



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Red John's Stone, Inc.

File: B-280974

Date: December 14, 1998

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Julia L. Perry, Esq., Department of Transportation, for the agency.
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DIGEST

Bid on road repair project on the Blue Ridge Parkway is nonresponsive, where it offers a contract performance schedule under which the contract would be completed before turf establishment (a material requirement of invitation for bids (IFB)) could be performed in compliance with the growing season specified in the IFB.

DECISION

Red John's Stone, Inc. protests the rejection of its bid under invitation for bids (IFB) No. DTFH71-98-B-00019, issued by the Department of Transportation, Federal Highway Administration, for roadway reconstruction and other related work on the Blue Ridge Parkway in Allegheny and Ashe counties, North Carolina.

We deny the protest.

The IFB, issued on June 26, 1998, contemplated the award of a fixed-price construction contract. The IFB stated that award would be based on lowest total cost to the government, which would be the sum of the bid price plus the contract administrative cost associated with the length of the performance period stated in the bid. IFB at B-1. The IFB stated an administrative cost of \$500 per day. *Id.* The bid schedule included a summary page on which each bidder had to state the number of calendar days it would take to complete all project work from a construction start date of November 16. IFB at B-8. The IFB required that bidders offer a performance period not to exceed 180 calendar days for completion of all contract work. IFB at A-4, B-1.

The bid schedule included 42 line items covering all of the work required under the contract and stated the estimated quantities of such work where other than lump-sum prices were required. The line items included hot asphalt concrete pavement,

pavement markings, furnishing and placing topsoil, and turf establishment. IFB at B-2 - B-7.

The IFB incorporated the project plans/drawings and the agency's Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, FP-96, 1996, which stated the requirements for the work to be performed under the contract. IFB at A-1. These requirements included the minimum temperature requirements for placement of hot asphalt concrete mix (FP-96 § 401.07 at 241), the minimum temperature requirements for painting pavement markings (FP-96 § 634.05 at 636), the required ground conditions for placing topsoil (FP-96 § 624.04 at 609), and the turf establishment season (FP-96 § 625-03 at 611). Although FP-96 did not state the dates of the local growing season for turf establishment, the IFB supplemented and amended the requirements to state that seed was to be applied during the growing season of "April 1 to September 30." IFB at J-14.

Bid opening was on July 29. The agency received four bids. Red John's bid price of \$299,937.55 was lowest. The next lowest bid price was \$342,514.75. Red John also bid the shortest performance period of 98 days. All of the other bids offered performance periods of 180 days. Because of its short performance period, Red John's bid represented the lowest evaluated cost to the government by an even wider margin (over \$80,000). Agency Report, Tab 8.

By fax transmission of July 30, the agency notified Red John that its 98 day performance period was considerably lower than the agency's estimate and stated:

It is necessary for us to ensure that Red John's Stone can complete the project work within 98 days. As a means to verify your contract time, please provide a copy of any documentation, such as a draft [critical path method (CPM)] schedule, that you used to determine your contract time for the work

Agency Report, Tab 13.

Red John responded by providing the agency with its CPM schedule. Consistent with the 98-day performance period, Red John had scheduled completion of all work by the third week of February 1999 (based on the required November 16 start date). Agency Report, Tab 14.

The agency determined that the average temperatures for the repair areas were too low to permit placing hot asphalt concrete, painting pavement markings, and placing topsoil in accordance with the minimum requirements stated in FP-96, and that seeding for turf establishment would be performed prior to April 1, the specified start of the growing season. Agency Report, Tab 7. The agency thus determined that Red John's bid proposed work that was noncompliant with the solicitation requirements and that the work could not be performed within 98 calendar days.

Agency Report, Tab 7. By letter of August 27, the agency rejected Red John's bid as nonresponsive. This protest followed.

Red John asserts that its bid did not take exception to the contract requirements and thus its bid was responsive. It alleges that the agency's determination constitutes a negative responsibility determination which, since Red John is a small business, must be approved by the Small Business Administration. See Mobility Sys. and Equip. Co., B-243332, Apr. 25, 1991, 91-1 CPD ¶ 412 at 3-4.

