

14-7353
Burkard



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: C. Iber & Sons, Inc./J.S. Alberici
Construction Co., Inc., a Joint Venture

File: B-247920.2

Date: August 12, 1992

James L. Hawkins, Esq., Greensfelder, Hemker & Gale, P.C.,
for the protester,
Joseph D. West, Esq., and Allen Cannon, III, Esq., Jones,
Day, Reavis & Pogue, for Blount, Inc., an interested party.
Mina Mazaheri, Esq., Federal Bureau of Prisons, Department
of Justice, for the agency.
Richard P. Burkard, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Agency properly rejected low bid as nonresponsive where solicitation required that offeror perform 20 percent of work with its own forces and protester's bid stated that it intends to perform only 15 percent of the work.

DECISION

C. Iber & Sons, Inc./J.S. Alberici Construction Co., Inc., a Joint Venture, protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. X00-0072, issued by the Federal Bureau of Prisons, Department of Justice, for the Phase II construction of a correctional institution in Pekin, Illinois.

We deny the protest.

The IFB, which was issued on October 15, 1991, contained the following clause as set forth at Federal Acquisition Regulation (FAR) § 52.236, which states in part:

"The contractor shall perform on the site, and with its own forces, work equivalent to at least 20 percent of the total amount of work to be performed under the contract. . . ."

The "REPRESENTATIONS AND CERTIFICATIONS" section of the IFB contained a "Business Management Questionnaire" which requested that bidders provide, among other information, the following:

"Total estimated amount of work under this contract that your firm will complete (excluding subcontractors): _____%."

Nine bids were received by the March 10, 1992, bid opening date. Iber/Alberici submitted the low base bid of \$50,198,000, and Blount, Inc. submitted the next low base bid of \$50,649,000. The contracting officer rejected Iber/Alberici's low bid because it provided in the questionnaire blank that the firm would perform only 15 percent of the work itself. The agency determined that this did not meet the minimum 20 percent requirement of the IFB's work performance clause. The contracting officer refused to allow the protester to alter its bid because in his view to do so would result in unfairness to other firms which bid on the understanding that they must comply with all of the IFB conditions.

Iber/Alberici has raised a plethora of arguments in support of its view that its bid should not have been rejected. These arguments fit into three general categories: (1) the IFB provision requiring the insertion of the percentage of the work to be performed by the bidder was not properly included in the IFB; (2) if the provision was properly in the IFB it is not a material requirement that concerned bid responsiveness; and (3) if it was a material requirement, the protester's insertion of 15 percent instead of 20 percent constitutes a minor irregularity that could be waived pursuant to FAR § 14.405.

IFB PROVISION

The protester argues that the agency lacked the authority to include the provision in the IFB requiring bidders to insert the percentage of the work they would perform themselves. We will not consider this argument since the provision was in the IFB and the protester did not raise any objection to it prior to bid opening. Our Bid Protest Regulations require that protests such as this based upon alleged solicitation improprieties be filed before bid opening. 4 C.F.R. § 21.2(a)(1) (1992).

MATERIAL REQUIREMENT

The protester argues that the provision is not material and does not relate to bid responsiveness. In this connection, the protester states that the percentage of the work performed by the bidder often has no relationship to the bid

price and points out that the provision is not located in a prominent place in the IFB and is not accompanied by a warning that the failure to conform would result in the rejection of the bid.

We think the provision is material. The requirement that the bidder perform at least 20 percent of the work imposes a legal obligation on the contractor that directly affects how the work will be performed. It establishes a performance commitment which the bidder must agree to, and according to the regulations, the requirement is to assure the government that its prime contractor has an "adequate interest in" and will actively supervise all work involved. See FAR § 36.501. If the requirement were not included in the IFB, the awardee would not be obligated to participate in the actual performance of the contract and could choose to either perform the work itself or subcontract it as its own interests might dictate. Consequently, we find that the requirement is a material one which bids must be in conformance with in order to be considered responsive. See Blount, Inc. v. U.S., 22 Cl. Ct. 221 (1990) (a case upholding the Bureau of Prison's rejection of a bid as nonresponsive under a similar IFB provision); C. Iber & Sons, Inc., B-208365.2, Apr. 20, 1983, 83-1 CPD ¶ 424.

As far as the placement and the lack of a "warning" in connection with the "fill in" provision which implements the contractor work requirement is concerned, there is simply no legal requirement that every provision in an IFB which affects the responsiveness of bids carry a warning that the bidder's failure to comply will result in the rejection of the bid as nonresponsive. In this regard, we point out that it is impossible to enumerate in an IFB, every act of a bidder which will render a bid nonresponsive, National Oil & Supply Co., Inc., B-198321, June 20, 1980, 80-1 CPD ¶ 437, and that an exception to a material IFB provision such as the one here may not be waived simply because the IFB did not explicitly warn that taking exception to it would result in rejection of the bid as nonresponsive. See Power Master Elec. Co., B-223995, Nov. 26, 1986, 86-2 CPD ¶ 615.

WAIVER

Iber/Alberici argues that even if the contract work requirement as implemented in the IFB here were a material one bearing on responsiveness of the bids, the protester's offer to self-perform 15 rather than 20 percent of the work should have been waived as a minor informality. While the protester admits that it took exception to performing 20 percent of the work itself, it argues that it would at least be obligated to perform 15 percent itself; this 5 percent discrepancy, it contends, does not constitute a material deviation. For the reasons set forth below, we

think that the agency properly rejected the protester's bid as nonresponsive.

