



## Decision

**Matter of:** Addison Construction Company

**File:** B-416525; B-416525.2

**Date:** September 4, 2018

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### DIGEST

Agency improperly rejected bid as nonresponsive for not providing information related to the solicitation's Buy American Act requirements, where the information was not needed to establish the bid's responsiveness.

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### DECISION

Addison Construction Company, a small business located in Cheyenne, Wyoming, protests the rejection of its bid as nonresponsive by the Department of Energy (DOE) under invitation for bids (IFB) No. 89503118BWA000003, issued for the construction and completion of a 345-kilovolt (kV) capacitor bank at the Liberty Substation located outside Liberty, Arizona. The protester contends that the agency improperly rejected its bid for failing to provide information related to the solicitation's Buy American Act provisions.

We sustain the protest.

### BACKGROUND

The solicitation was issued on April 5, 2018, as a small business set-aside, seeking a contractor to construct and complete a 345-kV capacitor bank at the Liberty Substation for the DOE Western Area Power Administration's Desert Southwest Region. The solicitation anticipated award of a fixed-price contract to the lowest-priced bidder whose bid conformed to the solicitation requirements.

As a part of the work to be performed, the successful bidder will purchase and install three 345-kV disconnecting switches, one 345-kV disconnecting switch with motor-operated grounding blades, and 77 station posts that constitute a portion of the station electrical bus system. See generally IFB at 46-70.<sup>1</sup>

Of relevance to the protest, the solicitation incorporated both Federal Acquisition Regulation (FAR) clause 52.225-9, Buy American--Construction Materials, and FAR provision 52.225-10, Notice of Buy American Requirement--Construction Materials. IFB at 14-17, 29. FAR clause 52.225-9 requires the contractor to use only domestic construction material in performing the contract, unless an exception applies. One such exception applies where the cost of domestic construction material is unreasonable, i.e., when the cost of domestic construction material exceeds the cost of foreign material by more than six percent. FAR clause 52.225-9(b)(3)(i). If no exception applies, FAR provision 52.225-10(d)(3)(i) requires the agency to reject, as nonresponsive, any bid that is based on the use of foreign construction materials.

The agency received 10 bids in response to the solicitation and opened these bids on May 22. Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 4. DOE reviewed the lowest-priced bid first, but rejected it as nonresponsive. Id. Addison's bid, which was second lowest, at \$2,231,997, was reviewed next. Id.

Addison's bid requested an exception to the Buy American Act, on the basis of unreasonable cost, for three categories of items: (1) three 345-kV disconnecting switches; (2) one 345-kV disconnecting switch with motor-operated grounding blades; and (3) 77 station posts. On June 4, the agency verified, via an email exchange with Addison, that the company intended to include the foreign version of these items in its bid. Id. at 4.

Following review of Addison's bid, the contracting officer determined that the bid failed to provide information required by FAR clause 52.225-9 and FAR provision 52.225-10 and was therefore nonresponsive. The agency then awarded the contract to the next lowest-priced bidder, Integrated Power Co., in the amount of \$2,356,696.

This protest followed.

## DISCUSSION

The protester primarily contends that its bid met the essential requirements of the solicitation, including those governing requests for exceptions to the Buy American Act based on the unreasonable cost of domestic material. In this regard, the protester asserts that its bid fully declared its intent to provide foreign-manufactured construction

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<sup>1</sup> Citations to the IFB refer to the solicitation document produced in tab A.1 of the agency report (AR), which includes amendments and appendices.

materials and also provided pricing and location information demonstrating that the material qualified for the applicable exception.<sup>2</sup>

Clause 52.225-9 of the FAR requires a contractor requesting an exception to the Buy American Act construction materials requirement on the basis of unreasonable cost to include, with its bid, the price, quantity, unit of measure, and a description of the foreign and domestic materials at issue, along with a detailed justification for the use of foreign construction materials, a “reasonable survey of the market,” and a completed price comparison table in the format provided in FAR clause 52.225-9(d). In addition, the clause requires the contractor to provide the time of delivery or availability of the materials, the location of the construction project, specific supplier information (including the name, address, and telephone number for the supplier, and a copy of the supplier’s response or a summary thereof), and “other applicable supporting information.” FAR clause 52.225-9(c), (d).

At issue here, Addison’s bid included a chart that listed, for both the foreign construction material included in the bid, and the corresponding domestic material, the following categories of information: the description of the material, unit of measure, quantity, unit price, total cost, and country or state of origin. See AR, Tab C.1, Addison Bid, at 32. Addison’s bid, however, did not include the name, address, telephone number, and contact information for the suppliers that had been surveyed, a copy of such suppliers’ responses, or any other supporting information. See id.

