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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Aquila Fitness Consulting Systems, Ltd.

File: B-286488

Date: January 17, 2001

Yvan Miklin for the protester.

Thomas A. Mascolino, Esq., and Tina Perruzzi, Esq., Department of Labor, for the agency.

Katherine I. Riback, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A bid that is based upon the incorrect premise that only three full-time and two part-time positions were required under a solicitation for services where the invitation for bids clearly requires five full-time positions may not be corrected.

2. Protest is sustained, even though the agency properly rejected the protester's low bid due to a mistake in bid, where it then made award to a higher-priced bidder whose bid contained the same mistake, notwithstanding that the higher-priced bidder submitted worksheets to the agency, prior to award in response to the agency's request for bid verification, that clearly evidenced the mistake, and then after award raised the contract price to account for this mistake.

DECISION

Aquila Fitness Consulting Systems, Inc. protests the agency's refusal to accept its modified bid and the award of a contract to FMF Corporation, under invitation for bids (IFB) No. J4R12001, issued by the Department of Labor, Mine Safety and Health Administration (MSHA), for fitness/wellness services.

We deny the protest in part and sustain it in part.

The agency issued the IFB on August 7, 2000 to assist in operating the Wellness Program at the MSHA Academy in Beckley, West Virginia, for a base year with 4 option years. Although the statement of work contained in the IFB did not state how many individuals were required to perform the contract work, the IFB

elsewhere (on the Standard Form (SF) 98a, Notice of Intention to Make a Service Contract and Response to Notice) advised bidders that five positions were to be used in the performance of the contract, and that these positions were covered by the Service Contract Act and were full-time. RFP at 52. Amendment No. 1, issued on August 11, modified the titles of these positions and again specifically indicated that these five positions were full-time.¹ Amendment No. 2, issued on August 22, contained questions posed by potential bidders and agency responses, including the following:

Amendment [No. 1] . . . indicates that there are 5 full time positions to be employed on contract. . . . The statement work . . . indicates only 1 fitness director, 1 fitness aide and 1 lifeguard. Which one is correct?

Amendment #1 overrides original page 52, indicating five (5) full-time employees.

Thus, the IFB unambiguously provided that five full-time positions were required.²

Seven bids were submitted by bid opening on September 6. The protester submitted the apparent low bid at \$426,671.88 and FMF submitted the fourth low bid at \$566,644. The agency asked the four lowest bidders, including Aquila and FMF, to verify their bids. Both Aquila and FMF provided worksheets supporting their bid prices. Upon reviewing Aquila's worksheets, the contracting officer determined that Aquila's bid price was based on three full-time positions and two part-time positions, instead of the five full-time positions required by the IFB. Agency Report at 1. The agency immediately advised Aquila of this determination and, later that same day, Aquila submitted an amended bid that increased its bid price to \$473,637 for the

¹ These changes were also stated on a SF-98a and not in the statement of work.

² In contending that the IFB required only three full-time and two part-time positions, Aquila references the Wellness Reduction Schedule included in the IFB, which indicated the days and hours during the year the wellness facility would not be open. While Aquila contends that this schedule indicates that there is no need for five full-time positions, the IFB, as indicated above, unambiguously stated that five full-time positions were required.

Aquila also contends that it was orally informed by the contracting officer prior to submitting its bid that the agency was seeking three full-time positions and two part-time positions. Agency Report, Tab 7, Aquila's Revised Bid at 1. Even assuming that Aquila is correct (the contracting officer denies he provided such advice), a bidder relies on oral explanations of solicitation requirements at its own risk, and since the IFB required five full-time positions, the agency's alleged oral advice had no effect. See Materials Management Group, Inc., B-261523, Sept. 18, 1995, 95-2 CPD ¶ 140 at 3-4.

5-year term to include the cost for five full-time positions. Agency Report, Tab 7, Aquila Bid Revision. The agency rejected Aquila's bid as nonresponsive and made award to FMF.³

Sometime after award had been made, the agency noticed that FMF's worksheets evidenced that that firm had made the identical mistake that Aquila had made, namely that its bid provided for two part-time positions and three full-time positions, instead of the five full-time positions required by the IFB. The contracting officer decided to "reform" FMF's contract by issuing a contract modification in the amount of \$24,500 increasing FMF's contract price to provide the required five full-time positions for the base year.⁴ Agency Report at 2.

