



## Decision

**Matter of:** 4Granite Inc.

**File:** B-406459

**Date:** April 2, 2012

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Henry Corvera, for the protester.

Captain Grant L. Arnold, Army Corps of Engineers, for the agency.

Tania Calhoun, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Contracting agency properly rejected bid as nonresponsive where the bidder introduced ambiguity regarding material terms of its bid by referencing clauses that conflicted with material terms and conditions of the solicitation.

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### DECISION

4Granite Inc., of Apple Valley, California, protests the rejection of its bid submitted in response to invitation for bids (IFB) No. W912ES-12-B-0002, issued by the Army Corps of Engineers for repairs to a channel along the Red Lake River near Crookston, Minnesota. The agency rejected 4Granite's bid as nonresponsive.

We deny the protest.

The solicitation, issued on January 11, 2012, sought a contractor to perform various repairs to the Crookston Channel. The IFB identified the project as a construction contract and included numerous Federal Acquisition Regulation (FAR) clauses applicable to such contracts. Among these were FAR § 52.246-21, Warranty of Construction, FAR § 52.243-4, Changes, and FAR § 52.249-10, Default (Fixed-Price Construction). IFB at 5.

The Corps received 11 bids by the February 10 bid opening date; 4Granite's bid of \$990,340.22 was the low bid. Although not required by the solicitation, the protester's bid included a one-page document with the heading, "Company

Information and F.A.R. and D.F.A.R. compliance statements.”<sup>1</sup> Agency Report, Exhibit C. At issue here are three sentences under this heading:

Offeror represents that Representations and Certifications-Commercial Items have been entered or updated in the past 12 months and are current, accurate, complete and applicable to this solicitation. (F.A.R. 52.212-3)

Offeror represents that he has read and understood F.A.R. clauses 52.212-4 and 52.212-5 and all other F.A.R. and D.F.A.R. clauses incorporated by reference in this solicitation.

Contractor is in complete agreement with all terms and conditions included in this solicitation. (F.A.R. 52.212-1)

Id.

The contracting officer found that these references to commercial items clauses created substantial doubt as to whether 4Granite was agreeing to the terms and conditions of those clauses or to the clauses that were in the solicitation. He further found that, in some cases, the terms and conditions in the commercial items clauses cited by 4Granite materially conflicted with the terms and conditions in the solicitation. The contracting officer concluded that the bid was ambiguous as to material provisions and rejected it as nonresponsive.

As an initial matter, 4Granite maintains that the references to the commercial items clauses in its bid was an “inadvertent error” and, as a consequence, they should not have been construed as imposing additional conditions or obligations in conflict with the terms established by the solicitation. Protest at 2. 4Granite also argues that the document at issue was not required by the solicitation, the contracting officer could have overlooked its contents, and that it should have been permitted to delete the references to the clauses set forth in the document because any differences between the referenced clauses and the solicitation’s clauses are immaterial. For the reasons discussed below, we find that the agency properly rejected 4Granite’s bid as nonresponsive.

To be responsive, and considered for award, a bid must contain an unequivocal offer to perform, without exception, the exact thing called for in the solicitation so that, upon acceptance, the contractor will be bound to perform in accordance with all of the solicitation’s material terms and conditions. Oregon Electric Constr., Inc. dba Integrated Systems Group, B-294279, Sept. 27, 2004, 2004 CPD ¶ 188 at 2. If,

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<sup>1</sup> 4Granite’s use of the acronym “D.F.A.R.” presumably refers to the Defense Federal Acquisition Regulation Supplement, or “DFARS.”

in its bid, a bidder imposes conditions or modifies a material solicitation requirement, limits its liability to the government, or limits the rights of the government under a resulting contract, then the bid must be rejected as nonresponsive. Id.; FAR § 14.404-2(d). A bidder's intention to be bound by the solicitation requirements must be determined from the bid itself at the time of bid opening. See Franklin Instrument Co., Inc., B-204311, Feb. 8, 1982, 82-1 CPD ¶ 105 at 2.

Here, the contracting officer could not overlook the document 4Granite included in its bid. Any extraneous documents submitted with a bid must be considered a part of the bid for purposes of determining the bid's responsiveness. Washington Printing Supplies Inc., B-227048, July 10, 1987, 87-2 CPD ¶ 34 at 3. The face of the document at issue indicates that 4Granite understood the commercial items clauses as applying to this solicitation. Specifically, 4Granite represented that the clause at FAR § 52.212-3, Representations and Certification-Commercial Items, was "applicable to this solicitation," and referenced the clause at FAR § 52.212-1, Instructions to Offerors-Commercial Items, when indicating it was in complete agreement with all terms and conditions included in this solicitation. These statements, coupled with 4Granite's subsequent indication that it had "read and understood" two particular commercial items clauses and "all other" FAR and DFAR clauses "incorporated by reference in this solicitation" rendered its bid, at best, ambiguous as to whether it was agreeing to the terms and conditions of the commercial items clauses or to the terms and conditions set forth in the solicitation.

Moreover, we agree with the agency that the ambiguity created by 4Granite's references to the commercial items clauses concerned material terms of the firm's bid since they implicate matters such as the contractual terms of the warranty. See Bailey Controls Co.; The Foxboro Co., B-256189, B-256189.2, May 23, 1994, 94-1 CPD ¶ 320 at 4 (establishing that warranty provisions are material terms of a contract since they affect the legal obligations of the contracting parties). In this regard, the reference in 4Granite's bid to FAR § 52.212-4, Contract Terms and Conditions--Commercial Items, invoked the standard commercial item warranty, which merely provides that a contractor "warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract." In contrast, the warranty provision set forth in the solicitation, FAR § 52.246-21, Warranty of Construction, establishes fundamentally different legal obligations concerning the length of the warranty, the contractor's obligation to remedy defects and at whose expense, the contractor's obligation to enforce warranties for the benefit of the government, and the government's rights in the event of a contractor's failure to fulfill its obligations. It is well settled that where a bidder introduces ambiguity in its bid regarding material terms, such as the case here, the bid must be rejected as nonresponsive. Washington Printing Supplies Inc., supra.

Although 4Granite now maintains that it unintentionally included this document, and meant to agree to all the terms and conditions in the solicitation, no such statement of this intent was attached to the bid at the time of its submission. This document and its contents were submitted along with the bid and must be considered part of the bid, as noted above, for purposes of determining responsiveness. Since only material available at bid opening may be considered in making a responsiveness determination, 4Granite's protest statements concerning its intent cannot be considered in determining the responsiveness of its bid. HBH, Inc., B-225126, Feb. 26, 1987, 87-1 CPD ¶ 222 at 2. Bidders bear the primary responsibility for properly preparing bid documents in such a fashion that the contracting agency can accept the bid with full confidence that an enforceable contract, conforming to all the requirements of the IFB, will result. See The Scotsman Group, Inc., B-245634, Jan. 13, 1992, 92-1 CPD ¶ 57 at 3. The protester failed to do so here.

The protest is denied.

Lynn H. Gibson  
General Counsel