The agency argues that Addison’s bid was missing information required by the FAR and that, without this information, it could not determine whether a Buy American Act exception applied. DOE contends that, as a result, it properly determined that

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<sup>2</sup> While we do not address every argument raised by Addison in its protest, we have reviewed each issue and, with the exception of those arguments discussed herein, do not find any basis to sustain the protest. For example, Addison argues that the IFB did not include a clause that would limit mobilization costs, and that this omission was inconsistent with the agency’s prior practice and “causes suspicion on our part of the . . . [c]ontracting [o]fficer showing preferential treatment to the [awardee].” Comments at 1. As an initial matter, we note that this argument is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), which require that challenges to alleged improprieties in a solicitation be raised prior to bid opening. The protester first raised the above challenge, however, in its comments on the agency report. Moreover, government officials are presumed to act in good faith and any argument that contracting officials are motivated by bias or bad faith must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or suppositions. Frontier Transp., Inc., B-400345, Sept. 9, 2008, 2008 CPD ¶ 165 at 3-4 n.2. Here, the protester provides no support for its assertion that the contracting officer showed preferential treatment, nor does the record evidence any such treatment.

Addison's bid did not qualify for the requested exception and rejected it as nonresponsive for failing to meet the domestic construction material requirement.

To be considered for award, a bid requesting the use of foreign construction material, on the basis of the unreasonable cost of domestic construction material, must establish on its face the amount of foreign material to be used and the price of that material. Illinois Constructors Corp., B-209214, Feb. 28, 1983, 83-1 CPD ¶ 197 at 2. This eliminates the opportunity for the bidder to manipulate its overall price--and thus relative standing--after bid opening. See Manatts, Inc., B-237532, Feb. 16, 1990, 90-1 CPD ¶ 287 at 4. A bid should not be rejected as nonresponsive simply because it does not include all of the information needed to determine whether a Buy American Act exception applies, however, where the missing information can be obtained by the agency through its own investigation and would not affect the relative standing of the bidder. See Key Constructors, Inc., B-205280, B-205280.2, Apr. 8, 1982, 82-1 CPD ¶ 328 at 7.

Here, we find that, based on the information provided in Addison's bid, the bid was responsive. In this regard, while the bid did not include all of the information required under FAR clause and provision 52.225-9 and 52.225-10 respectively, it nonetheless included sufficient information for the agency to understand the foreign material being provided, and the quantity and costs of such material. Thus, while the bid was missing required supporting documentation and details, the omission of this information would not enable Addison to alter the price, or relative standing, of its bid.

The agency argues that our prior decisions--where we found that a bid should not be deemed nonresponsive simply because it does not contain all of the information necessary to perform a Buy American Act evaluation--do not apply in light of the FAR requirements included in the IFB. The agency contends that these requirements, which were added in 1997, create an inflexible requirement for bidders to submit specific information to support any request for a Buy American Act exception. COS/MOL at 7 n.4.<sup>3</sup>

Based on our review, we see no support for the agency's argument that all of the information listed under FAR clause 52.225-9 is required to be submitted for the bid to be deemed responsive. While these requirements clearly require the submission of such information in order "[t]o permit evaluation of [exception] requests," FAR clause 52.225-9(d), nothing in either the clause or the provision requires an agency to reject a bid as nonresponsive simply because it does not include such information. While FAR provision 52.225-10(d)(3) does contemplate the rejection of a bid as nonresponsive where the bid is based on the use of foreign construction material, and the agency has

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<sup>3</sup> We note, however, that the agency seems to have taken the position in its evaluation that the location of the construction project, which is another required data category under FAR clause 52.225-9(c)(1), may be assumed, notwithstanding the protester's failure to include it in its bid. See AR, Tab B.1, Determination & Findings, at 2.

determined that no requested exceptions apply, this provision does not require the agency to reject a requested exception simply because the bidder did not provide every piece of information listed under FAR clause 52.225-9(c) and (d).

Instead, in our view, the agency is permitted to conduct its own investigation to determine the applicability of the requested Buy American Act exception provided that the information not included would not be the type that would enable a bidder to alter or amend the price, or relative standing, of its bid. See Key Constructors, Inc., supra. Here, the missing information, which includes such information as the contact information for the foreign supplier contacted by the protester, would not allow Addison to alter its acceptance of the IFB terms. Accordingly, we conclude that the agency erred in determining that the missing information required the rejection of the exception request.

The agency additionally argues that Addison's protest is an untimely challenge to the terms of the solicitation because it was not raised prior to bid opening in accordance with our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1). As discussed above, however, we find that the solicitation terms do not require the rejection of Addison's bid on the basis of the missing Buy American Act information. Accordingly, we conclude that the protest does not challenge the terms of the solicitation.

## RECOMMENDATION

We recommend that DOE investigate whether the foreign construction materials listed in Addison's bid qualify for an exception to the Buy American Act on the basis of unreasonable cost. Following that review, the agency should identify the lowest-priced responsible bidder. In the event the agency concludes that Addison offers the lowest-priced responsible bid, the agency should terminate for the convenience of the government its award to Integrated and make award to Addison.

We also recommend that the agency reimburse Addison its costs associated with filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. Id. at § 21.8(f).

The protest is sustained.

Thomas H. Armstrong  
General Counsel