Responsiveness deals with a bidder's unequivocal promise, as shown on the face of its bid, to provide the items or services called for by the material terms of the IFB. On the other hand, the issue of a bidder's responsibility concerns whether the bidder can perform as promised in the bid. Aviation Specialists, Inc.; Aviation Enters., Inc., B-218597, B-218597.2, Aug. 15, 1985, 85-2 CPD ¶ 174 at 2.

Here, the contract completion date apparent from the face of Red John's bid¹ is February 22, 1999, i.e., 98 days from the stated start date of November 16, 1998.² Regardless of the historical average temperatures for this performance period, Red John's bid did not take exception to performing the hot asphalt concrete paving, pavement marking, and placement of topsoil items in compliance with the minimum temperature and soil requirements stated in the IFB. Therefore, the issue raised by the average temperature data collected by the agency is not a question of bid responsiveness, but rather a question of whether Red John can perform these tasks as promised during the period of performance which it bid, which is a matter of responsibility not subject to review by our Office. See Harley-Davidson, Inc., B-238436.3, June 4, 1990, 90-1 CPD ¶ 528 at 3 (whether low bidder can perform in compliance with cold weather starting requirements is a matter of responsibility; whether bidder actually complies with the requirements is a matter of contract

¹The CPM schedule was not a bid document and thus cannot establish bid responsiveness. See Mobility Sys. and Equip. Co., *supra*, at 3 (responsiveness must be based solely on the bid documents themselves as they appear at the time of bid opening).

²Since the IFB solicited bids for shorter performance periods than the stated maximum period of 180 days, and did not state a minimum mandatory period, Red John's bid offering a performance period of 98 days was not per se nonresponsive. See Cedar Valley Corp., B-256556, July 5, 1994, 94-2 CPD ¶ 7 at 4-5 (where IFB solicited shortest practicable performance, bid offering short performance period, which was reasonably determined to be practicable, was acceptable); Cleveland Gen.--Recon., B-225804.3, June 1, 1987, 87-1 CPD ¶ 551 at 1 (where IFB authorized submission of accelerated delivery schedules, bid offering an accelerated delivery schedule is responsive).

administration); Government Contractors, Inc.--Recon., B-187671, Apr. 29, 1977, 77-1 CPD ¶ 295 at 2-4 (where bid did not take exception to staffing requirement, agency's knowledge that bidder in fact will not comply with the requirement is a matter of responsibility; whether bidder actually complies with the requirements is a matter of contract administration).

However, since Red John's bid promised to complete all of the contract requirements by February 22 (i.e., within 98 days of November 16), the bid, in effect, takes exception to the turf establishment requirement that seeding be done within the growing season of April 1 to September 30. Thus, as regards the turf establishment requirements, the issue concerns bid responsiveness. See Pettinato Associated Contractors and Eng'rs, Inc., B-246106, Feb. 19, 1992, 92-1 CPD ¶ 201 at 2-3.

As a general rule, a bid must be rejected if it modifies material requirements of the IFB or limits the bidder's liability to the government. Federal Acquisition Regulation (FAR) § 14.404-2(d) (June 1997); Pettinato Associated Contractors and Eng'rs, Inc., supra, at 3. However, a bid defect or variation from the exact requirements should either be cured or waived as a minor informality if the defect or variation is immaterial, and if correction or waiver will not be prejudicial to other bidders. FAR § 14.405; TECOM, Inc., B-236929.2, May 11, 1990, 90-1 CPD ¶ 463 at 3. 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. FAR § 14.405. No precise standard can be employed in determining whether a defect has a negligible effect on price, quantity, quality, or delivery, but rather the particular facts of each case will determine whether a defect or variation is immaterial. Leslie & Elliott Co., B-216676, Feb. 19, 1985, 85-1 CPD ¶ 212 at 2. In determining whether a defect or variation is immaterial, our Office generally reviews the particular facts of the case with the following considerations: (1) whether the item is divisible from the solicitation requirements, (2) whether the cost of the item is de minimis as to the contract's total cost, and (3) whether waiver or correction clearly would not affect the competitive standing of bidders.³ Id. at 3; Lamb Eng'g & Constr. Co., B-261240, Aug. 25, 1995, 95-2 CPD ¶ 87 at 4-5.

