

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: JOCH Construction Company

File: B-410980; B-410980.2

Date: April 7, 2015

Johnathan M. Bailey, Esq., Bailey & Bailey, PC, for the protester.
Mary A. Mitchell, Esq., Department of Veterans Affairs, for the agency.
Frank Maguire, Esq., Cherie J. Owen, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Bidder's submission of prices for work to be deleted rather than prices for the work remaining after the deletion, was properly waived by the agency as a minor informality in accordance with FAR § 14.405, and the bid was properly found to be responsive, where the bidder's prices for the remaining work were readily ascertainable from the face of its bid.
2. Protest that agency improperly accepted nonresponsive bid is denied where, in response to an invitation for bids, the awardee used an outdated bid schedule, but acknowledged the pertinent amendment and the record indicates there is no doubt as to the awardee's commitment to perform pursuant to the solicitation.

DECISION

JOCH Construction Company (JOCH), of San Antonio, Texas, protests the Department of Veterans Affairs' (VA) award of a contract to Trevino Group (Trevino) of Houston, Texas, under invitation for bids (IFB) No. VA256-14-B-1344, for renovations at the Michael E. DeBakey VA Medical Center in Houston, Texas. JOCH asserts that Trevino's bid should have been rejected as nonresponsive.

We deny the protest.

The IFB, issued on August 29, 2014, and set aside for service-disabled veteran-owned small businesses, called for bids for the supervision, labor, materials, tools, and equipment necessary for the renovation of Building 108 at the Michael E. DeBakey VA Medical Center. Agency Report (AR), Tab 1, Revised Solicitation, at 3. The agency issued several amendments to the IFB. As relevant here, amendment

No. 5 revised the IFB and identified “bid deducts” in the bid schedule. AR, Tab 10, IFB Amendments, at 9-10; Revised Solicitation at 3. The revised solicitation included a revised bid form. Revised Solicitation at 3. Under the revised IFB, bidders were to provide bids for three items: a base bid (item 1); base bid minus the Locker Rooms (item 2/alternate 1); and base bid minus the Locker Rooms, Corridor C1-1, and C1-2 Break/Storage (item 3/alternate 2). Id. The bid schedule advised:

A single award will be made on Base Bid No. 1, but in the event the bid exceeds the funds available, a single award will be made on Bid Item No. 2 or Bid Item No. 3, in that order, based on available funding. Bidders shall provide a total contract price on each bid item listed.

Id.

A public bid opening was held on October 30. Four timely bids were received, including bids from JOCH and Trevino. AR, Tab 13, Contracting Officer’s Statement (COS), at 1. Trevino’s bid included an earlier version of the bid schedule. Compare AR, Tab 4, Trevino Bid, at 9 with Revised Solicitation at 3. The record indicates that the contract specialist read aloud all four bids and that all four bidders acknowledged all six IFB amendments. COS at 1. Specifically, Trevino’s bid acknowledged amendment No. 5, which contained the updated revised solicitation, specifications, and drawings. Trevino Bid at 7. Trevino’s bid schedule included a base bid amount of \$1,630,000 and the following handwritten notation:

ALT# 1 & 2 are deducts

ALT#1 (\$94,000)

ALT#2 (\$30,000)

Id. at 9.

The contracting officer advises that the contract specialist “calculated the totals from their base bid and recorded the total amounts for bid items #2 and #3 in order to compare the pricing between all bidders.” COS at 1; see AR, Tab 3, Abstract of Offers.¹

¹ In its protest, JOCH proffers an account of the bid opening that is substantially different from the agency’s account and involved the contract specialist changing the amounts entered in Trevino’s bid schedule and attempting to “guess” what Trevino had intended to submit. Protest at 2. This account is supported neither by the contemporaneous record, see Trevino Bid at 9; Abstract of Offers at 1, nor by post-protest statements, see COS at 1; AR, Tab 14, Trevino Statement, at 1; AR, Tab 16, Trevino Email, Feb. 12, 2015. Further, JOCH appears to have abandoned this

(continued...)

