u>
Item No. 01 (NMRL)	\$8,577,180 *	\$9,609,362	\$8,604,000	\$8,980,000	\$8,912,000
Item No. 01 + 04 ♦	\$9,137,843 *	\$10,002,362	\$9,204,000	\$9,340,000	\$9,650,000
Item No. 02 (AHF)	\$8,818,262	\$8,025,000 *	\$8,494,000	\$8,480,000	\$9,539,000
Item No. 02 + 03 ♦	\$9,453,918	\$8,335,000 *	\$8,954,000	\$8,780,000	\$10,069,598
Item No. 02 + 03 + 05 ♦	\$10,346,218	\$9,327,806 *	\$9,827,000	\$9,680,000	\$11,045,766
Item No. 02 + 03 + 05 + 06 ♦	\$11,120,618	\$9,874,225 *	\$10,352,000	\$10,740,000	\$11,922,761
Item No. 01 + 02	\$17,395,442	\$17,634,362	\$17,098,000 *	\$17,460,000	\$18,451,000
Item No. 01 + 03 + 04 + 05 +06 ^	\$11,440,199	\$11,851,587	\$11,062,000 *	\$11,600,000	\$12,033,761
All Item Nos. 01 through 06	\$20,258,461	\$19,876,587	\$19,556,000 *	\$20,080,000	\$21,572,761

♦ Item No. 04 is an additive item for the NMRL construction; Item Nos. 03, 05 and 06 are additives for the AHF construction.
 ^ Calculation is to illustrate protester’s argument; an award could not be made based on this combination.
 * Indicates low bidder on that item or combination of items.

Based upon the USDA's allocation of the funds appropriated that were available for these projects, the total amounts budgeted were \$9,014,000 for the NMRL construction and \$6,000,000 for the AHF construction. Agency Report Tab 13, Fact Sheet, at 282. These budget numbers were calculated prior to bid opening and were indicated to be the upper limits for the awards of the items covering each of these two construction projects (including applicable additives). Id. While four of the five bids for base bid Item No. 1 were within the funding limit, all of the bids submitted for base bid Item No. 2 exceeded the budgeted amount. Consequently, the USDA awarded only base bid Item No. 1 to the low bidder for that item, Miron. This protest followed.

Staab contends that the IFB contemplated that both base bid items would be awarded and the USDA should either award both base bid items to Staab as the low aggregate bidder for those items or cancel the IFB. We disagree.

The IFB incorporated FAR § 52.214-19, which vested the USDA with the discretion to make an award of less than all of the items, unless the solicitation contained express language precluding such an award. Fire Sec. Sys., Inc., B-284147, Feb. 23, 2000, 2000 CPD ¶ 31 at 3. Because no "all or none" or similar language precluding an award of less than both base bid items was contained in the IFB or any bid, the agency had the discretion to make award of only Item No. 1. Id. The agency's discretion to award less than all of the items for which prices were solicited, based upon the funds determined available as of the award, was also recognized in AGAR § 452.236-70, which was also incorporated in the IFB.

Staab nevertheless references the language at item 21 in Amendment No. 1, which stated the agency's "intent" to award both bid items, and contends that this requires the agency to either award both items or cancel the IFB. This stated intent is insufficient to override the specific reservation to award less than the total line items contained in FAR § 52.214-19. Rather, the agency's expression of a plan or intention merely signifies the agency's expectations and does not create a legal obligation. See Fire Sec. Sys. Inc., supra; Global Readiness Enters., B-284714, May 30, 2000, 2000 CPD ¶ 97 at 5.

As indicated above, the record confirms that the USDA only had sufficient funds budgeted to award item No. 1 and consistent with AGAR § 452.236-70 determined that Miron was the low bidder and should receive the award for that item.

Staab asserts that the agency's low bid determination was inconsistent with AGAR § 452.236-70, contending that the clause required that all additive items (even those only applicable to Item No. 2) be considered in addition to base bid Item No. 1 to determine the low bidder, and that since the USDA had \$15,014,000 (\$6,000,000 + \$9,014,000) in funding available for an award under this IFB, Staab should have been determined the low bidder when its Item No. 1 price is added to all of the additives' prices. To be reasonable, an interpretation of a solicitation must be consistent with

the solicitation when read as a whole and in a reasonable manner. Southwest Educ. Dev. Lab., B-298259, July 10, 2006, 2006 CPD ¶ 105 at 4. Considering the fact that Item Nos. 3, 5, and 6 are additives to base bid Item No. 2 and cannot possibly be built without the AHF facility being built, Staab's proffered interpretation of this clause makes no sense. Moreover, contrary to Staab's hypothesis, the record shows that only \$9,014,000 is available for award of base bid Item No. 1 and the applicable additives.

The protest is denied.

Gary L. Kepplinger
General Counsel