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Decision

Matter of: Mark Dunning Industries, Inc.

File: B-415890.2; B-415890.3

Date: November 5, 2018

Douglas P. Hibshman, Esq., and Nicholas T. Solosky, Esq., Fox Rothschild LLP, for the protester.

Julia Di Vito, Esq., Megan C. Connor, Esq., and Timothy F. Valley, Esq., Piliero Mazza PLLC, for the intervenor.

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Joshua R. Gillerman, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that awardee's bid should have been rejected as nonresponsive because it did not acknowledge solicitation amendment is denied where the record shows that the awardee constructively acknowledged the amendment.

DECISION

Mark Dunning Industries (MDI), Inc., of Dothan, Alabama, protests the award of a contract to Zero Waste Solutions (ZWS) Inc., of Concord, California, under invitation for bids (IFB) No. W911SF-16-B-0006, issued by the Department of the Army for waste disposal services. MDI, the incumbent contractor, argues that the agency unreasonably failed to find ZWS's bid nonresponsive for failure to acknowledge all of the IFB's amendments.

We deny the protest.

BACKGROUND

The IFB, issued as a small-business set-aside on July 29, 2016, contemplated the award of a requirements contract, with fixed-priced task orders, for solid waste disposal services at Fort Benning, Georgia. Agency Report (AR), Tab 3, IFB, at 1, 29, 88. Award was to be made to the lowest-priced, responsible bidder. Id. at 102.

On January 5, 2018, MDI protested the terms of the IFB to our Office, prompting the agency to take corrective action. On February 7, our Office dismissed MDI's protest as academic.

On May 22, the agency issued amendment No. 9 to the IFB, which set the bid opening for June 14, 2018 at 2:00 p.m. AR, Tab 2, Contracting Officer's Statement (COS), at 1. The agency issued three additional amendments prior to the bid opening. Id. Relevant here, in response to a request for clarification, amendment No. 12 changed the unit description of contract line item number (CLIN) 2005¹ from "job" to "months." AR, Tab 15, IFB, amendment No. 12. The amendment also included the following question and answer (Q&A) exchange:

Q: In the event that the amounts in the [a]dditional pickup CLINS are exceeded (0007, 0008, 0009, et seq.), will the [g]overnment add additional funding to the contract to cover the pickups needed in order for the contractor to provide the service?

A: These numbers are estimates, please follow the instructions provided in the solicitation-the [g]overnment will make adjustments as they become necessary.

Id.

The amendment provided that bidders could acknowledge receipt of the amendment in the following ways: (1) by completing the top portion of the amendment and returning a copy with its bid; (2) by acknowledging the amendment on each copy of the bid submitted; or (3) by separate letter or telegram. Id.

At the bid opening, the agency's contract specialist (CS) opened bids and stated that MDI acknowledged all 12 amendments. COS at 2. The CS also initially stated that ZWS had only acknowledged 11 amendments. Id. The CS explains that he subsequently performed a more thorough review of ZWS's bid and concluded that ZWS's bid had, in fact, acknowledged all of amendments.

The agency states that ZWS acknowledged amendment Nos. 1-11 by returning a copy of the amendments with the top portion completed with the required information. AR, Tab 1, Memorandum of Law (MOL), at 3. With regards to amendment No. 12, ZWS did not return a copy of the amendment. Id. ZWS' bid, did, however, change the unit type for CLIN 2005 from "job" to "months," and included the amendment number in the header of its bid. COS at 2. Based on this, the CS concluded that ZWS acknowledged amendment No. 12. Id.

¹ This CLIN required the collection and emptying of roll-off open-top solid waste containers. MOL at 7.

On August 10, the agency made award to ZWS for \$1,489,325, as the lowest-priced, responsible bidder. AR, Tab 18, Award, at 1. MDI's protest followed.

DISCUSSION

MDI asserts that ZWS's bid was nonresponsive because the firm failed to acknowledge amendment No. 12.² Comments at 3. The firm further contends that this amendment was material and, as a result, the agency cannot properly waive the requirement to accept it. Id. at 4.

As a general rule, a bidder's failure to acknowledge a material amendment requires the agency to reject a bid as nonresponsive. This rule is based on the fact that acceptance of a bid when an amendment has not been acknowledged would afford the bidder an opportunity to decide, after bid opening, whether to furnish extraneous evidence showing that it had considered the amendment in formulating its price or to avoid award by remaining silent. See N.B. Kenney Co., Inc., B-220436, Feb. 4, 1986, 86-1 CPD ¶ 124 at 2-3. Moreover, if such a bid were accepted, the bidder would not legally be bound to perform in accordance with the terms of the amendment, and the government would bear the risk that performance would not meet its needs. See Doyan Constr. Co., Inc., B-212940, Feb. 14, 1984, 84-1 CPD ¶ 194 at 4. However, our Office has found that an amendment may be constructively acknowledged where the bid itself includes one of the essential items appearing only in the amendment, thus, evidencing the bidder's receipt of, and intent to be bound by, the amendment. Professional Aviation Maint. & Mgmt. Servs., Inc., B-232078, Oct. 13, 1988, 88-2 CPD ¶ 350 at 2; C Constr. Co., Inc., B-228038, Dec. 2, 1987, 87-2 CPD ¶ 534 at 3.

