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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: First American Engineered Solutions

File: B-289051

Date: December 20, 2001

David J. Taylor, Esq., Tighe Patton Armstrong Teasdale, for the protester.
Earl Dickerson, for ITS Imagineering Enterprises, the intervenor.
Gena E. Cadieux, Esq., and Beth A. Kelly, Esq., Department of Energy, for the agency.
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where invitation for bids (IFB) expressly required option period prices to be determined solely by application of IFB's economic price adjustment clause, bid was properly rejected as nonresponsive for offering different option year prices, since the economic price adjustment clause is a material term of the IFB and any bid taking exception to it materially affects the legal rights of the bidder and the government.

DECISION

First American Engineered Solutions protests the award of a contract to ITS Imagineering Enterprises under invitation for bids (IFB) No. DE-FB-65-01-WC-56963, issued by the Department of Energy, Western Area Power Administration, for fiber optic overhead ground wire and related hardware. The protester challenges the rejection of its bid as nonresponsive and contends that it should receive the award under the IFB.

We deny the protest.

The IFB contemplated the award of an indefinite-delivery/indefinite-quantity fixed-price contract with economic price adjustment for a base year and four option periods to the responsible bidder whose bid, conforming to the IFB's requirements, offered the lowest price. IFB at 34, 36. The IFB provided technical specifications for the advertised products and required the submission of descriptive literature with the bid to demonstrate each offered product's compliance with those specifications.

Id. at 35, attach. A. Multiple bids for alternative products were encouraged; each bid needed to provide a price for each item offered. Id. at 30, 34.

The IFB contained an economic price adjustment clause providing the formula to be applied to the contractor's base year prices to determine option period prices for two identified contract line items, Nos. 0001 and 0011 (for fiber optic overhead ground wire products). Specifically, the IFB, at § LH.0000-0058, provided that option period prices

shall be determined based on the change from the base period
Producer Price Index [at the time of award, as issued by the
Department of Labor, Bureau of Labor Statistics] . . . as compared to
the most current Producer Price Index in effect at the time of
exercising the option.

Id. at 22. Bidders were instructed not to provide option prices for these items; instead, they were to insert asterisks or the phrase "To Be Determined" in their bid schedules for the option period requirements for these items. Id. at 23. Bidders were also advised that option period prices to be paid under the contract would be "based solely on the economic price adjustment mandated by this clause" Id. Section LM.0217-0005 of the IFB again instructed bidders not to insert prices for items 0001 and 0011 in the option periods, since option period pricing under the contract was to be determined under the economic price adjustment clause. For evaluation purposes at bid opening, to determine the low bid, the base year extended totals of item Nos. 0001 and 0011 were to be used for all option periods. Id. at 37.

Twenty-two bids were received at bid opening. First American failed to follow the IFB's economic price adjustment provisions and instead offered specific prices for each option period for item Nos. 0001 and 0011, at a 2.5 percent escalation rate. The protester's bid also provided descriptive literature for four fiber optic overhead ground wire products; two products were assumed by the agency to be in response to the IFB's requirement at item No. 0001, and two products were assumed to have been submitted to meet the item No. 0011 requirement. One of the products submitted under each of those item numbers was considered to be technically unacceptable for failing to meet certain requirements regarding encasement of the fibers. The protester's bid provided only one price in its bid schedule for each of those item numbers.

After bid opening, the contracting officer questioned First American as to its bid's single line item pricing for the multiple items offered for those line items. In its attempt to clarify its bid, the protester submitted a series of letters to the contracting officer, the first of which provided that, in fact, First American was bidding separate prices for each of the four products. Shortly, thereafter, however, the protester wrote that the same line item price applied to each of the multiple products offered under that line item. The first post-bid opening communication from First American

also confirmed the protester's bid of a 2.5 percent escalation rate for the option periods.

The agency determined that the bid's descriptive literature showed that only two of the offered products were technically acceptable, that the bid's failure to clearly identify that it offered alternate products at the same price created uncertainty as to which of the products was offered at the stated price, and that the bid's escalated option year pricing was in violation of the IFB's mandatory economic price adjustment provisions. Consequently, the bid was rejected as nonresponsive for failing to comply with material provisions of the IFB. This protest followed.

