

Matter of: K&E Weather, Ltd.

File: B-261832

Date: October 12, 1995

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Department of Commerce, for the agency.
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Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

In a sealed bid procurement for weather observation services, the protester's failure to price a contract line item for phase-in services did not render its bid nonresponsive, where the invitation for bids did not require a phase-in period or that bidders price phase-in services and where acceptance of the bid will bind the protester to all the solicitation's material terms and conditions.

DECISION

K&E Weather, Ltd. protests the rejection of its low bid under invitation for bids (IFB) No. 51RANW500057, issued by the National Weather Service, Department of Commerce for weather observation services at the Orlando Intercontinental Airport, Florida. Commerce determined that K&E's bid was nonresponsive because K&E did not price the contract line item (CLIN) for phase-in services. K&E contends that the IFB did not require a phase-in period or that bidders price the phase-in CLIN, and thus that its bid was responsive despite the omission of a price for the phase-in services CLIN.

We sustain the protest.

The IFB, issued as a total small business set-aside, contemplated the award of a fixed-price contract for the collection, documentation, and dissemination of aviation and

synoptic¹ weather observations at Orlando Intercontinental Airport for a base year and 2 option years. The stated contract commencement date is October 1, 1995.

The bid schedule required prices for the following CLINs:

0001A	Phase-in	1 time	\$_____
0001B	Basic Year	12 months	\$_____ \$_____
0002	Option Year 1	12 months	\$_____ \$_____
0003	Option Year 2	12 months	\$_____ \$_____

Bidders were informed that any bid, not including prices for the basic year and the 2 option years, would be rejected as nonresponsive, but that:

"[i]t is not necessary to propose a price for the phase-in period; however, failure to do so will preclude any payment for time spent in contractor orientation as described in the Phase-In clauses in Sections C and F."

Bidders were instructed in section L of the IFB that, for their bids to be considered responsive, they must bid on all items in the quantities stated in the bid schedule, but that:

"EXCEPTION: Item 0001A (Phase-In) may be bid as a zero-dollar amount. An entry of zero or greater shall be made for Item 0001A."

The IFB provided that the government would pay for on-site phase-in services in accordance with the following schedule: if four certified observers were hired by the successful bidder, there would be no phase-in period; if three certified observers were hired, there would be a 7-day phase-in period beginning 7 days prior to the contract commencement date; if two certified observers were hired, there would be a 14-day phase-in period; if one certified observer was hired, there would be a 21-day phase-in period; and if no certified observers were hired, there would be a 30-day phase-in period.² Bidders were also informed that the government retained responsibility until the new contract began.

¹"Synoptic" in this context means observations relating to weather conditions existing simultaneously over a broad area.

²Certified weather observers are defined by the IFB as observers certified by the National Weather Service to take official aviation and synoptic weather observations.

The required contract services were described in a detailed statement of work (SOW) that, in pertinent part, provided that:

"To provide for an orderly transition, the bidder shall submit a detailed plan for a phase-in period if the bidder deems a phase-in period to be necessary. The phase-in plan shall contain a detailed milestone schedule for staffing, training, and certification of personnel."
[Emphasis added.]

The SOW also provided that the successful bidder must have at least three certified observers 7 days prior to the contract commencement date and that, by the commencement date and thereafter throughout the contract period, the contractor must have four certified observers at the facility.

In addition, the SOW informed bidders that the agency would assist the contractor by providing on-site orientation of the contractor's initial employees. Bidders were also informed that during the orientation period the agency would administer certification examinations;³ thereafter, employees requiring certification would be required to arrange examinations with the contracting officer's technical representative.

Commerce received five bids by the bid opening date:

K&E	\$416,376
A	\$436,656
B	\$445,788
C	\$449,640
D	\$454,800

K&E did not provide a price for CLIN 0001A (phase-in); it left this CLIN blank in its bid.⁴ K&E also did not provide a phase-in plan with its bid. K&E priced the other CLINs; the sum of these prices equals K&E's total bid price.

³The IFB does not define "orientation period" or when the orientation period is to occur. As noted above, the contractor will be required to provide four certified observers by the contract commencement date and thereafter. No certification testing would be required prior to the commencement of the contract where the contractor has four certified observers to perform the contract.

⁴Three other bidders, including the apparent second low bidder, entered "\$0" under the phase-in CLIN, while the remaining bidder bid \$100 for the phase-in period.

Because K&E did not price, or otherwise make an entry for, the phase-in CLIN, the contracting officer rejected K&E's bid as nonresponsive. This protest followed. No award has been made pending our decision in this matter.

