

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Cusack's Masonry Restoration, Inc.

**File:** B-407375

**Date:** November 29, 2012

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Stephen A. Hilger, Esq., Hilger Hammond, for the protester.  
Gary W. Segrest, Esq., Department of the Army, for the agency.  
Gary R. Allen, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

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### DIGEST

An agency properly rejected a bid as nonresponsive where the bidder provided for completion of performance within 350 days after notice to proceed which would not satisfy the requirement that performance be completed by August 31, 2013.

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### DECISION

Cusack's Masonry Restoration, Inc., of Hubbardston, Michigan, protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. W911XK-12-B-0006, issued by the Department of the Army, Corps of Engineers, for construction services at the agency's Sault Ste. Marie, Michigan facility.

We deny the protest.

### BACKGROUND

The IFB, issued on August 1, 2012, provided for the performance of various construction services. Block 11 of the standard form 1442 contains the following:

The Contractor shall begin performance within 10 calendar days and complete it within \_\_\_ calendar days after receiving \_\_\_ award, X notice to proceed. This performance period is X mandatory, \_\_\_ negotiable. (See 52.211-10 Alt.)

IFB at 1. The IFB incorporated the framework of Federal Acquisition Regulation (FAR) clause 52.211-10, Alternate 1, stating:

The Contractor shall be required to (a) commence work under this contract within 10 calendar days after the date the Contractor receives the notice to proceed, (b) prosecute the work diligently, and (c) complete the entire work ready for use not later than 31 August 2013.

IFB at 37. This clause also informed bidders that the completion date was based upon the assumption that the successful bidder would receive the notice to proceed by October 15, 2012, and that if the notice to proceed was received after October 15, the completion date would be extended by the number of days that the notice was delayed. Id. On August 31, the Corps amended the IFB to, among other things, extend the bid opening date to September 6. IFB amend. 1 at 1. In response to questions from prospective bidders with respect to IFB's completion date, the Corps stated that award was scheduled to be made no later than September 30, 2012. See Agency Report (AR), Tab E, Question/Answer No. 11 at 3.

The protester submitted the lowest of four bids by the September 6 bid opening date. In block 11 of its bid, the protester inserted the number "350" as the number of days that it would take to complete performance after receiving a notice to proceed. AR, Tab G, Protester's Bid, at 1. Because the protester did not unequivocally agree to complete performance by August 31, 2013, as required by the IFB, the contracting officer rejected the protester's bid as nonresponsive. AR, Tab K, Corps Letter to Protester, Sept. 11, 2012; Contracting Officer's (CO) Statement at 2. Award of a contract was made to Fuel Tank Maintenance Co., of Cookeville, Tennessee, on September 18.

This protest followed.

## DISCUSSION

The protester contends that its bid is responsive, because it was consistent with completing the project by the required August 31 completion date. Comments at 4. The protester argues that, from its point of view, the project "basically ran from August 31, 2012 [the effective date of IFB amendment 1] through August 31, 2013, which essentially is 365 days." Therefore, according to the protester, it actually bid a shorter performance period than that required by the IFB. Id. at 5.

To be responsive, a bid, as submitted, must comply in all material aspects with the terms of the IFB. Northwest Pesticide Enterprises, Inc., B-235982, Sept. 28, 1989, 89-2 CPD ¶ 284 at 2. As a general rule, a bid must be rejected if it modifies material requirements of the IFB. FAR § 14.404-2(d) (2012); Red John's Stone, Inc., B-280974, Dec. 14, 1998, 98-2 CPD ¶ 135 at 4. The performance schedule is a material requirement, and a bid that takes exception to the performance schedule is nonresponsive. Northwest Pesticide Enterprises, Inc., supra.

Here, the record shows that the protester did not unequivocally promise to complete performance of the project by the required due date. Rather, the protester provided that it would complete the project within 350 days after receipt of notice to proceed. Under this qualification, the agency would have had to provide notice to proceed by September 15 to ensure that the protester's 350 day performance period would be complete by August 31, 2013. Here, award was not made until September 18. In any event, the solicitation reserved to the agency the right to provide notice to proceed no later than October 15, 2012, and to expect completion of the project by August 31, 2013.<sup>1</sup>

There is no merit to the protester's contention that it actually provided a shorter performance period than was required. This is based upon the protester's unilateral view that the IFB provided for a 365 day contract period, which it calculated from the fact that IFB amendment 1 had an "effective date" of August 31, 2012. Protest at 2. The effective date of the IFB amendment has no relevance to the required performance period. It merely denotes when the amendment was issued and became effective. The required completion date is established by the plain language of block 11 and FAR clause 52.211-10, alternate 1, which clearly states that the project must be completed by August 31, 2013, unless the agency's notice to proceed date is later than October 15, 2012.<sup>2</sup> IFB at 1, 37.

Because the protester did not promise to complete the project by August 31, 2013, as required by the IFB, its bid is nonresponsive and was required to be rejected.

The protest is denied.

Lynn H. Gibson  
General Counsel

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<sup>1</sup> There are 320 calendar days between October 15, 2012 and August 31, 2013.

<sup>2</sup> We do not agree with the protester that the IFB was ambiguous with respect to the required date for completing the project. In any event, to the extent that the protester challenges the terms of the IFB, its protest is untimely. Our Bid Protest Regulations require challenges to alleged apparent solicitation improprieties to be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (2012).