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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Valley Quarries, Inc.

File: B-409859

Date: August 13, 2014

James W. Kutz, McNees Wallace & Nurick LLC, for the protester.
Milton Hsieh, Esq., Department of Transportation, for the agency.
Kathleen A. Gilhooly, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that the agency improperly rejected its bid as nonresponsive is denied where the invitation for bids stated that the contract must be completed within 245 calendar days and requested that bidders identify their estimated contract completion times so that the agency could calculate contract administrative costs for evaluation purposes, and the protester's bid specified 280 calendar days for completion of the contract.

DECISION

Valley Quarries, Inc., a division of New Enterprise Stone & Lime Co., Inc., of Chambersburg, Pennsylvania, protests the rejection of its bid and the award of a contract to Rogele, Inc., of Harrisburg, Virginia, under invitation for bids (IFB) No. DTFH71-14-B-00012, issued by the Federal Highway Administration (FHWA), Department of Transportation, for construction services in Gettysburg, Pennsylvania. Valley Quarries contends that its bid did not take exception to the IFB's required performance schedule.

We deny the protest.

BACKGROUND

The IFB, issued on January 29, 2014, sought bids for pavement and sidewalk reconstruction, street light installation, and other construction services in Gettysburg, Pennsylvania. The required work was identified on two schedules:

Schedule A (the basic requirement) for work on one street and Schedule B (optional work) for work on another street.¹

Bidders were informed that performance of the work must begin within 10 calendar days and be completed within 245 calendar days after receiving notice to proceed. IFB at 1. The IFB also stated that if funding was available at the time of award the agency may make award for both Schedule A and Schedule B at that time; but that if funding for Schedule B was received after award, the agency had the right to exercise its option for the Schedule B work not later than 120 calendar days after the notice to proceed for Schedule A. Bid Schedule Instructions at 1. In this regard, the IFB provided that if Schedule B was not part of the original contract award, but was exercised later, overall contract performance must still be completed within 245 calendar days of notice to proceed. IFB at B-8.

The IFB stated that award would be made to the responsive, responsible bidder with the lowest evaluated project price. In this regard, bidders were informed that the agency would evaluate the project price by adding the total bid prices of Schedules A and B to the “Contract Administrative Cost for Total Calendar Days Bid.” IFB at 3. The IFB stated that the contract administrative cost would be \$2,200 per calendar day and would be used only for evaluation and ranking purposes. IFB at 3, B-8. In this regard, bidders were instructed to complete a “Bid Summary,” on which bidders were to provide total calendar days to complete all contract work.² The total calendar days bid would be multiplied by \$2,200 per day to calculate the bidder’s contract administrative cost. IFB at B-8. Bidders were also informed that the number of calendar days specified by the successful bidder for contract completion would become the contract performance period. IFB at 3; Bid Schedule Instructions at 2.

FHWA received five bids at bid opening. AR at 2. The two lowest-priced bids were:

	Schedule A	Schedule B	Administrative Costs	Evaluated Price
Valley Quarries	\$2,773,970	\$226,030	\$616,000	\$3,616,000
Rogele	\$2,955,019	\$215,850	\$539,000	\$3,709,869

¹ The IFB stated that “[t]he purpose of the multiple schedules and options is to give the Government maximum flexibility in completing the project in a timely manner and at a cost-effective price, by proper utilization of available funds and upon receipt of all required funding.” Bid Schedule Instructions at 1.

² The Bid Summary also requested that bidders separately indicate their calendar days to complete schedules A and B, if the two schedules were not awarded at the same time. IFB at B-8.

AR, Tab 2, Bid Abstract, at 1. Valley Quarries inserted 280 calendar days on its Bid Summary for the calculation of contract administrative costs. AR, Tab 3, Protester's Bid Summary. Valley Quarries also indicated in its Bid Summary that if Schedules A and B were not awarded at the same time, it would complete Schedule A in 245 calendar days and Schedule B in 35 calendar days. Id.

FHWA rejected Valley Quarries' bid as nonresponsive because the protester's Bid Summary indicated that Valley Quarries had bid 280 calendar days to complete the contract work. This protest followed the denial of Valley Quarries' agency-level protest.

