



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Massillon Construction and Supply, Inc.

File: B-407931

Date: March 28, 2013

Thomas O. Crist, Esq., and James Weikamp, Esq., Benesch Friedlander Coplan & Aronoff LLP, for the protester.

Milton Hsieh, Esq., Department of Transportation, for the agency.

Paul E. Jordan, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Rejection of bid as nonresponsive for failing to provide price for optional line item was proper where the omission could not be waived as a minor informality because the option, if exercised as intended by agency, is an integral part of base contract work and thus not divisible from solicitation's overall requirements.

DECISION

Massillon Construction and Supply, Inc. (MCSI), of Massillon, Ohio, protests the Department of Transportation, Federal Highway Administration's rejection of its bid under invitation for bids (IFB) No. DTFH7113B00002, for road construction in the Great Smoky Mountains National Park, Tennessee. MCSI asserts that its bid was responsive and that the agency should have waived its omission of a price for one optional contract line item (CLIN).

We deny the protest.

BACKGROUND

The IFB, as issued, sought bids to rehabilitate approximately 6 miles of Newfound Gap Road, divided into three schedules of work items. Schedule A, from Tennessee milepost (TMP) 6.3 to TMP 9.4, included full-depth pavement reconstruction, repair of stone guardwalls, repair of drainage structures, and traffic control. Schedule B (option 1) included the same improvements from TMP 9.4 to TMP 12.4, while Schedule C (option 2) included resurfacing, shoulder stabilization, pavement markings, and signing from TMP 6.3 to TMP 12.4. The agency reserved

the right to exercise the Schedule B option not later than 90 days after the notice to proceed on Schedule A, and to exercise Schedule C not later than the contract completion date of Schedule B. IFB Schedule Instructions at 2.

To be eligible for award, bidders were required to submit prices for each CLIN. IFB at 1. The original IFB included a 19-page bid schedule under which bidders were required to furnish individual unit prices and extended prices (based on the estimated quantity of work) or a lump sum price for each CLIN, with a total for each individual Schedule. The summary page included spaces to enter each Schedule's total price and a total for the sum of the Schedules.

Prior to bid opening, the agency amended the IFB to add a third option (Schedule D) for intelligent compaction (IC) coring and coordination work with respect to a portion of the Schedule A road; the option was to be exercised not later than 60 days after the notice to proceed on the base work (Schedule A), but was to be performed at the same time as Schedule A. IFB amend. 0001. In addition to describing the work to be covered, the amendment included a new pricing page requiring entry of a lump sum price for Schedule D, as well as a new summary page which added a line for a Schedule D price and required its inclusion in the sum total of all Schedules. Id. at B-19, B-20.

MCSI received most of amendment 0001, but its office fax machine did not print out five pages including the instruction pages and the replacement bid schedule pages (B-19 and B-20). Instead of completing the replacement bid schedule pages, MCSI annotated CLIN No. 15401-0000 (representing lump sum prices for contractor testing) under Schedules A and B with the words "(Amendment 001)," and entered overall CLIN prices of \$150,000 and \$65,000, respectively. MCSI Bid at B-1, B-10. Although MCSI's total bid price (\$13,629,519) was the lowest of the five received by bid opening time, because MCSI's bid did not include prices identified as Schedule D work either on the Schedule D page (replacement page B-19) or on the bid summary page (replacement page B-20), the contracting officer rejected its bid as nonresponsive.

MCSI then filed an agency-level protest asserting that its bid should be found responsive because the firm had acknowledged amendment 0001. Specifically, it asserted that its \$150,000 price for the Schedule A testing CLIN included \$50,000 for the Schedule D IC work, and argued that the agency could waive the omission of a specific Schedule D price as a minor informality. Subsequently, at the request of the agency, MCSI submitted a revised bid schedule which included corrected pricing for the Schedule A testing (\$100,000) and Schedule A total (\$6,409,015.50), separate pricing for the Schedule D testing (\$50,000), and a revised bid summary page reflecting these changes. The \$13,629,519 total for all work remained unchanged. When the agency denied the agency-level protest, MCSI filed this protest with our Office.

DISCUSSION

While the IFB required bidders to submit prices for each CLIN in order to be eligible for award, IFB at 1, MCSI failed to submit a separate, lump sum price for the Schedule D CLIN. MCSI, however, asserts that the agency nevertheless should have found its bid responsive because it acknowledged IFB amend. 0001 and included the price for the Schedule D work as part of the testing CLIN under Schedule A.

