



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Penn Perry, Inc.

File: B-241777

Date: March 1, 1991

Allan L. Fluke, Esq., Rich, Fluke, Tishman & Rich, for the protester.
R.P. Wallace for R.P. Wallace, Inc., an interested party.
John A. Dodds, Esq., Department of the Air Force, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Mere acknowledgment of receipt of amendment that adds work, the price of which is to be evaluated for award, is not sufficient to bind the bidder to perform the additional work; therefore, bid on original bid schedule that does not include price for the additional work properly was rejected as nonresponsive.

DECISION

Penn Perry, Inc. protests the rejection of its bid, and award of a contract to R.P. Wallace, Inc., under invitation for bids (IFB) No. F16602-90-B-0031, issued by the Department of the Air Force for the replacement and related repairs of predominantly tile roofs on buildings located at Barksdale Air Force Base, Louisiana. Penn Perry argues that the Air Force improperly rejected its bid as nonresponsive for failing to state a price for an item added to the original work by an amendment.

We deny the protest.

The IFB's bid schedule, as originally issued, required bidders to state on line item 1 a lump-sum bid amount for the materials and labor to be used in the tile roof replacement. Additionally, line items 2 through 6 required bidders to submit unit and extended prices for various tasks associated with the wood and copper portions of the roofs. Prior to bid opening, the Air Force issued amendment 1, which revised the bid schedule by deleting the work in line item 6 and adding new line item 6, and line items 7 and 8. Original line item 6

(at issue here), for the soldering (i.e., repair) of joints (i.e., seams) in the copper portion of the roofs, was deleted and new line item 8 added for the removal and replacement of copper roofs and ridge caps. This change was made after the pre-bid site visit when potential bidders indicated that the warranty required by the original specifications could not be provided unless the copper roofs were replaced. In addition, the revised bidding schedule advised that award would be made to the responsible bidder submitting the responsive, low total bid, and that failure to bid on all items would cause rejection of the bid as nonresponsive.

At the bid opening, the agency received two bids. Penn Perry offered the lowest total price, \$1,845,938, compared to Wallace's offered price of \$1,888,888. The protester's bid acknowledged amendment 1, but included the original six-item bid schedule instead of the revised eight-item schedule. The contracting officer initially determined that the failure to use the revised schedule was a minor informality and gave the firm the opportunity to cure the deficiency, specifically advising it that the total amount of its revised bid must equal the total amount of its original bid. Subsequently, Penn Perry submitted a bid on the revised schedule with prices for all of the line items and a total amount that equaled the original bid amount, but with changes in the amounts for each of the original line items bid. Following command headquarters' review of the matter, however, the Air Force determined that the use of the original bid schedule could not be waived as a minor informality, and therefore rejected the bid as nonresponsive. The Air Force concluded in this regard that Penn Perry's failure to submit its bid with the revised schedule meant that the firm had not legally bound itself to perform the new work added by the revised schedule, i.e., the replacement rather than the repair of the copper roofs, and that allowing Penn Perry to make its bid responsive after bid opening to conform to the revised schedule would be improper.

Penn Perry argues that its use of the wrong bid schedule was a minor informality that did not affect the responsiveness of its bid. Penn Perry reasons that, since it acknowledged the amendment containing the revised bid schedule, it was bound to perform the work as contained in the amendment regardless of whether the work in the revised schedule was different from that in the original schedule. Alternatively, the protester argues that the amendment work and bid schedule were not materially different from that in the original IFB; while the method of performing the work may have changed, there was no change in the end result of the work, and no impact on the total price for all the required work. In this regard, the protester contends that the cost of soldering the copper roof seams is the same as that for replacement of the copper roofs due to the labor intensive nature of the former task, which

would encompass cleaning the copper prior to soldering. Finally, the protester argues that the agency was estopped from reversing its initial decision that the failure to use the revised bid schedule was a minor informality that could be corrected.

The mere acknowledgment of an amendment containing a revised bid schedule listing additional work, the price of which is to be evaluated for award, and which is not included in the initial IFB and its schedule, is not sufficient to bind a bidder to perform the additional work. E.H. Morrill Co., 63 Comp. Gen. 348 (1984), 84-1 CPD ¶ 508; see also Rocky Ridge Contractors, Inc., B-224862, Dec. 19, 1986, 86-2 CPD ¶ 691. Where a bidder does not insert a price for additional work added by an IFB amendment, doubt is created as to whether the bidder intended to bind itself to perform the additional work and, if so, at what price. The existence of this doubt requires rejection of the bid since any bid that on its face fails to offer unequivocally to comply with all of the IFB's material terms at the offered price renders the bid nonresponsive. Main Elec., Ltd., B-224026, Nov. 3, 1986, 86-2 CPD ¶ 511; John Mondrick Plumbing & Heating, Inc., B-201675.3, July 31, 1981, 81-2 CPD ¶ 73.

Penn Perry's bid clearly was nonresponsive. Amendment 1 added work, the price of which was to be evaluated in selecting the awardee. Penn Perry's acknowledgment indicated its receipt of the amendment, but the firm's failure also to price the additional work made it impossible to determine from the face of the bid whether Penn Perry was actually agreeing to perform the work. While the acknowledgment suggests that Penn Perry intended to perform the work, its failure to use the amended bid schedule just as strongly indicated that the firm was not agreeing to perform as required, notwithstanding its receipt of the amendment. Again, this rendered Penn Perry's obligation ambiguous and its bid, therefore, nonresponsive.

Under a limited exception to the general rule, a failure to use an amended bid schedule may be waived where the items added by the amendment are divisible from the original solicitation's requirements, are de minimis as to total cost, and clearly would not affect the competitive standing of bidders. Main Elec. Ltd., B-224026, supra; Leslie & Elliott Co., 64 Comp. Gen. 279 (1985), 85-1 CPD ¶ 212, aff'd, Ryan Elec. Co.--Recon., B-218246.2, Apr. 1, 1985, 85-1 CPD ¶ 366. This exception does not apply here. The record indicates that the replacement of the copper roofs added by the amendment was an essential and integral part of the overall contract performance, material and indivisible from the solicitation's original requirements. That is, the copper work is interrelated with the other elements of the roofing work such that one contractor logically would have to perform the work

associated with the copper, tile and other work. Because the copper work is integral to the contract as a whole, it cannot be considered divisible and therefore immaterial. Waiver therefore is not permissible.

Finally, the agency's admitted initial erroneous action in requesting the protester to cure its bid does not preclude the agency from rejecting the firm's nonresponsive bid, since it is required by law to do so. Federal Acquisition Regulation § 14.404-2(a); see H.C. Transp. Co., Inc., B-219600, Aug. 21, 1985, 85-2 CPD ¶ 207; Valley Forge Flag Co., Inc., B-216108, Sept. 4, 1984, 84-2 CPD ¶ 251.

The protest is denied.


for James F. Hinchman
General Counsel