

## Decision

**Matter of:** American Mine Services, LLC

**File:** B-420138

**Date:** December 3, 2021

---

Evan Willeke, American Mine Services, LLC, for the protester.  
Deena G. Braunstein, Esq., and Jenna Gustafson, Esq., Department of the Army, for the agency.  
Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

Agency properly rejected bid as nonresponsive where the bid included language imposing conditions that limit the rights of the government under a standard Federal Acquisition Regulation clause incorporated by reference into the solicitation.

---

### DECISION

American Mine Services, LLC (AMS), of Boulder, Colorado, protests the rejection of its bid, under invitation for bids (IFB) No. W912WJ21B0022, issued by the Department of the Army, United States Army Corps of Engineers (Corps), for service gates. The protester argues that the agency unreasonably rejected its bid.

We deny the protest.

### BACKGROUND

The IFB was issued on July 16, 2021, under Federal Acquisition Regulation (FAR) part 14 as a total small business set-aside, to furnish and install two new service gates at the Surry Mountain Dam in Surry, New Hampshire. Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 1; Agency Report (AR), exh. A, IFB at 3, 14, 22.<sup>1</sup> Relevant here, the IFB incorporated by reference FAR clause 52.249-10, Default (Fixed-Price Construction). IFB at 24.

---

<sup>1</sup> The IFB was amended three times. The Corps provided the agency report documents in a single Adobe PDF document. All citations to the record are to the consecutive numbering of the pages in the Adobe PDF document.

Four timely bids were received and opened by the agency on August 24. COS/MOL at 1. AMS was the apparent low bidder. *Id.* In reviewing AMS's bid, the agency found that AMS included the following provision under the "Clarification and Exceptions" section of its bid:

For purposes of this bid, COVID-19 is considered a Force-Majeure Event along with any other similar disease, epidemic, or pandemic event. If any of the aforementioned events occur and affect the project, AMS reserves its rights for additional time.

AR, exh. B, AMS Bid at 65.

On August 30, the agency notified AMS that its bid had been rejected. AR, exh. D, Bid Rejection Letter at 87. The agency explained that, pursuant to section 14.404-2(d) of the FAR, AMS's inclusion of the provision rendered AMS's bid nonresponsive as failing to conform to the essential requirements of the solicitation. The agency informed AMS that the provision was a material difference in the terms and conditions set forth in the solicitation, and, thus the provision could not be waived. *Id.* Upon receiving notice of its bid rejection, AMS requested an opportunity to discuss the rejection of its bid and offered to remove the language. AR, exh. E, Email Chain Between Corps and AMS at 90. The Corps, however, responded that it could not allow AMS to amend its bid because it would be unfair to other bidders. *Id.* at 89. On September 7, AMS filed this protest.

## DISCUSSION

AMS contends that the rejection of its bid by the Corps was unreasonable. The protester asserts that the provision added to its bid simply addresses the impact to a project from COVID-19 or other similar disease or epidemic event. Protest at 3; Comments at 2. According to the protester, FAR clause 52.249-10, which the IFB incorporates by reference, also addresses these consequences. Protest at 3. As such, the added provision merely confirmed a protection offered to all bidders under that FAR clause, *i.e.*, protecting a contractor's ability to continue working on a project after a delay caused by "the force-majeure events of [the] COVID-19 pandemic."<sup>2</sup> *Id.* AMS also contends that any variations between the FAR clause and its added provision were not material because the added language does not affect price, quantity, quality, or delivery. Comments at 5. According to the protester, the FAR allows for, and the agency should have allowed, the opportunity for AMS to remove the objectionable

---

<sup>2</sup> Neither the solicitation, the FAR, nor AMS's bid, defines the term "force majeure." According to the protester, the term "has a specific meaning in contract law; it describes an uncontrollable and 'unexpected event that prevents someone from . . . completing something that he or she had agreed . . . to do.'" Comments at 4 (*quoting* Black's Law Dictionary (11th ed. 2019)).

provision. Specifically, AMS argues that it should have been allowed to remove the provision under sections 14.404-2(e) and 14.405 of the FAR.<sup>3</sup> *Id.*

The Corps contends that the added provision modified and broadened the terms of FAR clause 52.249-10. COS/MOL at 2. The agency points out that the FAR clause lists epidemics and quarantine restrictions as possible causes of delay. The Corps contends that the added provision, however, broadens these terms because it includes COVID-19 and “any other similar disease.” *Id.* at 2-3. According to the agency, AMS’s provision makes the mere occurrence of a disease or an epidemic an excusable cause *per se*, requiring the contractor to only show that the disease “affects the project.” *Id.* The agency further explains that the differences between AMS’s added provision and FAR clause 52.249-10 were material because the provision seeks to expand AMS’s ability to receive additional time for contract performance for reasons not contemplated under FAR clause 52.249-10. *Id.* at 3. The agency argues that these differences had a non-trivial effect on price as AMS, presumably, would have submitted a higher bid absent the assumption that COVID-19 would be considered a force majeure event. In this respect, the Corps contends that it is likely other bidders submitted higher prices because they did not make such an assumption. *Id.* Because the added provision (1) materially deviated from the IFB by attempting to limit AMS’s liability to the government, and (2) changed the terms of a standard FAR clause, the Corps asserts that it could not waive the deviation or allow AMS to change its bid after bid opening. *Id.* at 4.

