DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

26156

FILE: B-210276 DATE: September 2, 1983

MATTER OF: Lusardi Construction Company

DIGEST:

1. Pricing information which was requested in solicitation for accounting purposes only and not as a basis for award is not material and therefore failure to include such information does not render bid nonresponsive.

2. Regulation allowing correction of mistake in contractor's bid which is not discovered until after bid opening applies only where contractor inadvertently includes in its bid something other than what it intended.

3. Where only evidence as to whether contracting official advised the protester to include certain elements in its bid is conflicting statements by protester and contracting officials, and even at best protester relies upon an "implication" in a conversation, the protester has not met the burden to prove its case.

4. Outcome of bidding was not affected by specification deviations taken by awardee since they did not give the awardee a price advantage exceeding the difference between its bid and the next low bid of the protester.

Lusardi Construction Company protests the award of a contract by the General Services Administration (GSA) to Harper Development & Associates for the design and construction of the Otay Mesa Border Station, San Diego, California (Project No. NCA00900-A). Lusardi contends that Harper's bid should have been rejected as nonresponsive because (1) it did not include any price for payment of fees for water service for the project and (2) it did not comply with all of the specifications in the solicitation. We deny the protest.

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Six months after it filed its protest with our Office, Lusardi filed suit against the Administrator of GSA in the United States District Court for the Southern District of California, seeking injunctive relief. Lusardi Construction Co. v. Gerald P. Carmen, et al., Civil No. 83-1033-GT(H). The court denied injunctive relief and has requested an advisory opinion from our Office. This decision is in response to that request.

Background

On August 18, 1982, GSA issued a request for technical proposals (RFTP), which was step one of a two-step formally advertised procurement for the design and construction of a border station, consisting of a truck inspection facility and primary and secondary vehicle inspection facilities. Nine firms submitted acceptable technical proposals and on October 13 the step-two invitation for bids was issued to those nine firms. Eight bids were received on the bid opening date of November 3. After bid opening, GSA concluded that the RFTP contained material defects and ambiguities and it subsequently canceled step two and reopened step one to amend the RFTP and to allow firms to submit revised technical proposals. The step-two IFB was reissued on December 8 and six bids were opened on December 17. The low bid was submitted by Harper in the amount of $7,749,000, while the second low bid was submitted by Lusardi in the amount of $7,882,000--a difference of $133,000. GSA awarded the contract to Harper on January 21, 1983, notwithstanding the filing of this protest.

Fees

The solicitation instructed bidders to submit one lump sum base bid to cover the entire contract, as well as to list on the bid form the lump sum for each component of the base bid. The bid form provided:

> "SEPARATED PRICE FOR BASE BID: The amount included in the lump sum Bid for the following work shall be stated on the Bid Form. This information is required for accounting purposes only and will not form a part of the basis of award. (See Section 01000, Para. 4.)

a. Lump sum for all Design Phase work $________
b. Lump sum for the Planning Schedule $________
c. Lump sum for Soils Test. & Report $________
d. Lump sum for New Constr. Phase Work $________
e. Lump sum for Fees $________"

Lusardi's first basis for protest concerns the fees to be paid for the provision of water service to the border station. It contends that the solicitation imposed on the contractor an obligation to pay certain of those fees and because Harper excluded them from its bid, that bid was nonresponsive. Alternatively, Lusardi argues that if its inclusion of those fees in its bid resulted from a mistaken reading of the solicitation, then it should be permitted to correct its bid downward. For the reasons stated below, this aspect of the protest is denied.

The RFTP informed bidders that there are no utilities existing on the site and that "[t]he contractor will be required to provide water as specified * * *, and shown on drawings. Hook-up fee shall not be included in the base bid. Coordinate with the Otay [Municipal] Water District." Note 6 of drawing C6 in the RFTP further provided that:

> "Contractor shall arrange for Otay Municipal Water District (OMWD) to install 16" x 8" tapping sleeve and 8" gate valve. Contractor shall install 8" cap for testing by OMWD. After successful test remove cap and connect to tapping gate valve. Contractor shall furnish, arrange for and pay for all water system work shown except the water connection fee and water main tapping cost, which will be paid for by the Government."

The record shows that on April 26, several months before GSA issued the RFTP, the Otay Municipal Water District provided GSA with an estimate of costs and charges for providing water service for the development. These fees, which totaled approximately $128,000, included $25,000 for providing water meters in concrete vaults.