Here, ZWS's bid indicates that it received amendment No. 12 and intended to perform in accordance with its terms. As such, regardless of whether ZWS' bid acknowledged amendment No. 12 in accordance with one of the methods set forth in the amendment, we find that ZWS constructively acknowledged the amendment by modifying CLIN 2005 in its bid to reflect the change in unit type from "job" to "months." AR, Tab 17, ZWS' Bid at 17. This specifically acknowledges compliance with the change to the CLIN unit type that was not contained in the original IFB, and was added by amendment No. 12. Therefore, we find that the agency reasonably concluded that ZWS acknowledged the amendment. Professional Aviation Maint. & Mgmt. Servs., Inc., supra. Moreover, as ZWS was properly found to have acknowledged all amendments, its bid was reasonably found to be responsive.³ See JOCH Constr. Co., B-410980, B-410980.2, Apr. 7, 2015,

² In its initial protest, MDI generally asserted that ZWS's bid was nonresponsive for failure to acknowledge all of the IFB's amendments. Protest at 11. After receiving the agency report, MDI only contends that ZWS failed to acknowledge amendment No. 12. Accordingly, this discussion exclusively focuses on whether ZWS acknowledged amendment No. 12.

³ The protester contends that constructive acknowledgement should not apply here because, even if ZWS's bid reflected the change in unit type for CLIN 2005, it did not
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2015 CPD ¶ 126 at 4 (finding bid responsive where, despite minor informality in bid, the bid offered to perform the exact thing called for in the IFB, so that acceptance of the bid bound the bidder to perform in accordance with all of the terms and conditions of a solicitation without exception).

During the course of the protest we dismissed MDI's other protest allegations for failure to include a detailed statement of the legal and factual grounds for the protest. Ruling on Partial Request for Dismissal, Electronic Protest Docketing System (EPDS) Docket Entry No. 23.⁴

First, our Office dismissed MDI's allegation that ZWS's price was "unrealistic, non-responsive, and defective." Protest at 12. The protester's argument about the realism of the awardee's price overlooks the inapplicability of price realism concepts to a sealed bid procurement. An acceptance by the contracting agency of an unreasonably low or below-cost bid is not illegal and, therefore, the possibility of "buying in" does not provide a basis for challenging a responsive bid. Gulf Coast Def. Contractors, Inc., B-212641, Feb. 28, 1984, 84-1 CPD ¶ 243 at 10. If the agency shared the view that the awardee's price was so low as to create a risk of non-performance--and the agency clearly did not share this view--the agency's only option would be to conclude that the awardee was not a responsible bidder. See id. (noting that an allegation that an unrealistically low bid of a bidder is due to the bidder's failure to understand what may be required under the contract involves the type of agency affirmative determination of the bidder's responsibility which we will not review.).

Moreover, as noted above, our Office will generally not review affirmative determinations of responsibility by a contracting officer. 4 C.F.R. § 21.5(c); FCi Fed., Inc., B-408558.4, et al., Oct. 20, 2014, 2014 CPD ¶ 308 at 7. One of the circumstances in which we will make an exception to the general rule is where a protest identifies evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant

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acknowledge the Q&A, which the protester asserts materially impacted bidders' pricing. Comments at 4,8. We find no merit to this argument. The agency's response to the question posed merely advised bidders to follow the terms of the solicitation. Accordingly, this Q&A did not constitute a material amendment to the solicitation, such that ZWS was specifically required to acknowledge it in its bid. See Site Dev., Inc., B-232813, Dec. 22, 1988, 88-2 CPD ¶ 620 at 2 (noting that an amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation).

⁴ We also dismissed MDI's supplemental protest allegations, as they did not actually raise new bases of protest, but rather furnished additional information in support of the allegations we found to be legally and factually insufficient.

information. See, e.g., Verestar Gov't Servs. Grp., B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 4. FN Mfg., Inc., B-297172, B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212 at 7-8 (reviewing an allegation that the agency failed to consider an ongoing investigation into whether the awardee defrauded the government on a prior contract for the same requirement). We dismissed MDI's allegation that ZWS should have been found nonresponsible to perform the work contemplated by the solicitation because MDI had not shown that the agency ignored any specific evidence that would be expected to have a strong bearing on whether ZWS should be found responsible.

The protest is denied.

Thomas H. Armstrong
General Counsel