First American contends that its bid was responsive, since, according to its supplier, all four products offered in its bid satisfy the technical requirements of the IFB. The protester also claims that the fact that its bid provided one price for two different products for each of the two line items at issue should have put the agency on notice that it could choose either product, as alternate bids, at the same price. As to the bid's nonconforming option period pricing, the protester generally argues that the IFB was defective for failing to better highlight for the protester the required economic price adjustment provisions; secondly, the protester contends that it should be allowed to correct its bid after bid opening to comply with the economic price adjustment terms.¹

¹ Contrary to the protester's suggestion that the IFB was defective in some way for not more clearly emphasizing the required economic price adjustment provisions, our review of the IFB confirms that the option year pricing terms of the economic price adjustment clause provisions were clear and that each provision was adequately highlighted for all potential bidders by the use of straightforward, explanatory titles (e.g., "Economic Price Adjustment Based on Producer Price Index" and "Evaluation of Options--Economic Price Adjustment"). IFB at 22, 37. The IFB reasonably should have put First American, as it did all other bidders, on notice of the mandatory economic price adjustment requirements. Further, the protester's contention that its bid's exception to the mandatory economic price adjustment terms should be considered an apparent administrative error correctable under the mistake-in-bid procedures of Federal Acquisition Regulation (FAR) §14.407 is without merit. As explained below, the mandatory economic price adjustment clause of the IFB is a material requirement affecting the legal relationship of the parties to the contract; the requirements of the clause had to have been met by the bid at bid opening in order for the bid to be responsive under the IFB. A bidder cannot make its otherwise nonresponsive bid responsive through correction or clarification after bid opening; accordingly, the protester is not entitled to the correction opportunity it now requests. See Metric Sys. Corp., B-256343, B-256343.2, June 10, 1994, 94-1 CPD ¶ 360 at 4.

All bidders must compete for sealed bid contracts on a common basis. No individual bidder can reserve rights or immunities that are not extended to all bidders by the conditions and specifications in the IFB. Therefore, to be responsive, a bid must contain an unequivocal offer to provide the required items or services in total conformance with the material terms of the solicitation; any bid which imposes conditions that would modify the material requirements of the solicitation must be rejected as nonresponsive. Metric Sys. Corp., supra. 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. Id. A bid that is nonresponsive on its face may not be converted into a responsive bid by post-bid opening clarifications or corrections. See Propper Mfg. Co., Inc., B-245366, Dec. 30, 1991, 92-1 CPD ¶ 14 at 4.

As discussed below, the agency properly rejected the First American bid as nonresponsive for taking exception to the mandatory economic price adjustment provisions.² The economic price adjustment clause essentially provides a system for post-award price adjustments based on particular price fluctuations. The basic purpose of an economic price adjustment provision is to protect the government in case of a decrease in the cost of labor or material, and to protect the contractor in the event of an increase. See Galaxy Custodial Servs., Inc., et al., B-215738, et al., June 10, 1985, 85-1 CPD ¶ 658 at 7. We have consistently recognized that a mandatory economic price adjustment clause is a contract provision that significantly affects the legal rights of the government and the legal obligations of the contractor. See Aluminum Co. of Am., B-246003, Feb. 13, 1992, 92-1 CPD ¶ 184 at 3-4; Galaxy Custodial Servs., Inc., et al., supra, at 10; Aqua-Trol Corp., B-191648, July 14, 1978, 78-2 CPD ¶ 41 at 4-5. The IFB's economic price adjustment provision here provided specific protections for the agency, and the bidder, and served as a common basis of competition for all bidders. The provision imposed legal obligations on the bidder (*i.e.*, to perform the contract during the option periods at adjusted prices determined under the terms of the clause) to which it would not otherwise be bound, and provided legal rights on behalf of the agency (limiting option period pricing to changes in the Producer Price Index). In short, by offering its own option prices, where the government instead mandated economic price adjustment for those periods, First American took exception to the economic price adjustment provisions of the IFB, thereby limiting the legal rights of the government and its own potential liability to the government; the bid's exception to this mandatory provision materially affects the legal relationship of the parties. Our

² Consequently, we need not discuss the merits of the other challenges raised by First American regarding the rejection of its bid (*i.e.*, regarding technical acceptability or the perceived uncertainty regarding the bid's single pricing for multiple products).

review of the record therefore provides no basis to question the propriety of the agency's rejection of the bid as nonresponsive. FAR §§ 14.404-2(d)(1) and (6), 14.408-4(b)(2).

The protest is denied.

Anthony H. Gamboa
General Counsel