Lusardi states that on the day prior to the first bid opening, its representative met with an employee of the Water District to discuss all fees associated with providing water to the project, and was provided information essentially identical to that given GSA. The next day, Lusardi states, prior to bid opening it called GSA's project manager and asked whether it should exclude from its bid all the fees claimed payable by the Water District or only the $25,000 fee for meters set in concrete vaults (which Lusardi refers to as a "hookup fee"). Lusardi states:

> "* * * [The project manager] did not inform me whether or not in his opinion the mentioned fees other than the first fee for hookup of $25,000 * * * should be included in the base bid but implied * * * that since those fees had not been expressly excluded from the scope of the obligations to be included in the base bid, they should be included in our bid. Accordingly, we did so.
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> "* * * Just prior to the second bid date [Lusardi again communicated with the Water District to] determine whether the fees for water service to the project were still required and whether there had been any change in the amounts claimed payable. The Otay [Municipal] Water District confirmed that the fees were still payable and had not changed. Accordingly, [Lusardi included in its bid] the sum of $100,000.00 for water service fees * * * as a rounded off figure."

GSA's project manager states that in response to Lusardi's inquiry:

> " * * * I advised * * * that all of the water connection fees would be paid by the Government as set forth in Note 6 on Drawing C-6. I cautioned * * * that the contractor is to pay for other fees in connection with the design and construction of the border station and that he should review the General Conditions, GSA Form 1139, paragraph 8 ['Building Codes, Fees and Charges' which provides in part that 'The Contractor shall obtain and pay all fees and charges for connections to outside services and for use of property outside the site.'].

"[Lusardi] persistently asked me which of the line items from the [Water District] were included in Note 6 of Drawing C-6. I advised * * * that since I did not have before me [the list of items or the Water District's April 26 letter to the Government], I could not respond to his inquiries on specific line items.

"My advice * * * was to thoroughly review the Government's Note 6 on Drawing C-6 and GSA Form 1139, paragraph 8, since I believed them to be clear. At no time did I advise [Lusardi] that the meters set in concrete vaults (the first item on his list from the [Water District]) were to be excluded from his base bid. I also at no time told [Lusardi] that the other items he mentioned were to be included in Lusardi's base bid."

Harper listed on its bid form its "Lump Sum for Fees" as "$-0-," while Lusardi listed its sum for fees as "$100,000." GSA thought that Harper's entry for fees may have been an error (even though the total of the other elements of its "separated price" exactly equaled its base bid) and it consequently requested that Harper verify its bid. Harper verified the accuracy of its bid, stating that it entered zero as the charge for fees because under the terms of the RFTP major fees were to be excluded from the bid, leaving only minor fees which it included in the general conditions of its base bid.

Lusardi first argues that its inclusion of $100,000 for water fees in its base bid was consistent with the oral advice it received from GSA's project manager prior to bidding. Although Lusardi concedes the project manager did not tell it which fees should be included, the protester contends that he "implied" that all fees other than those for water connection should be included. Lusardi consequently determined that all charges except that for the meters to be set in concrete vaults were to be included in its bid, which it did at the rounded off figure of $100,000. Lusardi therefore considers its own bid as responsive because it reflects its commitment to performing all of the obligations it understood GSA to require of a contractor.

In contrast, Lusardi contends, by entering zero as the lump sum for fees, Harper made an affirmative showing that it excluded from its bid the fees payable to the Water District for water service for the project. It argues that since these fees amount to $100,000, they are material, and therefore the failure to include such fees rendered Harper's bid nonresponsive. Lusardi argues further that by accepting Harper's bid and allowing it to enter zero, GSA was giving the firm an unfair competitive advantage because Harper was able to make sure it would be low, while retaining the right to claim a mistake in its bid if it was too low, or to claim, as it did, that fees were included elsewhere in its bid.

GSA responds that Harper's bid was responsive because the inclusion of a sum for fees was for accounting purposes only and therefore it was not a material requirement upon which a determination of nonresponsiveness could be based. Alternatively, GSA argues that even if this was a material requirement, the entry of zero in the space provided indicates Harper's intent to pay the fees and makes the bid responsive. GSA further responds that Harper did not have an unfair competitive advantage because the specifications clearly indicated that water connection fees due the Water District are the Government's responsibility and Lusardi simply misinterpreted the solicitation provisions regarding fees and erroneously included water connection fees in its bid. GSA also denies that Lusardi was ever told to include these fees in its bid price.