A responsive bid unequivocally offers to provide the exact thing called for in the IFB, such that acceptance of the bid will bind the contractor to perform in accordance with all the IFB's material terms and conditions, Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555. If in its bid a bidder attempts to impose a condition that would modify material requirements of the invitation, limit its liability to the government, or limit rights of the government under any contract clause, then the bid must be rejected, FAR § 14.404-2(d). However, such a condition is immaterial and may be waived if the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the services being acquired. See TECOM, Inc., 69 Comp. Gen. 441 (1990), 90-1 CPD ¶ 463; FAR § 14.405.

Iber/Alberici by including in its bid the statement that it intended to perform only 15 percent of the work itself, conditioned the IFB's requirement that the awardee perform 20 percent of the work and clearly limited the right of the government to enforce that contract provision. We find that the differing percentage, which the protester, in effect, inserted into the contract, was not a minor deviation, but in fact was a material condition going to the substance of the bid. Taylor-Forge Engineered Sys., Inc., 69 Comp. Gen. 54 (1989), 89-2 CPD ¶ 421.

We think that the condition would have more than a negligible impact on quality. As stated above, the requirement directly affects contract performance and will affect the quality of that performance. By including a requirement that the contractor perform at least 20 percent of the work, the agency established a threshold of involvement which it determined to be necessary to assure adequate interest in and supervision of the work by its prime contractor. By allowing the protester to unilaterally reduce its direct involvement in the work by 25 percent, the agency would be offering Iber/Alberici what would be, in effect, a different contract. Taylor-Forge Engineered Sys., Inc., supra. Under the protester's bid, the firm would be committed to doing less of the work itself and would be free to choose whether to subcontract the additional 5 percent or to do the work itself as its interests dictate, a privilege not granted to those abiding by the 20 percent requirement. Thus, the waiver of the condition would be improper.

Moreover, we think that the deviation of 5 percent may well have more than a negligible effect on the cost of performance. Firms prepare their bids with the expectation that they will perform in accordance with the "performance of work" clause and structure their prices accordingly.¹ While the protester argues that the variation of 5 percent would not affect its price, we think that when viewed objectively and without the benefit of prohibited post bid-opening explanations, Marco Equip., Inc.; Scientific Supply Co., 70 Comp. Gen. 219 (1991), 91-1 ¶ 107, the 5 percent deviation was reasonably viewed by the agency as affecting price. This concern would also prevent the waiver of the condition in the protester's bid.

Finally, we find that acceptance of the protester's bid would be prejudicial to other bidders. Bidders have a right to assume that the essential requirements of an IFB are the same for all. By allowing the protester to condition its bid and reduce its obligation to self-perform by 25 percent--the extra 5 percent of the work which the protester excluded from the self performance is worth approximately \$2.5 million--the agency's acceptance of the bid would be prejudicial to other bidders. Hewlett-Packard Co., B-216530, Feb. 13, 1985, 85-1 CPD ¶ 193. The other bidder may very well have been able to offer a lower price had it known that the agency would accept an offer which reserved to the bidder the option to subcontract out an additional \$2.5 million of the work.

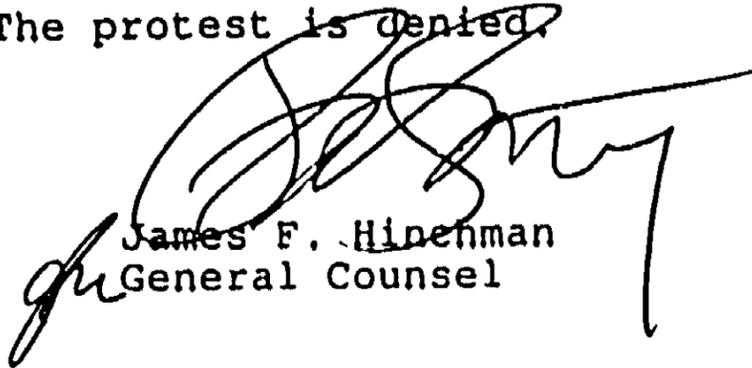
Consequently, for each of the three reasons cited above, the condition which Iber/Alberici inserted in its bid could not be waived as a minor informality under FAR § 14.405.

To the extent that the protester suggests that it should be allowed to alter its bid after bid opening to conform to the 20 percent requirement, such action would be improper. To provide a nonresponsive bidder such as the protester an opportunity to correct its bid would provide it the competitive advantage of being able to accept or reject the contract after bids have been publicly exposed simply by

¹For example, the extent to which a contractor would be required to move its own labor to the job site could affect the cost of performance. In addition, price may be affected by the protester's failure to abide by the 20 percent self-performance requirement because a bidder who contemplated subcontracting 85 percent of the work would have a greater opportunity for "bid shopping" than a bidder who was limited to subcontracting 80 percent of the work. 45 Comp. Gen. 177 (1965).

deciding to make the bid responsive, Data Copy Supply, Inc., B-229585, Mar. 16, 1988, 88-1 CPD ¶ 270. The protester would be able to refuse the award after bid opening should it decide that it no longer wanted the award, for example, because of unanticipated cost increases. While we recognize that Iber/Alberici may now be prepared to perform the work in accordance with the 20 percent requirement, possible monetary savings under a particular contract does not outweigh the importance of maintaining the integrity of the competitive bidding system by rejecting nonresponsive bids. Pettinato Associated Contractors and Eng'rs, Inc., B-246106, Feb. 19, 1992, 92-1 CPD ¶ 201.

The protest is denied.



James F. Hinchman
General Counsel