



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Interstate Construction, Inc.

File: B-281465

Date: February 10, 1999

Robert E. Thurbon, Esq., for the protester.

Clark J. Hulce, Esq., Department of the Army, Corps of Engineers, for the agency.

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DIGEST

Bid imposing condition on performance is nonresponsive where it modifies material terms of the solicitation, limits contractor's liability to the government, and limits the rights of the government under the contract.

DECISION

Interstate Construction, Inc. protests the award of a contract to Kinley Construction Company under invitation for bids (IFB) No. DACA05-98-B-0026, issued by the Department of the Army, Corps of Engineers, Sacramento District, for the repair and upgrade of the jet fuel hydrant system and bulk fuel storage area at Beale Air Force Base, California. Interstate contends that Kinley's bid is nonresponsive, since it included a material condition on performance of the contract which may not be waived by the agency to make Kinley's bid responsive.

We sustain the protest.

The IFB, issued on August 12, 1998 and amended four times prior to the September 18 bid opening, sought bids for the repair and upgrade of the fuel hydrant system and fillstand. The solicitation's pricing schedule sought prices for seven basic items (Nos. 0001-0007) relating to repairs/upgrades at the Pumphouse No. 1 site, and two option items (Nos. 0008 and 0009) relating to repairs/upgrades at the bulk fuel storage area. IFB at 00010-5. Item No. 0009, relevant here and discussed more fully below, involves lowering the high-level shut-off valves on three bulk fuel storage tanks. *Id.* All "major work items" listed in the IFB (including all of the basic and option items in the pricing schedule) were to be included in a total lump-sum price for evaluation and award purposes. *Id.* at 00010-5, 01025-1, 00100-13, and 00100-14.

Twelve bids were received by bid opening. Kinley submitted the apparent low bid (at \$1,591,566) and Interstate submitted the apparent second low bid (at \$1,649,867).

The Kinley bid included the following statement, identified as a bid "qualification": "Bid Item #9--Tanks will be cleaned and gas free by government before commencement of work." By letter of September 23, the contracting officer rejected the Kinley bid as nonresponsive under Federal Acquisition Regulation (FAR) § 14.404-2(d), which provides that "[a] bid shall be rejected when the bidder imposes conditions that would modify requirements of the invitation or limit the bidder's liability to the Government, since to allow the bidder to impose such conditions would be prejudicial to other bidders."

In response to this rejection notice, Kinley submitted a letter of protest to the contracting officer stating that the IFB required award to be made to Kinley as the low bidder. Kinley also contended that the agency could waive the firm's bid qualification regarding item No. 0009 as a minor informality or irregularity in the bid, since, upon a subsequent review of the IFB by Kinley, particularly, IFB Drawing No. CC4, the firm concluded that "there is not a specified condition for the tanks to be clean and gas free." Letter from Kinley to Contracting Officer (Sept. 23, 1998). By letter of September 25, Kinley notified the contracting officer that the firm was withdrawing the qualification in its bid; specifically, Kinley stated that "[b]y withdrawal of our qualification statement, there are no liabilities put forth on the government or prejudice against other bidders."

Upon advice from agency technical personnel and legal counsel, on October 7, the contracting officer concluded that Kinley could be asked to delete the objectionable qualification from its bid, since the condition was one of form and not of substance. See FAR § 14.405. Specifically, the contracting officer found that the qualification did not render the bid nonresponsive since neither of the tasks listed in the qualification to Kinley's bid--"cleaning" the tanks and making them "gas free"--was required to perform the work called for under the line item at issue.

Consequently, on October 8, Kinley withdrew its agency-level protest. The agency awarded a contract under the IFB to Kinley on November 4. Interstate filed its protest of the award with our Office on November 5. The agency reports that it has suspended performance of the contract pending a decision by our Office on Interstate's protest.

All bidders must compete for sealed bid contracts on a common basis. No individual bidder can reserve rights or immunities that are not extended to all bidders by the conditions and specifications advertised in the IFB. See Lathan Constr. Corp., B-250487, Feb. 5, 1993, 93-1 CPD ¶ 107 at 3-4. Therefore, in order to be responsive and considered for award, the bid must contain an unequivocal offer to perform, without exception, the exact thing called for in the IFB, in total conformance with the material terms of the solicitation. NR Vessel Corp., B-250925, Feb. 11, 1993, 93-1 CPD ¶ 128 at 2-3. If in its bid a bidder attempts to impose conditions 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. Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555 at 2-3; H.M. Kern Corp., B-239821, June 22, 1990, 90-1 CPD ¶ 586 at 2. Further, a bid which is nonresponsive on its face may not be made into a responsive bid by post-bid opening clarifications or corrections. Lathan Constr. Corp., *supra*, at 3-4.

In our opinion, the only reasonable interpretation of the asserted "qualification" regarding item No. 0009 is that, at the time of bid opening, Kinley agreed to perform the work item at the price bid only if the "[t]anks will be cleaned and [made] gas free by [the] government before commencement of [the] work." All parties agree, and our review confirms, that there was no such requirement or condition in the IFB. As discussed in detail below, since the Kinley bid qualification conditions performance by the firm on the agency taking steps to clean the tanks and render them "gas free," the bid imposes additional obligations on the agency not contemplated by the IFB which limit the government's rights, as well as the contractor's liability under the contract. The bid therefore must be rejected as nonresponsive.

