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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: McKinley Construction & Excavating

File: B-295547

Date: March 3, 2005

Edwin J. Broecker, Esq., Sommer Barnard Attorneys, PC, for the protester.
Samar A. Shams, Esq., Department of Agriculture, for the agency.
Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Bid that acknowledges all amendments to an invitation for bids, but which contains only the original version of the bid schedule, which was modified by an amendment to increase the footage of pipe to be provided, is nonresponsive because the bid is ambiguous regarding whether the bidder intends to be bound to the original or amended quantity.

DECISION

McKinley Construction & Excavating protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. IN-NRCS-2003, issued by the Department of Agriculture for construction work on the Goose Pond Phase 2 wetland restoration project.

We deny the protest.

Issued on October 12, 2004, the IFB solicited bids for an on-site contractor to perform construction activities on nine separate wetland restoration units. The IFB contained a bid schedule calling for bids on 27 items corresponding to the construction activities identified in the specifications. The IFB provided that award would be based on the aggregate of all items. Prior to bid opening, the agency issued two amendments to the solicitation. This protest concerns amendment No. 1, which changed the type of pipe to be used and included a revised bid schedule in which the

unit quantity for line item No. 16, 12-inch diameter surface water pipe, was increased.¹

On November, 17, five timely bids were received in response to the IFB, and McKinley was the apparent low bidder at a price of \$964,858.52. The next low bid was \$1,368,947.70 and the government estimate was \$1,141,834.65. While examining the bids, the contracting officer noted that McKinley had made some mathematical errors and also discovered that, while McKinley had acknowledged all amendments, it submitted its bid using the wrong bid schedule.² Specifically, McKinley used the original bid schedule that listed the quantity for line item No. 16 as 218 lineal feet, instead of the revised bid schedule of amendment No. 1 which increased the quantity to 394 lineal feet. As a result, McKinley appeared to have based its bid on the wrong quantity for line item No. 16. On November 30, the protester was advised that it had submitted the wrong bid schedule and had made several mathematical errors in its bid. The protester subsequently submitted the revised bid schedule with the mathematical errors corrected and with the correct quantity for line item No. 16. On December 6, the protester was notified both orally and by letter that its bid had been rejected as nonresponsive. McKinley filed an agency-level protest on December 13, which was denied by the agency on December 16. McKinley filed this protest with our Office on December 16.

The protester contends that the agency's rejection of its bid as nonresponsive was improper because the firm's use of the original schedule, which did not include the additional units of piping, constituted a minor informality that could be easily identified and corrected. The protester states that its bid specifically acknowledged all amendments, including amendment No. 1, and thus acknowledged that the firm was aware of, and would be bound by, the amendment, including the increase in the quantity for line item No. 16. The protester also argues that its failure to use the revised bid schedule was caused by the agency's failure to clearly indicate on the face of the revised bid schedule that the schedule had, in fact, been revised and maintains that the revised bid schedule did not clearly and unequivocally communicate the changes required by amendment No. 1.³

Generally, where a bidder does not submit its price on a revised bid schedule listing an increased requirement, but instead submits its bid on the original schedule, the mere acknowledgment of the amendment containing the revised bid schedule is not

¹ For reasons not relevant here, FedBizOpps, where amendment No. 1 was posted, identified it as amendment No. 2.

² Three of the five bids submitted on November 17 contained the correct bid schedule.

³ Contrary to the protester's arguments, amendment No. 1 clearly indicated that a revised bid schedule was included and we think this identification was sufficient.

sufficient to bind a bidder to provide the increased quantity because it is not clear that the bidder has committed itself to provide the additional quantity for the price set forth in the bid. See Harvey Honore Constr. Co., Inc., B-262071.2, Jan. 31, 1996, 96-1 CPD ¶ 30 at 3 (bid was found nonresponsive where bidder acknowledged amendment but submitted its bid on original bid schedule instead of revised schedule provided by an amendment which increased the estimated quantity of dirt to be excavated under construction contract). Application of that rule leads us to the conclusion that the agency properly found the protester's bid to be nonresponsive.

Here, the protester submitted a bid for a quantity of 218 lineal feet of pipes, rather than for 394 lineal feet required by the revised bid schedule. Since it is not clear from the bid whether the protester intended to be committed to the amendment's larger quantity or the original schedule's lesser quantity, we can only conclude that, on its face, McKinley's bid does not provide a firm commitment to what the IFB, as amended, envisioned as the required work and, therefore, the bid properly was rejected as nonresponsive.

To the extent McKinley contends that its unit price for line item No. 16 represents its unit price for the increased quantity, a nonresponsive bid cannot be made responsive by explanation after bid opening. Environmental Health Research & Testing, Inc., B-246601, Mar. 10, 1992, 92-1 CPD ¶ 274 at 2. Allowing McKinley to explain its bid after bid opening would, in effect, give McKinley the advantage of electing to accept or reject the contract by choosing whether to make its bid responsive. Id. Such a situation obviously would have an adverse impact on the integrity of the bidding process. Id.

The protest is denied.

Anthony H. Gamboa
General Counsel