



Decision

Matter of: Prudent Technologies, Inc.

File: B-401736.3

Date: December 9, 2009

William B. Barton, Esq., and Bryan R. King, Esq., Barton, Baker, Thomas & Tolle, LLP, for the protester.

Sara E. McGraw, Esq., Environmental Protection Agency, for the agency.

Christina Sklarew, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Procuring agency may permit correction of a mistake in bid where the bidder's intended bid amount is ascertainable from the face of the bid and logically supported by clear and convincing evidence.

DECISION

Prudent Technologies, Inc., of Kansas City, Missouri, protests the award of a contract to Environmental Restoration LLC, of St. Louis, Missouri, under invitation for bids (IFB) No. PR-R7-09-10251, issued by the Environmental Protection Agency (EPA) for environmental remediation services at the Omaha Lead Superfund Site in Omaha, Nebraska. Prudent argues that the EPA improperly permitted Environmental Restoration to adjust its bid after bid opening.

We deny the protest.

The IFB provided for the award of a fixed-price contract for a 2-year base period and 1 option year for environmental remediation and related services. Bidders were informed that the agency would "evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirements," and that award would be made to the low, responsible and responsive bidder. IFB § M-1.

The IFB's pricing schedule consisted of two parts. The first part, "B.1 Contract Price," provided blanks for extended prices, as follows:

The fixed price for this contract is \$_____. This represents a Two Base Period for 900 properties without incentives. If both incentives are earned in full, the fixed price is \$_____. If the quantity option available in the Base Period is exercised, and all possible incentives earned, the total price will be \$_____. If option period one and option quantities available are exercised and all possible incentives are earned, the total possible dollar value (w/o Davis-Bacon adjustment) is \$_____.

IFB § B-1.

The second part, “B-2 Pricing Schedule,” contained a number of contract line item numbers (CLINs) to be priced, and included incentives and “negative incentives.” The base period CLINS were as follows:

CLIN	DESCRIPTION	QTY	UNIT	UNIT PRICE	TOTAL
0001	Remediation of lead contaminated residential properties (QTY 900)	1	LOT		\$_____
0002	Incentive #1 - equal to 2.5% of CLIN 0001	1	EA		\$_____
0003	Incentive #2 - equal to 2.5% of CLIN 0001	1	EA		\$_____
0004	Negative Incentive - \$1,000 per property	1	EA		(\$_____)

QUANTITY OPTION

0005	Quantity option for remediation up to 400 additional properties	1	EA	\$_____	\$_____
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NOTE: Option quantity exercised to be billed under CLIN 0005.

0006	Per property price decrease if EPA provides disposal area	1	EA		(\$_____)
0007	Incentive #1 - equal to 2.5% of CLIN 0005 unit price and # of properties exercised (SEE QASP)	1 LOT	NTE		\$_____
0008	Incentive #1 - equal to 2.5% of CLIN 0005 unit price and # of properties exercised (SEE QASP)	1	EA		\$_____
0009	Negative Incentive – \$1,000 per property	1	EA		(\$_____)

IFB § B-2.¹ Similar CLINS, Nos. 1001 through 1009, were provided for the option year. Schedule B-2 did not include a place for bidders to provide a total price for all CLINs.

Although both sections of the pricing schedule included blanks for bidders to complete, bidders were only expressly instructed to submit pricing for schedule B-2. IFB amend. 1, at 5. At a pre-bid conference in response to questions concerning how bid prices would be evaluated, EPA informed bidders that the “[b]id price [would] be the total of all CLINS for all years,” and that “EPA will add the total for the base period and option years.” Agency Report (AR), Tab 5, Pre-bid Conference Transcript, at 90. In response to an inquiry that noted that CLIN 0005 had blanks for a unit price and a total, but that the quantity was listed as “one each,” and asked whether the unit price would be multiplied out by the option quantities, an EPA contracting official stated:

That—it would be for purposes of billing and everything, but you’re only giving a one each price, a unit price. Now, unless you change your schedule here to have them all, it would just be the price of one and then we will just have to remember to multiply it out all the way because it does impact. I would suggest putting in another column and putting the one each price for a total possible of. Just have another little line item so that we add the total of the unit price.”

Id. at 112. Another EPA official stated that an “[a]djustment will be made on there for better clarification, an amendment.” Although the IFB was subsequently amended twice, neither amendment addressed this issue.