In this case, the turf establishment item includes turf shoulders for the roadway. Project Plan Sheets 3, 4, 13. The Blue Ridge Parkway was designed and constructed with turf shoulders. Agency Supplemental Report, November 24, 1998, at 4, Enclosure. The agency's position is that turf shoulders are an aesthetic component which is an integral part of the overall visitor experience and paramount

³The turf establishment line item is de minimis (less than \$2,000 of the government estimated contract value of \$345,000) and, due to the wide disparity in price between Red John's bid and the next lowest bid, waiver of the requirement would not affect the competitive standing of the bidders.

to the overall management of the park. Agency Supplemental Report at 4-5, Enclosure. The turf shoulders are designed to support the weight of a vehicle, thus replacing paved shoulders and increasing the ability of the roadway to blend in with the adjacent environment. Agency Supplemental Report, Enclosure. Since turf serves as the shoulder material, improper establishment of the shoulders is also a safety concern for motorists in that vehicles leaving the paved surface and/or erosion may create ruts or drop-offs on the edges of the roadway that would be a hazard to moving vehicles which may stray off of the paved travel lane. Agency Supplemental Report at 4, Enclosure. The turf shoulders also serve to control erosion by stabilizing the soil adjacent to the pavement and thus preventing damage to the structure of the roadway itself. Agency Supplemental Report at 4; Agency Report, Legal Memorandum at 2.

Under the IFB, where permanent turf establishment is required, it must be in place to stabilize the disturbed area "no more than 14 days after" work has ceased. Project Plan Sheet 14. Although use of other stabilization methods are permitted for temporary erosion control, see id., until permanent turf is established on the shoulders, the shoulders cannot be used by vehicles in emergency circumstances, nor would the shoulders bear the weight of vehicles sufficiently to prevent unsafe driving conditions. Agency Supplemental Report at 4. Thus, none of these other stabilization methods are suitable for serving as a safe roadway shoulder. Agency Supplemental Report at 4.

Since Red John's bid calls for completion of the contract by February 22, permanent turf establishment could not be applied within 14 days of completion of construction, even by another contractor, due to the growing season not starting for 38 days after February 22.⁴ Although Red John's would be responsible for repairing damage to the shoulder caused by vehicular traffic or weather until contract completion, if the turf establishment item were severed from the contract and Red John's contract was completed with temporary erosion controls by February 22, Red John may not be responsible for repairs occurring after February 22 but prior to permanent turf establishment in April. See FP-96 § 107.06; Agency Supplemental Report at 5. Under such circumstances, the agency may have to contract for such repairs in addition to the permanent turf establishment requirement. Also, since permanent turf establishment could not begin prior to April 1, vehicular traffic would be exposed to unsafe roadway conditions for an extended period.

⁴The protester alleges that, due to delay resulting from this protest process, contract completion would now occur within the growing season. This cannot affect the responsiveness analysis since bid responsiveness must be based solely on bid documents themselves as they appear at the time of bid opening. Mobility Sys. and Equip. Co., supra.

Under these circumstances, we believe the turf establishment requirement is material to the overall project and, since roadway construction cannot be completed in February and turf shoulders established in April without creating a safety hazard and possibly increasing work requirements for the agency, the turf establishment item is essential and integral to, and indivisible from, the overall IFB requirements. Thus, Red John's bid is nonresponsive for taking exception to this material term of the IFB. See Lamb Eng'g & Constr. Co., *supra*, at 5 (bid is non-responsive where bid created doubt about bidder's intent to comply with a requirement that was essential and integral to, and indivisible from, the overall requirements); Pettinato Associated Contractors and Eng'rs, Inc., *supra*, at 2-3 (bid is nonresponsive where it modifies a requirement that cannot go unperformed and thus is indivisible from the overall requirements).