The fact that Harper entered zero for fees would not make Harper's bid nonresponsive. The test of a bid's responsiveness is whether the bid as submitted complies with the IFB's material provisions without exception. WFT Service Corp., B-206603, August 31, 1982, 82-2 CPD 190. The solicitation clearly stated that this pricing information was for accounting purposes only and did not form the basis for award. Thus, this information was not material and the failure to submit it could not render a bid nonresponsive.

It appears that Lusardi erroneously included these fees in its bid, while Harper apparently interpreted the specifications correctly. Lusardi states that if it mistakenly included a charge of $100,000 for fees in its bid, GSA could correct this mistake pursuant to Federal Procurement Regulations (FPR) § 1-2.406-4, even after award, since correction would make the "contract" more favorable to the Government. This regulation, however, is inapplicable to this situation. The term "mistake" refers to where the bidder inadvertently includes in its bid something other than what it intended to, see Paul Schmidt Construction Company, B-204009, August 5, 1981, 81-2 CPD 99, whereas Lusardi intended to include the $100,000 charge for fees and it did. Its "error" stemmed from its interpretation of the specifications and this is not the type of error to which this regulation is directed.

As to whether GSA advised Lusardi to include these fees in its bid, Lusardi admits it was not specifically told to include the fees but it read into the remarks of the project manager that it was to include them. Assuming that Lusardi is actually alleging that it was told to include these fees, the protester and agency have made conflicting statements on this issue. The protester has thus not met its burden of affirmatively proving that it was advised by GSA to bid as it did. Vanguard Industrial Corporation, B-204455, January 6, 1982, 82-1 CPD 17, affirmed on reconsideration, B-204455.2, March 1, 1982, 82-1 CPD 174.

Specifications

Lusardi's second basis for protest is that Harper's bid is nonresponsive because the firm's bid materially deviated from the project specifications.

With regard to the method of procurement used here, we stated in our decision E. C. Campbell, Inc., B-205533, July 8, 1982, 82-2 CPD 34:

> "Two-step formal advertising is a hybrid method of procurement, combining the benefits of competitive advertising with the flexibility of negotiation. The first-step procedure is similar to a negotiated procurement in that technical proposals are evaluated, discussions may be held, and revised proposals may be submitted. The second step is conducted in accordance with formal advertising procedures, each firm bidding on its own technical proposal. * * * The step-one negotiation procedures do not require that technical proposals comply with every detail of the specifications, but proposals must satisfy the Government's basic or

essential requirements. 53 Comp. Gen. 47 (1973). If a technical proposal represents a basic change in the Government's essential requirements, it can be accepted only if the agency informs the other offerors of the change and affords them an opportunity to submit revised proposals based on the changed requirements. Baird Corporation, B-193261, June 19, 1979, 79-1 CPD 435. This reflects the fundamental principle that all offerors must be treated fairly and equally so as to promote full and free competition. RCA Corporation; Norman R. Selinger & Associates, Inc., 57 Comp. Gen. 809 (1978), 78-2 CPD 213."

In the present case, GSA's first-step request for technical proposals contained certain specification requirements which were mandatory upon all offerors regardless of the details of their individual designs. GSA does not argue that the exceptions Harper is alleged to have taken do not fall within these mandatory requirements.

On September 27, Harper submitted to GSA as part of its technical proposal a number of proposed changes to the drawings and specifications in the RFTP. Harper met with GSA to discuss the proposed drawing changes. As a result, Harper revised its drawings in accordance with the Government's objections and resubmitted them on October 3. GSA failed to reject some of Harper's proposed changes at that time, however, and therefore they were accepted as part of that firm's technical proposal. These deviations in the drawings correspond with specification changes proposed by Harper.