EPA received bids from 10 bidders, including Prudent and Environmental Restoration. The contracting officer calculated the price for each bid by adding the CLIN amounts entered on the B-2 price schedule, including the 2-year base period and the option year, as well as the quantity options, as they appeared in the “total” column for CLINs 0005 and 1005. The negative incentive amounts in CLINs 0004, 0009, (and the corresponding option year CLINS 1004 and 1009), which were specified to be \$1,000 per property, were not included in the agency’s calculation, nor did the calculation include conditional pricing in CLINs 0006 and option year

¹ The solicitation, as amended, set forth a Quality Assurance Surveillance Plan (QASP), and identified how the incentives and negative incentives would be calculated. For example, with respect to the negative incentives in CLINs 0009 and 1009, bidders were informed that “[f]or each property where remediation activities are begun and the remediation is incomplete (incl. backfill and/or sod) for more than 3 weeks (21 calendar days), a deduction of \$1,000 will be taken off the contractor’s next invoice submittal.” See IFB amend. 2, QASP, at 1-2.

CLIN 1006 (a per-property price decrease in the event EPA provided the disposal area).²

The low bid was withdrawn, and Environmental Restoration was found to have submitted the next low bid, which the contracting officer calculated from the firm's schedule B-2 CLIN pricing to be \$12,160,354.52; Prudent submitted the third low bid of \$18,826,500.00.

Environmental Restoration requested an opportunity to correct mistakes in its bid, noting a more than \$6 million discrepancy between the total price the firm had bid in schedule B-1 and the agency's total evaluated bid price based upon Environmental Restoration's CLIN pricing in schedule B-2. Specifically, Environmental Restoration informed the contracting officer that the firm's \$18,674,250 total bid price mistakenly included negative incentives and that this total bid price should have been \$18,679,500. Environmental Restoration also informed the contracting officer that the firm had mistakenly not extended its unit price for CLIN 0005 to reflect that this CLIN provided for a quantity of 400 properties; rather, Environmental Restoration bid \$8,895 for both the unit price and the total bid price for CLIN 0005. Similarly, Environmental Restoration bid \$8,895 for both the unit price and the total bid price for the option year CLIN 1005, and thus the total price for CLIN 1005 did not reflect the quantity of 300 properties. AR, Tab 14, Environmental Restoration Letter to EPA, July 16, 2009.

The agency allowed Environmental Restoration to correct its bid, and this protest followed.

Prudent challenges the agency's decision to permit Environmental Restoration to correct its claimed mistake, arguing that the IFB's terms and instructions to bidders were unambiguous and that Environmental Restoration should therefore be held to the prices it submitted on schedule B-2 and the evaluated total bid price at bid opening.

A bidder may be permitted to upwardly correct its bid price prior to award where there is clear and convincing evidence that a mistake was made, the manner in which the mistake occurred, and the intended price. See Federal Acquisition Regulation (FAR) § 14.407-3(a); *Odyssey Int'l, Inc.*, B-296885.2, Nov. 16, 2005, 2006 CPD ¶ 49 at 4. Because the authority to correct mistakes alleged after bid opening but prior to award is vested in the procuring agency, and because the weight to be given the evidence in support of an asserted mistake is a question of fact, we will not

² At the pre-bid conference, EPA stated that CLINs 0006 and 1006 "will be included when determining low bid," and that an amendment would be issued to clarify the issue. AR, Tab 5, Pre-bid Conference Transcript, at 90, 105. An amendment addressing this matter was not issued.

disturb an agency's determination concerning bid correction unless it is unreasonable. Id.

Here, we find that the agency reasonably concluded that there was clear and convincing evidence that a mistake had occurred and the manner in which it occurred and the intended bid price. Specifically, with respect to CLINs 0005 and 1005, it was obvious that Environmental Restoration had simply failed to multiply its unit price on the B-2 schedule by the quantity option's potential maximum amount, since it listed the same number for its unit price and total price.³ In addition, it is clear that when Environmental Restoration calculated its bid amounts in the B-1 schedule, it mistakenly included the negative incentive CLINs (0004, 0009, 1004, and 1,009) as well as the CLINs representing the amount by which the bidder would lower its per-property price in the event EPA provided the disposal area (0006 and 1006). This is clear because Environmental Restoration's calculated total prices differed from the agency's calculated total prices in exactly the amount of these CLINs.⁴ Thus, when Environmental Restoration's unit pricing is extended by the appropriate quantities, and the extended prices are totaled, using the same calculation method as the agency used for every other bidder, the sum exactly matches the amount that Environmental Restoration requested for the correction of its bid.

In short, all of the information necessary to ascertain that a mistake was made, manner in which it was made, and the amount Environmental Restoration intended to bid, was apparent from the bid itself. Moreover, correction of the mistake does not result in displacement of any lower-priced bids. We find that the agency's determination that Environmental Restoration should be permitted to correct its mistake was reasonable.

The protest is denied.

Lynn H. Gibson
Acting General Counsel

³ Environmental Restoration's total bid prices in schedule B-1 evidence that the firm mistakenly failed to extend its unit pricing for CLINs 0005 and 1005 to calculate the total quantity price.

⁴ For each of the amounts Environmental Restoration inserted on B-1, the delta between the protester's entries and the contracting officer's calculations exactly matches the amounts for the associated negative-incentive CLINs and the conditional price-reduction CLIN.