As recorded on the Abstract of Offers, Trevino's and JOCH's bid amounts were as follows:

Bidder	Item1/Base Bid	Item 2/Alternate 1 (Base minus lockers)	Item 3/Alternate 2 (base minus lockers, corridor, break/storage)
Trevino	\$1,630,000	\$1,536,000	\$1,500,000 ^[2]
JOCH	\$1,652,000	\$1,441,000	\$1,434,000

Abstract of Bids at 1-2.

The agency concluded that since three of the four bidders provided base bid amounts lower than the Independent Government Estimate (IGE), which was the agency's construction budget, award would be made on the basis of the base bid. AR at 3. Trevino's base bid, at \$1,630,000, was the lowest of all responsible bidders. Abstract of Offers at 1. Award was made to Trevino on December 18. This protest followed.

DISCUSSION

JOCH argues that Trevino's bid should have been rejected as nonresponsive, since it did not state the dollar value for item 2/alternate 1 or item 3/alternate 2. Protest at 8. In this regard, the protester asserts that without "the Contracting Officer's calculations, Trevino's bid was nonresponsive and did not conform to the solicitation by failing to use the correct bid schedule, and failing to calculate its own total amounts for the alternate bids." Comments and Supp. Protest at 3.

The agency responds that Trevino's bid was responsive and provided all of the necessary information to determine Trevino's intended bid. AR at 4. Further, the agency asserts that Trevino's failure to include total bid amounts for bid items

(...continued)

allegation, since it was disputed by the agency in the agency report but was not addressed by JOCH in its comments or supplemental comments. In any case, we find the agency's account, supported by the record, to be credible.

² This appears to be a mathematical error. The correct amount should be \$1,506,000 based on Trevino's base bid and quoted deduct for item No. 3 (alternate No. 2). See AR, Tab 16, at 1.

No. two and three was waivable under Federal Acquisition Regulation (FAR) § 14.405, regarding minor informalities or irregularities in bids. AR at 6-8.

The test for responsiveness is whether a bid offers to perform the exact thing called for in an IFB, so that acceptance of the bid will bind a bidder to perform in accordance with all of the terms and conditions of a solicitation without exception. Randy Sabala; John Button, B-251221, B-251222, Nov. 24, 1992, 92-2 CPD ¶ 379 at 2. Minor informalities and irregularities in bids may be waived. FAR § 14.405. A minor informality or irregularity is one that is “merely a matter of form and not of substance,” and “[i]t also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders.” Id. When a bid contains such a minor informality or irregularity, the FAR requires that the contracting officer “either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government.” Id.

Here, we find that Trevino’s bid was responsive to the solicitation, and that the submission of prices for the work to be deleted rather than prices for the work remaining after the deletion was a waivable minor informality. While Trevino did not follow the exact instructions of the IFB, it nevertheless provided prices for the work to be deleted in the bid schedule for each alternate deductive bid item; thus, the amount of Trevino’s bid for the remaining work could be ascertained by simply deducting the dollar amount for the deleted work from the corresponding base bid. Further, Trevino’s intentions were evident on the face of the bid, and the contract specialist did not need to alter Trevino’s bid or take into account information not included on the face of Trevino’s bid schedule. In these circumstances, we find that the agency properly concluded that Trevino’s bid was responsive and properly waived Trevino’s failure to calculate the total bid amounts for items No. 2 and 3 as a minor informality. See De Ralco, Inc., B-281042, Dec. 7, 1998, 98-2 CPD ¶ 138 at 3-4 (where awardee entered price for work to be deleted rather than price of work remaining, agency properly considered this to be a waiveable informality in accordance with FAR § 14.405).³

³ In any case, prejudice is an element of every viable protest. Bannum, Inc., B-408838, Dec. 11, 2013, 2013 CPD ¶ 288 at 4. Here, we find that JOCH was not prejudiced by the contract specialist’s calculation of Trevino’s alternate bid amounts, since those amounts were not relevant to the award decision. The base bid, on which award was made, was clearly apparent on the face of Trevino’s bid schedule and did not require any calculations by the contract specialist.