Aquila protests that the agency should have accepted its request to amend its bid. This request was in effect a request that its bid be corrected based upon a claimed mistake in bid pursuant to Federal Acquisition Regulation (FAR) § 14.407. However, correction of a claimed mistake in bid is not permitted where the alleged mistake is based on an incorrect premise which a bidder discovers after bid opening. Innovative Refrigeration Concepts, B-242515, Mar. 27, 1991, 91-1 CPD ¶ 332 at 3. To allow such a correction would impermissibly permit a bidder to recalculate its bid to arrive at a bid never intended before bid opening. Oregon Elec. Constr., Inc., B-232419, Nov. 23, 1988, 88-2 CPD ¶ 512. Since Aquila's bid is clearly based upon a mistaken premise that only three full-time and two part-time positions were required, rather than the five full-time positions required by the IFB, its request for bid modification was properly rejected.⁵ See Nova-CPF, Inc., B-261677, Oct. 18, 1995, 95-2 CPD ¶ 181.

In its comments on the agency report, Aquila argues that if its bid is considered to contain a mistake that is not capable of correction, then the agency should have also rejected FMF's bid, because it contained the same mistake. Protester's Comments at 3.

³ The second and third low bidders were also rejected.

⁴ If this same adjustment were made to FMF's option year prices, its total bid would increase by \$122,500 to \$689,144, although this figure could be even higher, since FMF's option year prices are higher than its base bid price.

⁵ Contrary to the agency's expressed belief, Aquila's bid was responsive, since there was nothing on the face of its bid which took exception to any of the IFB requirements. Innovative Refrigeration Concepts, *supra*. However, since Aquila's bid could not be corrected as requested and evidenced an obvious yet uncorrectable error, the agency's use of the wrong nomenclature in rejecting Aquila's bid is immaterial here. *Id.*

In general, a bidder whose bid was properly rejected, such as Aquila, is not an interested party eligible to protest an award to another firm where, as here, there are other bidders that would be in line for award if the protest were sustained (that is, the three other bidders, presuming they are responsible, their bids are responsive, and their higher prices are reasonable). 4 C.F.R. §§ 21.0(a), 21.2(a) (2000). However this rule does not apply where a bidder protests that it was denied equal treatment because the agency rejected its nonconforming bid while accepting a competitor's similarly nonconforming bid. Maintenance and Repair, B-251223, Mar. 19, 1993, 93-1 CPD ¶ 247 at 5; Dillingham Ship Repair, B-218653, Aug. 14, 1985, 85-2 CPD ¶ 167 at 3. In other words, we view a protester as an interested party where, as here, the basis for protest is that the protester and the awardee were treated disparately. Maintenance and Repair, *supra*. Therefore, Aquila is an interested party to argue that FMF's bid should also be rejected for containing the same mistake as Aquila's.

As indicated, before making an award the contracting officer requested that the four low bidders, including FMF, verify their bids. In response to this request FMF sent the agency its worksheets upon which its bid price was based. The contracting officer acknowledged receipt of FMF's bid worksheets before award, yet he states that he "overlooked" the mistake in FMF's bid. Agency Report, Tab 10, Contracting Officer's Statement. A cursory review of these worksheets shows that FMF's bid price was also based upon two part-time positions and three full-time positions, rather than the five full-time positions required. Based on this record and given that Aquila's bid was rejected for containing the same mistake, we find that the contracting officer did not exercise reasonable care in his examination of FMF's worksheets, which we view as required under FAR § 14.407. Thus, while Aquila's bid was properly rejected for containing a mistake that was not susceptible to correction, the agency also should have rejected FMF's bid for the same reason, and we sustain Aquila's protest on this basis.

We recommend that the agency terminate FMF's contract and either make award to the next low responsible bidder if its bid is determined responsive and reasonable, or resolicit this requirement. Because the award was improper, we recommend that the protester be reimbursed the reasonable costs of filing and pursuing that aspect of its protest that was sustained. 4 C.F.R. § 21.6(d). We do not recommend reimbursement of the protester's bid preparation costs, however, since its bid was properly rejected. See Maintenance and Repair, *supra*, at 6. The protester should submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is denied in part and sustained in part.

Anthony H. Gamboa
Acting General Counsel