K&E contends that it was not required to price the phase-in CLIN and states that, because it will hire the current Orlando weather office staff, it will need no phase-in period prior to the commencement of the contract. In this respect, K&E acknowledges that, in accordance with the IFB requirements, it waived any right to payment for contractor orientation by not pricing the phase-in CLIN and not submitting a phase-in plan.

Commerce argues that the IFB required bidders to bid on all items to be considered responsive, and that because K&E made no entry in the phase-in CLIN (such as entering a zero or a no charge notation) the contracting officer could not determine K&E's intended bid price. Commerce also argues that while the IFB provided that a contractor was precluded from receiving payment for contractor orientation if the contractor did not price the phase-in period CLIN, there were other unspecified phase-in activities required for which K&E could seek payment.

A bid is responsive, as submitted, when it offers to perform the exact thing called for in the solicitation, such that acceptance of the bid will bind the bidder to perform the contract in accordance with all the IFB's material terms and conditions. Inland Service Corp., B-249590, Dec. 7, 1992, 92-2 CPD ¶ 394. Material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services offered. American Spare Parts, Inc., B-224745, Jan. 2, 1987, 87-1 CPD ¶ 4. As a general rule, a bid that fails to provide a price for every item required by an IFB must be rejected because a bidder who has failed to submit a price for an item generally cannot be said to be obligated to furnish that item. United Food Servs., 65 Comp. Gen. 167 (1985), 85-2 CPD ¶ 727.

Here, we conclude that there is no material IFB requirement that K&E's bid has not obligated K&E to perform. By completing each of the CLINs for the basic year and option years, K&E obligated itself to perform all the SOW requirements, including providing four certified weather observers by the contract commencement date and thereafter throughout the basic and option years periods, and making its employees available for on-site contract orientation and certification testing, if necessary. By not bidding a phase-in period or providing a phase-in plan, K&E waived its right to a phase-in period prior to the commencement of the contract, while remaining obligated to provide four certified weather observers at the contract commencement

date. K&E also waived any right to payment for any activities that would occur during the phase-in period, such as contract orientation or certification testing. Rather, as contemplated by the IFB where no phase-in period is provided, contract orientation and/or certification testing, if and when certification testing would be required, would occur during the contract performance period, and K&E would not be separately paid for its time relating to these services.

We also do not find K&E's bid ambiguous as to its intended bid price, as Commerce asserts.⁵ The IFB bid schedule specifically informed bidders that "it [was] not necessary to propose a price for the phase-in period," if a bidder was not offering a phase-in period,⁶ and that bidders needed to submit a phase-in plan only if they priced the phase-in CLIN. By not pricing the phase-in CLIN and not providing a phase-in plan, K&E's bid indicated that it waived a phase-in period prior to the commencement of the contract and accordingly that K&E would not be paid for a phase-in period. K&E priced the remaining CLINs, and the sum of those prices equals the total bid price. Under these circumstances, we see no reasonable basis to conclude that the bid price is unclear.

In conclusion, we find K&E's bid responsive to the material requirements of the IFB and accordingly recommend that the agency make award to K&E, if that firm is otherwise eligible

⁵Commerce speculates that K&E's failure to make any notation for the phase-in CLIN may have been the result of a mistake. Since K&E bid as permitted by the IFB, there is no evidence of a mistake.

⁶It is true, as Commerce points out, that the IFB instructed bidders in section L to price all CLINs and to enter a price of zero or greater for the phase-in CLIN if the bidder intended to price this CLIN as a zero-dollar amount. However, as noted above, the bid schedule explicitly provided that bidders need not price the phase-in CLIN. The standard Order of Precedence--Sealed Bidding clause, set forth in Federal Acquisition Regulation § 52-214.29, was incorporated by the IFB, and this clause provides that any inconsistency in the solicitation would be resolved by giving precedence first to the bid schedule and then the bid instructions. Thus, to the extent there is an inconsistency between the bid schedule and section L, the bid schedule--which stated that the phase-in CLIN need not be priced--takes precedence.

for award.⁷ We also find that the protester is entitled to recover the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.6(d)(1) (1995). K&E should submit its certified claim for these costs directly to Commerce within 60 days of receiving this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Comptroller General
of the United States

⁷The contracting officer, in his statement on the protest, suggests that K&E may be found to be nonresponsible, although no such determination has yet been made. Because K&E is a small business concern, a determination of nonresponsibility would have to be referred to the Small Business Administration for consideration of issuance of a certificate of competency. 15 U.S.C. § 637(b)(7) (1994).