We disagree. Rather, we find that the agency properly determined MCSI's bid to be nonresponsive because of the failure to submit a separate bid for the optional Schedule D work. To be responsive, a bid must constitute an unequivocal offer to perform the exact thing called for in the solicitation, such that acceptance of the bid will bind the contractor in accordance with the material terms and conditions of the solicitation. Custom Env'tl. Serv., Inc., B-234774, May 24, 1989, 89-1 CPD ¶ 501 at 3. While MCSI acknowledged the amendment providing for Schedule D, the mere acknowledgement of an amendment, without a specific price, is not sufficient to constitute a bid for the additional quantity of work since doubt exists as to the amount of the bid and the bidder's obligation to perform the increased work. See J.D. Bertolini Indus., Ltd., B-231598, Sept. 14, 1988, 88-2 CPD ¶ 245 at 3; Larry's Inc., B-230822, June 22, 1988, 88-1 CPD ¶ 599 at 2. Further, MCSI's post-bid opening explanation that its price was included within another CLIN under Schedule A is unavailing since nothing in MCSI's bid established the likely price for Schedule D. See, e.g., United Food Servs., Inc., B-218228.2, Dec. 30, 1985, 85-2 CPD ¶ 727 at 3 (correction of omitted price may be allowed where there is a consistent pattern of pricing within the bid itself establishing both the error and the intended price). In this regard, each testing CLIN called for specific work to be accomplished under the relevant Schedules A, C, and D. IFB, as amended, § 154 at J-20. MCSI's mere inclusion of a total price under Schedule A, with the annotation "Amendment 001," while allegedly covering both Schedules A and D testing work, provided neither an assurance that the firm had agreed to perform the specific Schedule D requirements nor any indication of the cost of that work. Furthermore, MCSI's non-responsive bid cannot be made responsive by explanations after bid opening since doing so would effectively allow the bidder to elect whether to accept or reject the additional work. Larry's Inc., supra.

MCSI nevertheless asserts that its omitted price is a minor informality or immaterial defect, and thus that the agency should waive the omission or allow its correction. Federal Acquisition Regulation § 14.405; W.B. Constr. and Sons, Inc., B-405818, B-405818.2, Jan. 4, 2012, 2012 CPD ¶ 17 at 4. A defect or variation is immaterial if the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the services being acquired. Id. Thus, a contracting agency may waive the failure to bid on an item as a minor informality if the item for which the price is omitted is divisible from the solicitation's overall requirements, de minimis as to total cost, and would not affect the competitive standing of the

bidders. W.B. Constr. and Sons, Inc., *supra*; E. H. Morrill Co., B-214556, May 3, 1984, 84-1 CPD ¶ 508 at 3.

Here, the record shows that one of the prerequisites for waiver of the omission is not met inasmuch as the Schedule D work is not logically divisible. Although priced as an option, the agency considers the Schedule D intelligent compaction work to be an essential, integral part of the overall contract, intended to accelerate project delivery and improve pavement performance, and which will be ordered as soon as funding becomes available. Supplemental Agency Report (SAR) at 2. The agency explains that, since the intelligent compaction work involves sampling, testing, and compaction support activities to be performed on a portion of the road in conjunction with the asphalt laying work, it would not be practical to have two contractors--one performing intelligent compaction and the other laying asphalt--separately accomplish the required work. Second SAR at 1-2; *see* E. H. Morrill Co., *supra* (need to have contractor responsible for additional (omitted) excavation work which represented material part of overall contract requirements); *cf.* Leslie & Elliott Co., B-216676, Feb. 19, 1985, 85-1 CPD ¶ 212 at 3; *aff'd* Ryan Elec. Co.--Recon., B-218246.2, Apr. 1, 1985, 85-1 CPD ¶ 366 (unpriced, potential work considered divisible where no need for same contractor to perform it as well as remaining work). For example, according to the agency, if the asphalt was not properly compacted, the paving contractor could be required to remove the asphalt it put down and would not be paid until the problem was corrected. This in turn could potentially lead to claims against the agency by the paving contractor. Second SAR at 1-2.

While MCSI asserts that the agency could easily contract for the Schedule D intelligent compaction testing with the paving contractor used by the protester (and apparently other bidders), the government would not be required to do so. Thus, we see no basis to question the agency's determination that the Schedule D work is not, as a practical matter, divisible from the other aspects of the contract. Accordingly, MCSI's failure to include a price for Schedule D cannot be waived and the agency thus properly rejected the firm's bid as nonresponsive.

The protest is denied.

Susan A. Poling
General Counsel