The changes which Harper proposed, and which are in issue here, relate to specifications for insulation, built-up roofing, skylights, and suspended acoustical units. The solicitation required that exterior concrete masonry unit walls be insulated with 2 inch thick semi-rigid fiberglass board; Harper instead proposed to insulate the walls with 2 inch thick rigid board with attached gypsum finish. The solicitation also required that semi-rigid glass fiber insulation board with a thermal resistance of R-13 be attached beneath the metal roof deck with wire netting; Harper proposed to provide insulation as specified or in the alternative to lay glass fiber batt insulation with a R-19 rating on top of the suspended ceiling. As to the built-up roof, the solicitation specified that it must consist of a base sheet of 37 lb. asbestos felt, three layers of 15 lb. asbestos felt, and an asphalt and gravel topping. Harper proposed to modify the specifications so that the roof would consist of three layers of 15 lb. asbestos felt and one layer of mineral surfaced-asbestos cap sheet. Harper further proposed that instead of installing a double-dome plastic skylight at the Main Building and wire-glass skylights at the Truck Facility Building and Headhouse as required by the specifications, it would install single-dome plastic skylights in all three buildings. Finally, Harper proposed to modify the solicitation's requirement that the suspended acoustical units be a concealed system with 12 inch x 12 inch tile installed with splines so that instead the suspended acoustical units would be 24 inches x 48 inches in size with a lay-in type supporting system.

GSA notes that although it failed to reject the ceiling insulation and roofing deviations prior to acceptance of Harper's technical proposal, it later did so in pre-bid opening telephone conversations with Harper in which Harper orally agreed to comply with the solicitation's specifications for these two features. Specifically, GSA states that prior to the initial bid opening on November 3, its project manager noted the provision for "lay-in" ceiling insulation in one of Harper's drawings; that he advised Harper by telephone that this was not acceptable; and that Harper agreed to provide the specified ceiling insulation. As to the built-up roof, prior to the second bid opening on December 17, a representative of Lusardi telephoned the project manager and notified him that based upon information it had obtained from roofing subcontractors, Lusardi believed that Harper intended to deviate from the roofing specifications. The project manager then telephoned Harper about this and Harper again agreed to comply with the pertinent specifications. GSA observes that although through oversight neither of these verbal agreements was reduced to writing, Harper confirmed them by a post-bid opening letter of April 6, 1983.

Of course, GSA should have confirmed in writing Harper's agreement to meet the insulation and roofing requirements before it accepted the technical proposal. However, it is clear that GSA sought and obtained Harper's agreement, prior to the step two bid opening, to meet the requirements, and we believe that under the circumstances

GSA could view Harper's bid as one responsive to the insulation and roofing requirements.

This leaves for consideration the deviations GSA accepted relating to insulation of the masonry walls, skylights, and suspended acoustical units. GSA maintains that the deviation on the suspended acoustical units applies only to the Headhouse and Truck Building, because amendment No. 3 reiterated this requirement for the Main Building. Since in its bid Harper acknowledged receipt of this amendment, GSA argues, the company can be held to the specifications in that building. GSA estimates as follows the price advantage to Harper of these deviations:

Concrete masonry unit walls insulation	$10,790
Skylights	8,865[1]
Suspended acoustical units	23,866
	$43,521

GSA states that since the price advantage of these accepted changes in the specifications amounts to less than the $133,000 difference between the two low bids, it does not affect the relative standing of the bidders. Thus, GSA concludes the award should not be disturbed. We agree.

An agency may waive or afford the bidder an opportunity to cure a minor informality or irregularity which pertains to some immaterial or inconsequential defect or variation from the solicitation's requirements. A bid must be rejected as nonresponsive, however, when it deviates from the solicitation's requirements so as to affect price, quality, quantity or delivery, in more than a trivial manner when compared to the total cost or scope of the contemplated contract. WFT Service Corp., supra.

The difference between the two low bids is $133,000; GSA estimates the value to Harper of the exceptions it

[1]GSA's estimate of $8,865 is based on $2,265 for a single dome plastic skylight instead of a double dome plastic skylight in the Main Building and Headhouse and $6,000 for a single dome plastic skylight instead of a wire glass one in the Truck Building. Actually, the specifications call for a wire glass skylight, not a double dome plastic skylight, in the Headhouse. Thus, the proper estimate of the cost advantage using GSA's figures would be $6,000 each for the Truck Building and Headhouse and $1,132 for the Main Building, totaling $13,132.

took to the wall insulation, skylights and suspended acoustical units to be $43,521. This is substantially below the amount which would affect the relative standing of the two low bidders: therefore, whether Harper took these exceptions to the specifications or was not permitted by GSA to do so, it would remain the low bidder. Altough Lusardi maintains that GSA's cost estimates are understated and that the monetary impact of the exceptions taken by Harper are in fact greater, it has not shown that the combined values of these three items equals or exceeds $133,000. We conclude that since the outcome of the bidding has not been shown to have been affected, the deviations accepted by GSA were not prejudicial to the protester.

The protest is denied.

for Harry R. Van Cleve
Comptroller General
of the United States