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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Staker & Parsons Companies

File: B-402404.2

Date: March 1, 2010

Joseph C. Rust, Esq., Kesler & Rust, for the protester.
David Sett, Esq., Federal Highway Administration, for the agency.
Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where an invitation for bids for road repair and improvements incorporated the standard Federal Acquisition Regulation clause 52.217-3, "Evaluation Exclusive of Options," agency properly did not consider options prices in evaluating bid prices.

DECISION

Staker & Parsons Companies of Elko, Nevada, protests the award of a contract to Eagle Peak Rock and Paving, Inc., a Historically Underutilized Business Zone (HUBZone) small business concern, under invitation for bids (IFB) No. DTFH68-09-B-00045, issued by the Department of Transportation, Federal Highway Administration (FHwA), for road repair and improvement. Staker & Parsons argues that it submitted the lowest-priced bid when options are considered.

We deny the protest.

The IFB sought bids for road resurfacing, rehabilitation, and restoration in the Humboldt-Toiyabe National Forest, Nevada. Bidders were required to price contract line items (CLIN) for three lengths of road (Schedules A, B, and C) as well as price a number of option CLINs (Options V, W, X, Y, and Z). The IFB stated that award would be based on the lowest price for the work to be completed under Schedule C, unless sufficient funding was not available, in which case Schedule B would be evaluated, and if funds were not available for Schedule B, then Schedule A would be evaluated. IFB at A-4. The IFB also provided for a 10-percent price evaluation preference in favor of HUBZone small business concerns. See IFB at A-ii; Federal Acquisition Regulation (FAR) clause 52.219-4. In addition, the IFB incorporated by

reference standard FAR clause 52.217-3, "Evaluation Exclusive of Options (APR 1984)," which states in its entirety:

> As prescribed in 17.208(a), insert a provision substantially the same as in the following in solicitations when the solicitation includes an option clause and does not include one of the provisions prescribed in 17.208(b) or (c):
>
> **EVALUATION EXCLUSIVE OF OPTIONS**
> **(APR 1984)**
>
> The Government will evaluate offers for award purposes by including only the price for the basic requirement; *i.e.,* options will not be included in the evaluation for award purposes.

FHwA received seven bids, including Staker & Parsons's and Eagle Peak's. Staker & Parsons bid $3,596,741.40 for Schedule C and Eagle Peak bid $3,945,078 to perform the same work. Agency Report (AR), Tab 3, Bid Abstract. Applying the HUBZone preference, the agency added 10 percent ($359,674.14) to Staker & Parson's Schedule C bid, which resulted in an overall evaluated price of $3,956,415.40. The agency determined that it had sufficient funding to make award under Schedule C, as well as award options W, X, and Z. Award was made to Eagle Peak as the bidder with the lowest evaluated price for Schedule C, and this protest followed.

Staker & Parsons argues that the agency was required to consider the bidders' prices for the option CLINs that the agency awarded, and that, considering the option prices, the protester's overall bid price for Schedule C and for Options W, X and Z is lower than Eagle Peak's, even after application of the HUBZone preference. Staker & Parsons does not dispute that the IFB included the FAR clause that informed bidders that options would not be evaluated, but essentially argues that the agency's incorporation of the clause by reference was ineffective.

Specifically, Staker & Parsons contends that the FAR language requires that the agency "insert a provision in the solicitation" containing language "substantially the same" as the operative language of the clause. In the protester's view, the act of incorporating the clause by reference means the agency did not insert a provision containing substantially similar language. Thus, the protester contends that the failure to include the actual operative words of the clause in the IFB meant that the solicitation failed to inform bidders that award would be based on the schedule prices alone. In short, Staker & Parsons contends that it should have been awarded the contract for Schedule C and Options W, X and Z.

We find no merit to Staker & Parsons's contention that FHwA's incorporation of this standard FAR clause was ineffective, or failed to inform bidders that option prices would not be evaluated. It is a well accepted principle of contract law that when an item is incorporated by reference into a contract or other document, it is not

necessary to bodily insert the text of the item itself into the contract or document. See Cober Elecs., Inc., B-173643, Nov. 23, 1971; see also Northrop Grumman Info. Tech., Inc., 535 F.3d 1339, 1343-46 (Fed. Cir. 2008) (providing a lengthy explanation of incorporation by reference in government contracts). In this regard, the FAR provides that provisions and clauses "should be incorporated by reference to the maximum practical extent, rather than being incorporated in full text . . . ." FAR § 52.102(a).

Here, as noted above, the IFB identified FAR clause 52.217-3, "Evaluation Exclusive of Options," as applying to this solicitation. Given this express incorporation, bidders were on notice that option prices would not be evaluated. To the extent that the protester believed that option prices should be evaluated or that the solicitation was in someway ambiguous with respect to the evaluation of option prices, such allegations concern alleged apparent solicitation improprieties that the protester was required to raise prior to bid opening. 4 C.F.R. § 21.2(a)(1) (2009).

The protest is denied.

Lynn H. Gibson
Acting General Counsel