JOCH also asserts that Trevino's bid was nonresponsive because the bid schedule used by Trevino differed from the bid schedule included in the IFB with regard to required supplies and services. According to the protester, amendment No. 5 "completely revised the solicitation, specification, and drawings," and therefore "Trevino committed itself to providing the work for a different project number and scope of work." Comments and Supp. Protest at 4-6; Supp. Comments at 2.

The record here does not support JOCH's position. The bid schedule used by Trevino includes the following "Description of Supplies/Services:"

580-13-402 Provide all labor, materials, equipment & supervision to accomplish work associated with Project 580-13-402, "Renovate the VISOR Building 108 gym and new fitness showers" in accordance with the scope of work, specifications, & drawings. Work includes, but is not limited to, demolition, architectural, mechanical, plumbing & electrical. Project includes demolition and reconstruction on space to house primary care women's clinic functions, as required by project plans and specifications.

Trevino Bid at 9. The revised bid schedule contained the following description of work:

Contractor shall furnish all supervision, labor, materials, tools, and equipment to renovate approximately 6,500SF in Building 108 for VISOR specified herein at the Michael E. DeBakey VA Medical Center located at 2002 Holcombe Boulevard, Houston, Texas 77030. All work shall be performed in accordance to the project plans and specifications. The project period of performance is 395 calendar days.

The FAR specifically permits bidders to use a bid schedule different from that provided with the IFB. Pertinent here, FAR § 14.301(d) provides:

(d) Bids should be filled out, executed, and submitted in accordance with the instructions in the invitation. If a bidder uses its own bid form or a letter to submit a bid, the bid may be considered only if--

(1) The bidder accepts all the terms and conditions of the invitation; and

(2) Award on the bid would result in a binding contract with terms and conditions that do not vary from the terms and conditions of the invitation.

We conclude that Trevino's bid satisfied the conditions of FAR § 14.301(d) for acceptance of a different bid schedule. The outdated bid schedule submitted by Trevino is reasonably encompassed within the phrase "its own bid form or a letter" in FAR § 14.301(d). Further, Trevino's bid schedule stated that it would "[r]enovate the VISOR Building 108 gym and new fitness showers," which the agency asserts is "in fact the premise of this construction project." Supp. COS at 1.

Moreover, the record is clear that Trevino acknowledged amendment No. 5, as well as all other amendments, thereby obligating itself to perform in accordance with the solicitation as amended. Trevino Bid at 2-8. In this regard, we have held that a bidder can bind itself to the contents of some amendments merely by acknowledging receipt of the amendments; however, when a bidder, despite acknowledging an amendment, otherwise creates doubt as to its commitment to perform pursuant to the amendment, its bid must be rejected. ATR Logistic Co., LLC, B-402606, June 15, 2010, 2010 CPD ¶ 140 at 2. Here, we conclude that Trevino's use of an outdated bid schedule did not reasonably create doubt as to its commitment to perform pursuant to the IFB, and in particular, amendment No. 5. The "Description of Supplies/Services" in Trevino's bid schedule is a summary description of work to be completed "in accordance with the scope of work, specifications, & drawings." Trevino Bid at 9. There is no reason to conclude that either Trevino's or amendment No. 5's bid schedule purports to be anything other than a descriptive summary of the requirements otherwise set forth in the IFB. The protester points to no specific part of the description in Trevino's bid schedule that takes exception to any IFB requirement and our review indicates none. Accordingly, we conclude that the agency acted reasonably in considering Trevino's bid to be responsive.

The protest is denied.

Susan A. Poling
General Counsel