



Decision

Matter of: Master Pavement Line Corporation

File: B-419111

Date: December 16, 2020

Stuart Weinstein-Bacal, Esq., Weinstein-Bacal, Miller & Vega, P.S.C., for the protester. Milton Hsieh, Esq., Department of Transportation, for the agency. Paula A. Williams, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the rejection of protester's bid as nonresponsive for failing to have an active System for Award Management (SAM) registration at the time of bid submission is sustained. Compliance with the SAM registration requirements are matters of bidder responsibility, not bid responsiveness. The agency should have provided the protester with the opportunity to correct the SAM registration, which the protester, in fact, did prior to award.

DECISION

Master Pavement Line Corporation, a disadvantaged small business located in Mayaguez, Puerto Rico, protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 693C73-20-B-000024, issued by the Department of Transportation, Federal Highway Administration (FHWA), for repair services. The protester argues that the agency improperly rejected its bid as nonresponsive on the basis that it did not have an active System for Award Management (SAM) registration at the time of bid submission.

We sustain the protest.

BACKGROUND

The solicitation was issued on July 10, 2020, as a small business set-aside, seeking a contractor to repair signs, guardrails, and other safety repairs as described in PR-52

and PR-53, Project No. PR ST ER PRMNT RPR (5), in Puerto Rico. IFB at 2.¹ The solicitation anticipated award of a fixed-price contract to the lowest-priced bidder whose bid conformed to the solicitation requirements. *Id.* at 33.

Of relevance to the protest, the IFB's checklist for bid submission included the following statement: "THE FOLLOWING THREE ITEMS IF NOT SUBMITTED WITH THE BID; MUST BE COMPLETED ELECTRONICALLY PRIOR TO CONTRACT AWARD." IFB at 7. One of the three items was registration in the System for Award Management. *Id.* The solicitation also incorporated by reference Federal Acquisition Regulation (FAR) provision 52.204-7, System for Award Management (Oct. 2018). Agency Report (AR) exh. C, Contract Clauses Index at 1.

As amended, FAR provision 52.204-7 requires bidders to be registered in SAM at the time an offer or quotation is submitted, and continue to be registered until time of award, during performance, and through final payment of any contract, basic agreement, basic ordering agreement, or blanket purchasing agreement resulting from this solicitation. FAR provision 52.204-7, *see also* 83 Fed. Reg. 48691 (Sept. 26, 2018). The FAR explains that: "Offerors and quoters are required to be registered in SAM at the time an offer or quotation is submitted in order to comply with the annual representations and certifications requirement" except in certain circumstances set forth in FAR 4.1102(a).² Once completed, the required annual certifications and representations are then incorporated into the contract. *See* FAR 4.1200(c).

The agency received 11 bids in response to the solicitation and opened these bids on August 18. Master Pavement was the apparent low bidder. Contracting Officer's Statement and Memorandum of Law at 2. Following review of Master Pavement's bid, the agency found that the firm's SAM registration had expired on June 28, 2013, and determined that Master Pavement's bid was nonresponsive because Master Pavement was not registered in SAM when it submitted its bid, as required by FAR provision 52.204-7. *Id.* The record reflects that the protester submitted its SAM registration for processing on August 20, 2020, two days after bid opening.³ AR exh. D, Protester's Email to Agency at 2. On September 1, the contracting officer notified the protester that its bid was nonresponsive and would not be considered for award based on the SAM registration requirement set forth in FAR provision 52.204-7. Protest exh. 2, Notice to Unsuccessful Bidder. On September 2, Master Pavement requested reconsideration of the agency's decision to reject its bid noting, among other things, the provision in the

¹ For clarity, our Office has numbered the pages of the IFB consecutively, and we refer to those page numbers in this decision.

² The definition of the term "offeror" includes a bidder under a FAR part 14 procurement, such as the procurement at issue here. *See* FAR 2.101.

³ There are indications in the record that the protester began a process of attempting to update its SAM registration as far back as July 8, 2020, however, it experienced various procedural and technical difficulties. *See* Protest exh. 10, Protester's Letter to Agency, (Sept. 2, 2020).

solicitation providing that its SAM registration could be completed prior to award. Protest exh. 10, Protester's Letter to Agency (Sept. 2, 2020). Then on September 3, the protester provided evidence that its SAM registration was reactivated. AR exh. B, Protester's Email to Agency at 2-3. That same day, the agency denied the protester's request for reconsideration of its decision. This protest followed.