The IFB provided little instruction to the bidders as to the performance of item No. 0009, which is only generally described as "lowering existing high level alarm valves for three of the aboveground storage tanks." IFB, Amendment No. 2, Summary of Work, ¶ 1.02D, at 01010-2. A drawing of the tanks that was included in the solicitation illustrated the shut-off valves as handle-shaped objects that are to be repositioned to a lower elevation; the hole for the existing top of the handle is to be plugged and a new lower hole made to reattach the handle. Drawing No. CC4.¹

The IFB notified bidders of the fact that the contractor will be performing in an area with significant hazardous environmental conditions. For instance, the IFB's summary of work (IFB, Amendment No. 2 § 01010), emphasized that the base will

¹The contracting officer describes the work required as follows:

There are three bulk tanks, each of which contains fuel. Each tank resembles a very large, tall metal cylinder, with a handle like structure on the outside. The handle is the high level cutoff. The tank contains fuel, has a vented top to keep out rain and leaves, and it also has a floating pan on the fuel which rises and falls with the liquid level. The task is to detach the top of the handle, seal the top hole, rotate the handle 180 degrees (switch top to bottom), and place a hole in the tank where the new attachment of the handle is made. . . . Such work as may be done inside the tank will be done from the floating pan."

Contracting Officer's Report at 2.

remain in full operation during performance of the contract (with the potential for substantial amounts of fuel to remain in the tanks that are being repaired) and that additional contractor responsibilities were included in the IFB (e.g., air monitoring of the enclosed work areas) to ensure the safety of contractor personnel and subcontractors in light of the identified hazards. See also Contracting Officer's Statement at 2; IFB at 01110-7 and 01410-4. In particular, ¶ 1.08 of the summary of work specifically advised bidders as follows:

The Work entails performing activities in close proximity to physical hazards. These conditions could present potentially life-threatening, or other situations of extreme consequence and will require paramount attention to safety and personnel protection at all times. It is the complete and indivisible responsibility of the Contractor to maintain adequate protective equipment and procedures Special attention shall be paid to the following potential hazards: 1. Vapor-freeing of existing fuel components

IFB at 01010-4 (emphasis added).

Although it is unclear what is meant by Kinley in its qualification that the government must render the tanks "gas free," this phrase could reasonably indicate that Kinley demands either that the tanks be fully drained of fuel, or that the tanks be free of fuel vapor. Either interpretation is clearly inconsistent with the IFB. For instance, as discussed above, the IFB establishes that the base will remain in full operation and, as depicted in Drawing No. CC4, that fuel is continuously provided below the tanks' floating pans by an underground pipeline. The agency reports that it is in fact impossible to completely drain the tanks--yet Kinley conditions performance of the item on the tanks being "gas [or fuel] free." Likewise, if the "gas free" term of the Kinley bid qualification means that the tanks must be rendered free of fuel vapor, it is also clearly inconsistent with the statement in the IFB, quoted above, notifying bidders to take into account the hazard of potential fuel "vapor-freeing" in formulating their bids. As Interstate points out, the lowering of the valves reasonably may involve welding work, which will require special precautions on the part of the contractor given the cited hazard of potential "vapor-freeing" in the work area. In this regard, the Kinley bid qualification effectively and improperly limits this cited risk for Kinley alone, while the other bidders were required to bid in the face of such risk.

Similarly, by conditioning its bid on the government's cleaning of the tanks, Kinley imposed added material obligations on the agency that were not envisioned by the IFB. This would improperly change the legal relationship between the contractor and agency, limiting the government's rights under the contract. For instance, if Kinley were to blame any subsequent injury or explosion on the government's failure to adequately "clean" or make "gas free" the fuel tanks, the government's liability under the contract could increase, while Kinley's liability would decrease.

The agency argues that the qualification is immaterial because it is not necessary to clean or make the tanks "gas free" before performing the work under item No. 0009.² Whether or not, in the agency's view, those two tasks are in fact necessary to perform the work is not dispositive, however. Rather, the point is that, as a result of the bid qualification, the awardee indicated that it would not perform unless the government cleaned and made the tanks "gas free," thereby conditioning its bid in a manner inconsistent with the IFB, which imposed no such obligations on the government.

Given the qualifying terms of the firm's offered performance, Kinley effectively created an opportunity for itself to refuse the award if it decided after bid opening that it no longer wanted the contract. A bidder cannot be given the opportunity to correct a bid to remove a material qualification, since it would provide it the competitive advantage of being able to accept or reject the contract after bids have been publicly exposed simply by deciding to make it responsive. C. Iber & Sons, Inc./J.S. Alberici Constr. Co., Inc., a Joint Venture, B-247920.2, Aug. 12, 1992, 92-2 CPD ¶ 99 at 5-6. Since, as the contracting officer initially found, the Kinley bid qualification imposes conditions inconsistent with material IFB provisions, altering the legal relationship between the contractor and the agency, it is a matter of substance (not form) that renders the bid nonresponsive and may not be waived by the agency as a minor informality or irregularity in the bid. NR Vessel Corp., supra, at 3-4. Although Kinley emphasizes its low bid price, the 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. Id.

We recommend that the agency terminate Kinley's contract for the convenience of the government and award a contract under the IFB to the protester, if otherwise appropriate. We also recommend that the protester be reimbursed the reasonable cost of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1998). The protester should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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²According to the agency, any work to be done inside the tank will be done from the "floating pan," which has seals to seal off the fuel from air and, as the pan falls, clean the walls. In addition, the agency contends that, since each tank has a vented roof, residual vapors should not be a problem; although the IFB provides that vapor-freeing of the fuel is a critical hazard at the site, the agency reports that vapor readings have historically been at "non-detect" levels.