

Decision

Matter of: RB Construction Company

File: B-419894.2

Date: October 22, 2021

Cindy R. Victor, Esq., Kus Ryan & Associates, PLLC, for the protester.
Brian R. Reed, Esq., Department of Veterans Affairs, for the agency.
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DIGEST

1. Agency reasonably concluded that awardee submitted a responsive bid when it acknowledged mandatory amendments and took no exception to the terms of the solicitation.
 2. Agency reasonably permitted upward correction of awardee's low bid where the record included clear and convincing evidence of both the mistake and the intended price.
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DECISION

RB Construction Company, a service-disabled veteran-owned small business (SDVOSB), of Mount Clemens, Michigan, protests the award of a contract to Freedom Contracting Group, an SDVOSB of New Hudson, Michigan, under invitation for bids (IFB) No. 36C25021B0022, issued by the Department of Veterans Affairs (VA) for a construction project at the Ann Arbor VA Medical Center in Ann Arbor, Michigan. The protester alleges that the agency improperly allowed Freedom to correct a mistake in its bid.

We deny the protest.

BACKGROUND

On March 24, 2021, the agency issued the IFB as a set-aside for SDVOSB concerns seeking sealed bids for the construction of Site Prep Angio OR-6 for the Ann Arbor VA Medical Center. Protest, exh. 1, IFB at 1. Before the due date for submission of bids, the agency issued three amendments to the IFB. The first amendment, issued on April 20, 2021, extended the bid opening date to May 6, 2021, and informed bidders that

they would need to include the cost to furnish and install two listed brand name high-tech medical equipment systems within their bids. Protest, exh. 2, IFB, amend. 1 at 1-2.

To ensure that all bids would be based on the installation of the two required brand name systems, namely, an AirFRAME ceiling system (AirFRAME) and a Skytron surgical lights and booms system (Skytron), the VA sought quotations from a supplier of the systems--Stevens Moon and Associates. Protest, exh. 3, IFB amend. 2 at 1. On May 5, 2021, the VA issued a second amendment, which provided bidders with quotations from Stevens Moon for the two systems (AirFRAME and Skytron). *Id.* at 1. The amendment went on to instruct bidders that the "two quotes from Stevens Moon [] must be included with your bid." *Id.* at 1; Req. for Dismissal, attach. 2, Stevens Moon AirFRAME System Quotation; Req. for Dismissal, attach. 3, Skytron System Quotation.

Shortly after issuing the second amendment, the VA issued a third amendment to provide updated pricing for the AirFRAME system and the Skytron system to include sales tax values that were inadvertently omitted from amendment 2. Protest, exh. 4, IFB amend. 3 at 1. The agency required bidders to acknowledge these amendments. IFB at 5. The final provided price quotation for the AirFRAME system was \$280,800.39 and the price for the Skytron system was \$370,922.32. *Id.* at 2; Req. for Dismissal, attach. 4, Revised AirFRAME Quotation at 1; Req. for Dismissal, attach. 5, Revised Skytron Quotation at 4.

On May 6, 2021, the VA opened four timely bids submitted in response to the IFB. The bid prices were as follows:

Bidder	Value of Submitted Bids
RB Construction Company	\$1,182,651
Freedom Contracting Group	\$747,000
Daniel Building Co.	\$1,185,000
CAVU Roncelli LLC	\$1,333,000

Req. for Dismissal, attach. 7, Determinations and Findings at 2, 7-8.

Later, that same day, Freedom contacted the contracting officer by telephone, explained that it had mistakenly omitted the cost of the Skytron system from its bid, and asked permission to make an upward correction to account for the error. *Id.* at 2. The contracting officer requested documentary evidence of the mistake and advised that the agency would review the request for correction in accordance with Federal Acquisition Regulation (FAR) section 14.407-3(a). *Id.* at 2; Req. for Dismissal at 3.

Freedom submitted a statement explaining the error and contemporaneous pricing worksheets in support of its request to correct the identified mistake. This information reflected that Freedom had included the cost of the AirFRAME system but omitted the cost of the Skytron system. Req. for Dismissal, attach. 7, Determinations and Findings at 15. In addition, Freedom submitted revised pricing worksheets accounting for the inclusion of the Skytron system to demonstrate the intended bid, and using the price for

the system that had been identified in the solicitation. *Id.* After reviewing Freedom's bid, the contracting officer found that Freedom had acknowledged all of the IFB amendments and concluded that the bid appeared to be responsive. In addition, after reviewing the documentation of the alleged mistake, the contracting officer approved the upward correction of Freedom's bid and identified Freedom for award because it remained the lowest bidder after the upward correction.

The agency provided the notice of award to the protester on July 13, 2021. On July 19, this protest followed.