DISCUSSION

Valley Quarries contends that its bid is responsive, arguing that its bid did not take exception to the required 245 calendar day schedule to complete all work. In this regard, Valley Quarries notes that it indicated on the Bid Summary that, in the event that Schedules A and B were not awarded at the same time, it would complete Schedule A in 245 calendar days and Schedule B in 35 days. Valley Quarries argues that, because Schedule B had to be exercised within 120 days after notice-to-proceed, this necessarily indicated that all of the contract work would be completed within 245 days. See Comments at 3. Valley Quarries contends that its entry of 280 calendar days on the Bid Summary was to be used only for evaluation purposes to calculate administrative costs; Valley Quarries maintains that the FHWA's administrative costs would obviously be greater with more work occurring at the same time if both schedules were ultimately chosen. Protest at 7. The protester also notes that the IFB informed bidders that a failure to specify a number of calendar days on the Bid Summary for contract completion would indicate that the bidder accepted the 245 calendar day completion schedule, see Bid Instructions at 2, and argues that:

It is hard to fathom that the FHWA has effectively put a bidder in the position that the bidder would have been better served by leaving an item blank (which the bid documents permitted) rather than putting the number in it believed actively reflected the administrative costs the Government would use for comparison purposes.

Comments at 4-5.

To be responsive, a bid must show on its face at the time of bid opening that it is an unqualified offer to comply with all material requirements of the solicitation, and that the bidder intends to be bound by the government's terms as set forth in the solicitation. Sundt Corp., B-274203, Nov. 5, 1996, 96-2 CPD ¶ 171 at 2. The performance schedule is a material requirement. Northwest Pesticide Enterps., Inc., B-235982, Sept. 28, 1989, 89-2 CPD ¶ 284 at 2. A bid, which takes exception

to a material IFB requirement or is ambiguous with respect to whether the bid represents an offer to comply with a material requirement, may not be changed or clarified after bid opening and must be rejected as nonresponsive. Marco Equip., Inc.; Scientific Supply Co., B-241329, B-241329.2, Jan. 31, 1991, 91-1 CPD ¶ 107 at 3. This is to ensure that all bidders compete on an equal basis, with no advantage being given to any bidder over another, and thus to ensure the integrity of the competitive bidding system. Id.

Here, the record shows that, at best, the protester's bid was ambiguous with respect to whether Valley Quarries had unequivocally promised to complete contract performance within the time required. Although it is true that the calculation of contract administrative costs was for evaluation purposes only, this calculation was to be based upon the bidders' estimated number of days to complete the contract work. By specifying 280 calendar days for this calculation, Valley Quarries called into question its commitment to perform the contract work within 245 calendar days as required. In this regard, the Bid Summary stated, directly above the space provided for the bidders' estimated calendar days for calculating the contract administrative costs, that "[t]he total calendar days bid to complete all contract work must be greater than or equal to ($\geq$) 120 and less than or equal to ($\leq$) 245." IFB at B-8 (emphasis in original). Although Valley Quarries argues that it intends to perform the contract work within 245 calendar days, it is well settled that when determining the responsiveness of a bid, the controlling factor is not whether the bidder intends to be bound, but whether this intention is apparent from the bid as submitted. Balongas, S.A., B-215153, July 23, 1984, 84-2 CPD ¶ 86 at 2.

Valley Quarries also argues that the bid instructions indicated that when evaluating bids, the FHWA would consider the contract administrative costs for the project to be "\$2,200 per calendar day bid," but the IFB did not specify whether the "per calendar day bid" was for Schedules A and B separately or for Schedules A and B collectively. Comments at 2. According to Valley Quarries, the FHWA will likely incur more administrative costs if work is being performed concurrently on both options, so it completed the bid form by combining the separate performance periods for Schedule A (245 days) and Schedule B (35 days) respectively, for bid comparison purposes only. Id. To the extent that the protester believes that the terms of the IFB are ambiguous, 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) (2014).

Valley Quarries argues alternatively that its identification of 280 days should be treated as a minor bid mistake, which the agency was required to waive. Valley Quarries asserts that, if FHWA believed that 280 days was the wrong number to enter for bid comparison purposes, it should have either sought clarification from Valley Quarries or used 245 days, if the FHWA believed that that was the "maximum contract time" as set forth by the bid instructions. Comments at 5. A bid that is nonresponsive on its face may not, however, be made responsive through

post-bid-opening clarifications, and the procedures for correcting bid mistakes may not be used to make a bid responsive. See Federal Acquisition Regulation § 14.407-3; Oregon Elec. Constr., Inc. dba Integrated Sys. Group, B-294279, Sept. 27, 2004, 2004 CPD ¶ 188 at 2.

Valley Quarries also asserts that its price was significantly lower than Rogele's bid, and that the FHWA, in rejecting Valley Quarries' bid, will not be accepting the bid that is most advantageous to the government. Protest at 5, 6. We consistently have held, however, that a nonresponsive bid may not be accepted, even where it might result in monetary savings to the government, since acceptance would compromise the integrity of the sealed bidding system. Systron Donner, B-230945, July 5, 1988, 88-2 CPD ¶ 7 at 3.

The protest is denied.

Susan A. Poling
General Counsel