DISCUSSION

In its protest, Master Pavement argues that the contracting officer unreasonably rejected its bid for failing to have an active SAM registration at the time of bid submission. In support of its position, the protester makes two arguments. First, the protester contends that the IFB contained conflicting instructions about when bidders had to be registered in SAM. Specifically, the protester argues that the IFB "contained a false and misleading instruction in its CHECKLIST advising that bidders had to be actively listed on the SAM '**PRIOR TO CONTRACT AWARD.**'" Comments at 3 (emphasis in original). According to the protester, this clear and unambiguous instruction "induced Master into submitting Master's Bid without reviewing the hundreds of pages of FARs incorporated by reference into the Solicitation, including FAR 52.204-7, seeking hidden defects therein." *Id.* at 4. Second, the protester alternatively argues that its failure to possess an active SAM registration at bid opening should have been waived by the agency as a minor informality since it was in fact registered in SAM shortly after bid opening and prior to award. See Protest at 5; Comments at 2-4.

In response, the agency argues it reasonably determined that Master Pavement's bid was nonresponsive, and therefore ineligible for award, because Master Pavement did not have an active SAM registration when it submitted its bid, as required by FAR provision 52.204-7. The agency contends that the protester's reliance on other solicitation language, such as the checklist for bid submission provision, as support for its claim that bidders were required to be actively registered in SAM--prior to award and not at bid submission--is an untimely solicitation challenge that should have been raised before the initial bid closing time. Contracting Officer's Statement and Memorandum of Law at 3-4, *citing* Bid Protest Regulations, 4 C.F.R. 21.2(a)(1). The agency also disputes the protester's contention that it could have waived this defect and allowed the protester to correct the issue after bid opening. Citing the provisions of FAR 14.405, Minor informalities or irregularities in bids, the agency argues that it could not waive the SAM registration requirement of FAR provision 52.204-7 because it is a material requirement of the IFB.

As an initial matter, we agree with the agency that given the conflicting language in the solicitation about when bidders had to be registered in SAM, the solicitation was patently ambiguous in this respect. Because Master Pavement did not challenge this apparent inconsistency prior to bid opening, it may not now complain about the agency's adoption of a contrary reading of the solicitation, namely that the IFB required bidders to be registered in SAM at the time of bid submission, rather than at award. Under our Bid Protest Regulations, a patent ambiguity must be protested prior to the time set for bid opening or for receipt of initial proposals, when it is most practicable to

take effective action against such defects. 4 C.F.R. 21.2(a)(1); see e.g., *American Sys. Grp.*, B-418535, June 9, 2020, 2020 CPD ¶ 190 at 3; *Anders Constr., Inc.*, B-414261, Apr. 11, 2017, 2017 CPD ¶ 121 at 6. A bidder or offeror that chooses to compete under a patently ambiguous solicitation does so at its own peril and cannot later complain when the agency proceeds in a way inconsistent with its interpretation. *Id.*; see also *CardioMetrix*, B-274585, Nov. 18, 1996, 96-2 CPD ¶ 190 at 3.

Nonetheless, we find that the agency acted improperly when it rejected Master Pavement's low bid as nonresponsive because Master Pavement was not registered in SAM at the time of bid submission as required by FAR provision 52.204-7. Generally, a responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. See FAR provision 14.301; *Propper Mfg. Co., Inc.*; *Columbia Diagnostics, Inc.*, B-233321, B-233321.2, Jan. 23, 1989, 89-1 CPD ¶ 58. Responsiveness is determined at the time of bid opening from the face of the bid documents. Unless something on the face of the bid, or specifically a part of it, limits, reduces or modifies the bidder's obligation to perform in accordance with the terms of the solicitation, the bid is responsive. *Cal-Tex Lumber Co., Inc.*, B-277705, Sept. 24, 1997, 97-2 CPD ¶ 87 at 3.

The provisions of FAR 14.405, however, establish the rules for handling bids that contain minor informalities or irregularities. It defines such informalities or irregularities as matters of "form and not of substance" pertaining to some "immaterial defect in a bid or variation in a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders." The provision goes on to explain that a defect is "immaterial" when it has a "negligible effect on price, quantity, quality, or delivery." FAR 14.405. With regard to immaterial defects, FAR 14.405 directs that a contracting officer "shall give the bidder an opportunity to cure any deficiency" or "waive the deficiency." (emphasis added).

As set forth above, the agency argues that the cure and waiver provisions of FAR 14.405 do not apply here because the SAM registration requirement is material, and the failure to comply with this material requirement rendered the bid nonresponsive. According to the agency, the requirement is a material term of the IFB because, at the time of SAM registration, bidders must comply with the annual contractor representations and certifications requirement; these representations are subsequently incorporated into the contract pursuant to FAR provision 4.1200(c). Contracting Officer's Statement and Memorandum of Law at 5. We are not persuaded by the agency's argument.