Red John also alleges that temporary turf establishment is permitted under the IFB as one of the means of temporary erosion control pending permanent turf establishment, and that temporary turf establishment could be performed prior to April 1. Protester's Supplemental Comments, November 24, 1998, at 2; see Project Plan Sheet 14 "1. General Guidelines." The protester states that permanent turf establishment would not be necessary if temporary turf establishment efforts result in growth of "permanent suitable vegetation." Protester's Supplemental Comments at 2; see IFB at J-14 (supplementing FP-96 § 625.01).

Even assuming the IFB permits planting of temporary turf seed prior to the local growing season (which is not at all apparent⁵), the IFB does not require a specific type of temporary erosion control, but rather identifies several acceptable stabilization methods. See Project Plans at Sheet 14 "1. General Guidelines." If the permanent turf establishment item were severed from the IFB, nothing in Red John's bid would bind Red John to use temporary turf establishment over the other appropriate and acceptable stabilization methods. Also, the protester's argument is based on the occurrence of an uncertain event--the growth of permanent suitable vegetation from temporary turf establishment efforts prior to the local growing season.⁶ Under this argument, the conditions that would make the permanent turf establishment immaterial and divisible from the IFB requirements cannot be known until performance of the contract, and thus cannot be considered in determining

⁵See Project Plan Sheet 14 ("Phase II . . . To control erosion during the time periods between seeding seasons, as shown in [FP-96 §] 625, apply temporary mulch in lieu of temporary turf establishment.")

⁶The agency also states that temporary turf would probably consist of seed which would not contain the mix of seeds specified for suitable vegetation and/or would produce vegetation which would not survive more than one year. Therefore, temporary turf establishment could not produce suitable vegetation to displace the permanent turf establishment requirement. Agency Supplemental Report at 5.

whether the bid is responsive at the time of bid opening. See Mobility Sys. and Equip. Co., supra.

Red John also alleges that bids submitted by itself and other contractors have been determined responsive and the low bidder awarded contracts by this agency, even though the bid's performance period required turf establishment outside of the specified growing season, and thus Red John's bid should be found responsive here based on the agency's previous practices. The protester's reliance on this agency's prior determinations has no bearing on the merits of the issue before us. As stated above, bid responsiveness is determined solely from the bid documents themselves as of bid opening. Id. Since each procurement is a separate transaction, and action taken on one procurement does not govern the conduct of similar procurements, the issue of bid responsiveness here must be determined from the current bid documents without reference to determinations under other procurements. See ERC Gen. Contracting Servs., Inc., B-261404.2, Oct. 11, 1995, 95-2 CPD ¶ 170 at 4 n.1; Trio Graphics, Inc., B-253471, Aug. 27, 1993, 93-2 CPD ¶ 139 at 3-4.⁷

Finally, Red John asserts that this exception to the IFB requirements should be waived as a minor informality because the contract will be considered substantially performed even without turf establishment. In support, Red John cites decisions by boards of contract appeals finding that substantial performance of construction projects occurs prior to turf establishment. However, the concept of substantial performance concerns a matter of contract administration which arises during contract performance, as indicated by the contract appeals cases cited by the

⁷To the extent the protester is challenging the dates of the growing season stated in the IFB, the protest is untimely. Protests based on allegation of improprieties apparent from the face of a solicitation must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1998); Hein-Werner Corp., B-247459, June 2, 1992, 92-1 CPD ¶ 484 at 3.

protester.⁸ As such, the concept is not directly applicable to bid responsiveness, which is determined as of bid opening solely from the bid documents. See Mobility Sys. and Equip. Co., supra, at 3.

The protest is denied.

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⁸FP-96 § 101.04 at 12 defines substantial completion as:

The point a which the project is complete such that it can be safely and effectively used by the public without further delays, disruption, or other impediments. For conventional bridge and highway work, the point at which all . . . pavement structure, shoulder, . . . work is complete.