DISCUSSION

The central issue presented in this protest is whether Freedom could correct its bid to include the cost for the Skytron system pursuant to the mistake-in-bid provisions set forth under FAR part 14. In the protester's view, Freedom's failure to follow the IFB's express instructions directing bidders to include the price for the required Skytron system in their bids rendered Freedom's bid *per se* nonresponsive. The agency counters that Freedom's failure to include the Skytron system in its bid price did not render the bid nonresponsive because the face of the bid did not take exception to the agency's requirements or terms of the solicitation. Instead, because Freedom's error was confined to its price, the agency argues the error was amenable to correction after Freedom demonstrated its intended bid price by clear and convincing evidence as contemplated by FAR part 14. For the reasons discussed below, we reject the protester's argument that Freedom's bid was nonresponsive and conclude that the agency acted within its discretion when it allowed Freedom to correct the mistake with its bid price.

As a general matter, a responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. See FAR 14.301; *Propper Mfg. Co., Inc.*; *Columbia Diagnostics, Inc.*, B-233321, B-233321.2, Jan. 23, 1989, 89-1 CPD ¶ 58 at 2. Responsiveness is determined at the time of bid opening from the face of the bid documents. Unless something on the face of the bid, or specifically a part of it, limits, reduces or modifies the bidder's obligation to perform in accordance with the terms of the solicitation, the bid is responsive. *Cal-Tex Lumber Co., Inc.*, B-277705, Sept. 24, 1997, 97-2 CPD ¶ 87 at 3.

More specifically, the test for responsiveness is whether a bid offers to perform the exact thing called for in an IFB, so that acceptance of the bid will bind a bidder to perform in accordance with all of the terms and conditions of a solicitation without exception. *Randy Sabala*; *John Button*, B-251221, B-251222, Nov. 24, 1992, 92-2 CPD ¶ 379 at 2. Our Office has stated that a bidder can bind itself to the contents of some amendments simply by acknowledging receipt of the amendments; however, when a bidder, despite acknowledging an amendment, otherwise creates doubt as to its commitment to perform pursuant to the amendment, its bid must be rejected. *ATR Logistic Co. LLC*, B-402606, June 15, 2010, 2010 CPD ¶ 140 at 2.

Next, concerning the matter of mistakes in bids, agencies may permit the correction of bids, but only those that are, as submitted, responsive to the solicitation; bids may not be corrected to make them responsive.¹ FAR 14.407-3. An agency may permit upward correction of a bidder's price if clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. *Id.*; *Reliable Mechanical, Inc.*, B-282874.2, Sept. 13, 1999, 99-2 CPD ¶ 52 at 2; *Holmes Mechanical, Inc.*, B-281417, Jan. 13, 1999, 99-1 CPD ¶ 6 at 2.

Responsiveness of Freedom's Bid

We reject the protester's argument that Freedom's failure to include the price of the Skytron system rendered Freedom's bid nonresponsive. The record shows that Freedom acknowledged both amendments 2 and 3 concerning the AirFRAME and Skytron requirements. Req. for Dismissal, attach. 6, Freedom Bid Amendment Acknowledgment at 2, 8. Through these acknowledgments, Freedom obligated itself to include the quoted price for the (AirFRAME and Skytron) items provided by Stevens Moon in its bid. *Id.*; *ATR Logistic Co. LLC, supra*. Nothing on the face of Freedom's bid takes exception to these requirements, or to any of the other bid requirements.

While the protester points to Freedom's acknowledgement that its bid failed to include the price for Skytron system, this omission could not be discerned from the face of the bid because the IFB did not solicit separate line item prices for the items required by amendments 2 and 3. Rather, the IFB required that bidders submit a total price for the agency's construction requirement, which includes the installation of the identified equipment, which Freedom provided. See IFB at 5; Req. for Dismissal, attach. 7, Determinations and Findings at 2. Absent any express indication in Freedom's bid that it was taking exception to the government's requirements, the agency properly considered Freedom's bid responsive. *Randy Sabala; John Button, supra*; *ATR Logistic Co. LLC, supra*.

¹ However, we note that our Office has found that agencies may permit the correction of a nonresponsive bid--in effect authorizing a waiver of the technical nonresponsiveness rule--when the result would clearly not be prejudicial to other bidders and the competitive bid system would not be adversely affected. *Wynn Constr. Co.*, B-220649, Feb. 21, 1986, 86-1 CPD ¶ 184 at 3; *Wynn Constr. Co.--Recon.*, B-220649.2, Apr. 14, 1986, 86-1 CPD ¶ 360 at 4. In such circumstances, however, the bidder must still establish both the existence of a mistake and its intended bid by clear and convincing evidence. *Wynn Constr. Co.--Recon.*, B-220649.2, Apr. 14, 1986, 86-1 CPD ¶ 360 at 4.