Representations and certifications are not material terms *ipso facto* by virtue of their incorporation in the awarded contract. Rather, FAR provision 14.405 expressly defines a defect as immaterial when it has little impact on "price, quantity, quality, or delivery." In other words, for a defect to have a material impact, it must be one that has a more than negligible effect on price, quantity, quality, or delivery. See, e.g., *Mobility Sys. and Equip. Co.*, B-243332, Apr. 25, 1991, 91-1 CPD ¶ 412 at 3; *Aviation Specialists, Inc.*; *Aviation Enters., Inc.*, B-218597, B-218597.2, Aug. 15, 1985, 85-2 CPD ¶ 174 at 3. The

agency, however, has failed to explain how the SAM registration's annual contractor representations and certifications impact these aspects of the protester's bid. Thus, we reject the agency's blanket contention that the provisions of FAR 14.405, requiring a contracting officer to allow a bidder to cure an immaterial defect, do not apply to Master Pavement's failure to complete its SAM registration and associated annual contractor representations and certifications at the time of bid submission.

In reaching the above conclusion, we find one of the examples set forth in FAR provision 14.405 of an immaterial defect particularly instructive. Paragraph (e) specifically identifies as an immaterial defect a bidder's failure to execute certain required representations with respect to equal opportunity and affirmative action programs, and affirmative action compliance. Thus, it is apparent that required representations can be cured or waived when they are not material to the bid.

Moreover, our conclusion is consistent with our long held view that, in the context of an IFB, matters concerning contractor representations and certifications generally pertain to a bidder's responsibility, not the responsiveness of a bid, because they do not concern the material obligations of a bidder, *i.e.*, they do not affect the price, quantity, quality, or delivery terms of the bid. Accordingly, we have found that the failure of a bidder to include completed standard representations and certifications with its bid does not render the bid nonresponsive. See *Charter Envtl., Inc.*, B-297219, Dec. 5, 2005, 2005 CPD ¶ 213 at 4; see also *Nomura Enter. Inc.-- Recon.*, B-244993.2, B-245521.2, Oct. 9, 1991, 91-2 CPD ¶ 322 at 3.⁴ Similarly, because registration--or failure to register--in SAM does not affect a firm's obligation to perform in accordance with the terms of the IFB, we have explained that compliance is not a matter of responsiveness, but rather a matter of responsibility. See *GC Works, Inc.*, B-416379, B-416379.2, Aug. 14, 2018, 2018 CPD ¶ 286 at 2 n.3 (*citing Veterans Construction of South Carolina, LLC*, B-401723.2, Jan. 21, 2010, 2010 CPD ¶ 36 at 3-4).

Relatedly, notwithstanding the agency's suggestion to the contrary, we have rejected the contention that the failure of a bid to comply with a solicitation provision requiring bidders to have current and accurate online representations and certifications at the time of bid opening can render a bid nonresponsive merely by making compliance mandatory in the solicitation. As we have explained, the terms of a solicitation cannot

⁴ Although not argued by the agency, it is not apparent that allowing the protester to cure its failure to register in SAM and complete the required representations and certifications after bid opening would have prejudiced any of the other bidders. In addition, where a protester has challenged an agency's waiver of a requirement that firms be registered in SAM at a particular time, we have found that such agency action does not provide a basis for our Office to conclude that a protester has been prejudiced; in those circumstances, there was no reason to suggest that the protester would have changed its bid or proposal had it known that the requirement would be waived by the agency. See *GC Works, Inc.*, *supra* at 2 (*citing C.L.R. Development Group*, B-409398, Apr. 11, 2014, 2014 CPD ¶ 141 at 7-8; *Graves Construction, Inc.*, B-294032, June 29, 2004, 2004 CPD ¶ 135 at 3).

convert a matter of eligibility or responsibility into one of responsiveness. See, e.g., *Aviation Specialists, Inc.; Aviation Enters., Inc., supra; Mobility Sys. and Equip. Co., supra.*

In sum, we conclude the agency improperly rejected the protester's bid as nonresponsive on the basis that the protester was not registered in SAM at the time of bid opening and had not completed the required annual contractor certifications and representations. The agency should have instead afforded the protester an opportunity to cure the matter after bid opening, which the protester ultimately did cure shortly after receiving the agency's rejection notice, and before any award.⁵

RECOMMENDATION

Because the protester submitted the lowest price, and the record reflects that the protester has corrected the matter on which the agency rejected the protester's bid, we recommend that the agency consider the protester's bid for award of the contract consistent with applicable regulations. We also recommend that the agency reimburse Master Pavement 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

⁵ Our decision in this case is distinguishable from our recent decision in *Acon Traders, LLC*, B-417558, June 26, 2019, 2019 CPD ¶ 226 where we denied a protest challenging the agency's rejection of a quotation when the firm submitting the quotation was not registered in SAM at the time it submitted its quotation as required by FAR provision 52.204-7. Unlike the case here, in *Acon*, the procurement was conducted using the simplified acquisition procedures of FAR part 13, which do not have the same mandatory cure or waiver provisions as set forth in FAR 14.405, and the protester was otherwise ineligible for award because it was technically unacceptable.