As a general matter, 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 14.301; *Propper Mfg. Co., Inc.*; *Columbia Diagnostics, Inc.*,

---

<sup>3</sup> Section 14.404-2(e) of the FAR provides: “A low bidder may be requested to delete objectionable conditions from a bid provided the conditions do not go to the substance, as distinguished from the form, of the bid, or work an injustice on other bidders. A condition goes to the substance of a bid where it affects price, quantity, quality, or delivery of the items offered.” FAR 14.404-2(e).

Under section 14.405 of the FAR, a contracting officer “shall give the [low] bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government.” FAR 14.405. The FAR explains:

A minor informality or irregularity is one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired.

*Id.*

B-233321, B-233321.2, Jan. 23, 1989, 89-1 CPD ¶ 58 at 2. 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.

In this context, the test for responsiveness is whether a bid offers to perform the exact thing called for in an IFB, so that acceptance of the bid will bind a bidder to perform in accordance with all of the terms and conditions of a solicitation without exception. *Randy Sabala; John Button*, B-251221, B-251222, Nov. 24, 1992, 92-2 CPD ¶ 379 at 2. If, in its bid, a bidder attempts to impose conditions that would modify material requirements of the IFB, limit its liability to the government, or limits the rights of the government under any contract clause, then the bid must be rejected. *DLH Constr. and Trucking Co., Inc.*, B-292578, Oct. 10, 2003, 2004 CPD ¶ 2 at 3; *Walashek Indus. & Marine*, B-281577, Jan. 29, 1999, 99-1 CPD ¶ 30 at 2. A material deviation is one which affects, in more than a trivial way, the price, quality, or quantity of goods or services offered, or which changes the legal relationship between the parties that is envisioned by the IFB. *First American Engineered Sols.*, B-289051, Dec. 20, 2001, 2001 CPD ¶ 207 at 4; *Metric Sys. Corp.*, B-256343, B-256343.2, June 10, 1994, 94-1 CPD ¶ 360 at 4.

On this record, we find that the agency reasonably rejected AMS's bid. Pertinent here, section 14.404-2(d) of the FAR states 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. For example, bids shall be rejected in which the bidder . . . (6) Limits rights of the Government under any contract clause.

FAR 14.404-2(d). Additionally, FAR clause 52.249-10, which is the default clause for fixed-price construction contracts and is incorporated by reference in the IFB, provides in relevant part:

The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if –

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include–

\* \* \* \* \*

(vi) Epidemics,

(vii) Quarantine restrictions[.]

FAR 52.249-10(b)(1). Under that FAR clause, a contractor is required to notify the contracting officer in writing, within 10 days from the beginning of any delay, the causes of the delay. FAR 52.249-10(b)(2). The clause explains that after the contracting officer ascertains the facts and the extent of the delay, the contracting officer may extend the time for completing the work, “[i]f, in the judgment of the [c]ontracting [o]fficer, the findings . . . warrant such action[.]” *Id.*

Here, we agree with the agency that AMS’s added provision materially modifies the terms of FAR clause 52.249-10. While the FAR clause lists epidemics and quarantine restrictions as possible causes of excusable delay, the language of the provision inserted in the protester’s bid specifically lists “COVID-19” and “any other similar disease, epidemic, or pandemic event.” The FAR clause clearly does not include “COVID-19,” “disease,” or “COVID-19 . . . along with any other similar disease, epidemic, or pandemic event” as listed examples of unforeseeable cause of delay. See FAR 52.249-10(b)(1). Moreover, AMS’s comments on the agency report reveal that AMS’s own interpretation of the term “COVID-19” is very broad and does not simply refer to a specific disease or an epidemic. Comments at 2 (explaining that the term “does not simply relate to the World Health Organization’s naming of a disease. . . . It is a complex and loaded word that may be used to refer specifically to the viral disease but may also be used to describe the global public health event, including the consequences of it.”).