Upward Correction of Freedom's Bid

Next, we agree with the agency that it properly allowed Freedom to make an upward adjustment to its bid under FAR section 14.407-3 to account for the cost of the Skytron system.

As explained above, a bidder may be permitted to upwardly correct its bid price prior to award if there is clear and convincing evidence of both a mistake and the intended bid price. FAR 14.407-3(a); *Prudent Techs., Inc.*, B-401736.3, Dec. 9, 2009, 2009 CPD ¶ 254 at 4. When a bidder, like Freedom, seeks upward correction but will remain the lowest-priced bidder, a request for correction must be supported by statements and shall include all pertinent evidence, including original worksheets and other data used to prepare the bid, subcontractors' quotations, if any, published price lists, and any other evidence that establishes the existence of the error and the intended bid price. *Cooper Constr., Inc.*, B-285880, Sept. 18, 2000, 2000 CPD ¶ 153 at 4.

Evidence of a Mistake

The record reflects that Freedom submitted clear and convincing evidence showing that it made a mistake. In cases where a party can demonstrate that a quantified subcontractor quotation was inadvertently omitted from a bid, evidence of a mistake can be found. See, e.g., *Fishermen's Boat Shop, Inc.*, B-252560, July 9, 1993, 93-2 CPD ¶ 11 at 3 (concluding that the worksheets omitting subcontractor quotations evidenced a mistake because the omitted line item prices were for floor covering work and the presented pre-bid subcontractor quotations were also for floor covering work); *Lambert Roofing & Constr. Co., Inc.*, B-255183, Feb. 14, 1994, 94-1 CPD ¶ 103 at 4 (explaining that an incorrect decimal place on the worksheet evidenced a mistake because awardee used a subcontractor quotation that clearly showed a quotation for a figure exactly ten times the amount included on the worksheet); compare *Herman Construction Grp., Inc.*, B-415480, , January 15, 2018, 2018 CPD ¶ 18 (explaining that an arbitrary place holder value for a line item in a proposed bid's worksheet without any evidence connecting a subcontractor's quotation to the line item does not provide clear and convincing evidence of a mistake).

As noted above, the AirFRAME and Skytron subcontractor prices were predetermined by the government through IFB amendments 2 and 3. Freedom expressly acknowledged these amendments and thereby committed to using the subcontractor prices in its bid. As requested, Freedom provided a letter to the contracting officer with an explanation for how the mistake occurred and supplied contemporaneous documentary evidence of its original price list. In its explanation, Freedom noted that its estimator had inadvertently omitted the price for the Skytron system that was provided by the agency. The documentary evidence showed that Freedom's bid calculation included a line item price for the AirFRAME system from amendment 3 (\$280,801), but did not include a similar line item for the Skytron system from amendment 3 (\$370,922). Req. for Dismissal, attach. 7, Determination and Findings at 13. Based on this record we have no reason to question the agency's conclusion that clear and convincing

evidence established that Freedom had inadvertently omitted the cost of the system from its initial price worksheet.

Evidence of Intended Bid

Finally, we find the agency reasonably concluded that Freedom demonstrated clear and convincing evidence of its intended bid price. Freedom's corrected bid included the price provided by the agency for the Skytron system. Because the price for the equipment was established by amendments 2 and 3, the intended price for this item was not in doubt. *Id.* at 15. Freedom's corrected bid also added a markup for this item. The markup matched how Freedom applied its markups for other similar items, such as the required AirFRAME system, when Freedom calculated its initial bid. Specifically, Freedom's original pricing worksheet demonstrated that it added an overhead and profit cost of 8 percent (marked as "O&P") and a bid bond cost (marked as "P&P") of 1.5 percent to its subcontracted costs. *Id.* at 14. The initial bid information provided by Freedom showed that it applied these same percentages as blanket cost modifiers for all subcontracted items. *Id.*

Thus, the documentary evidence supports the existence of the subcontractor price for the omitted Skytron system--this price was established by the agency itself for all bidders--and supports Freedom's application of the markup associated with the price for this item, which was consistent with how Freedom applied the markup in its original bid. Accordingly, we have no basis to question the agency's conclusion that Freedom also demonstrated its intended bid by clear and convincing evidence. *See Michaels Constr. Co., Inc.*, B-257764, Nov. 7, 1994, 94-2 CPD ¶ 176 (finding that agency reasonably accepted upward bid correction, which included markup for subcontractor price).

In conclusion, we find no basis to sustain RB Construction's protest. Freedom's originally submitted bid was responsive and the agency reasonably allowed Freedom to correct its bid under FAR section 14.407-3(a) after Freedom demonstrated, by clear and convincing evidence, the existence of a mistake and its intended bid.

We deny the protest.

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General Counsel