Additionally, while the FAR clause lists epidemics and quarantine restrictions as examples, the clause, however, does not deem these events to be *per se* “unforeseeable causes beyond the control and without the fault or negligence of the [c]ontractor.” FAR 52.249-10(b)(1). That determination is left to the judgment of the contracting officer once the facts surrounding the delay are ascertained. FAR 52.249-10(b)(2). In contrast, the provision added by AMS unilaterally declares, without qualification, that “COVID-19 . . . along with any other similar disease, epidemic, or pandemic event” is a “force-majeure event,” *i.e.*, an uncontrollable and unexpected event that prevents the contractor from performing the contract. AR, exh. B, AMS Bid at 65; Comments at 4. The AMS provision provides that if an event covered by the provision “occur[s] and affect[s] the project, AMS reserves its rights for additional time.” AR, exh. B, AMS Bid at 65. The language of the provision inserted by AMS appears to remove the responsibility and discretion from the contracting officer to determine whether such causes are excusable delays.

Here, we agree with the Corps that the AMS provision imposes a lower standard than what is required by the FAR clause. COS/MOL at 3; *see, e.g., Asa L. Shipman’s Sons, Ltd.*, GPOBCA No. 06-95 (Aug. 29, 1995); *Ace Elecs. Assocs., Inc.*, ASBCA No. 11496, 67-2 BCA ¶ 6456 (July 18, 1967) (“It is incumbent upon [the contractor] to establish not only the existence of an excusable cause for delay but also that such cause actually contributed materially to such delay as well as the actual extent of the delay so caused.”). The differences between the added provision and the FAR clause were not minor informalities or irregularities that the contracting officer could have waived, or as the protester insists, provided AMS the opportunity to remove. In short, where the

deviations are neither minor nor immaterial--as is the case here--sections 14.404-2(e) and 14.405 of the FAR do not provide a basis for our Office to sustain the protest, as the protester suggests.

Further, as the agency points out, COVID-19 created many new challenges for contractors. COS/MOL at 3. Having operated in a COVID-19 environment for roughly 18 months, however, not all challenges are unforeseeable or beyond mitigation. *Id.* As such, the agency contends that bidders are expected to consider these risks when determining the total price of their bid. *Id.* Under these circumstances, we cannot conclude that allowing AMS to correct its nonresponsive bid would not be prejudicial to other bidders and that the competitive bidding system would not be adversely affected.<sup>4</sup>

In sum, because AMS's added provision attempts to impose conditions that limits the rights of the government under FAR clause 52.249-10, on this record, we conclude that

---

<sup>4</sup> In general, agencies may permit correction of bids, but only those that are--as submitted--responsive to the solicitation; bids may not be corrected to make them responsive. FAR 14.407-3. Our Office, however, has found that agencies may permit the correction of a nonresponsive bid--in effect authorizing a waiver of the technical nonresponsiveness rule--when the result would clearly not be prejudicial to other bidders and the competitive bid system would not be adversely affected. *Ultimate Concrete, L.L.C.*, B-412255, B-412255.2, Jan. 13, 2016, 2016 CPD ¶ 20 at 7 n.3. In such circumstances, however, the bidder must still establish both the existence of a mistake and its intended bid by clear and convincing evidence. *Wynn Constr. Co.--Recon.*, B-220649.2, Apr. 14, 1986, 86-1 CPD ¶ 360 at 4. Here, AMS does not assert that the introduction of the provision into its bid was a mistake, but only that AMS interprets that the inserted provision "does not constitute a material difference in terms and conditions set forth in the [s]olicitation because it merely confirms a right already extended to all bidders in the [s]olicitation." Protest at 3. For the reasons discussed above, we find unobjectionable the Corps decision to not provide AMS the opportunity to correct its nonresponsive bid.

the agency reasonably found AMS's bid to be nonresponsive and rejected it.<sup>5</sup> *DLH Constr. and Trucking Co., Inc., supra.*

The protest is denied.

Edda Emmanuelli Perez  
General Counsel

---

<sup>5</sup> In its comments on the agency report, AMS asserts that it has previously been awarded a federal contract under an IFB, where its bid included the same provision. Comments at 1, 6. Although the protester does not identify the contract or the agency that awarded the referenced contract, the fact that the some federal agency may have previously accepted a bid from AMS with the same added provision does not prohibit the Corps from invoking the legal requirements of the competitive bidding process under the FAR. *Pacific Dredge and Constr., LLC*, B-418900, Sept. 18, 2020, 2020 CPD ¶ 299 at 5. An improper award under one or more IFBs does not justify a repetition of the same error under a later IFB. *Id.* at 5-6. In general, responsiveness must be determined solely from the face of the bid and materials submitted with the bid. *Handyman Exch., Inc.*, B-224188, Jan. 7, 1987, 87-1 CPD ¶ 23 at 2.