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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: DLH Construction and Trucking Company, Inc.

File: B-292578

Date: October 10, 2003

Jullane J. Jackson for the protester.

Sanford A. Solomon, Esq., and Ronald O. Wietecha, Esq., U.S. Army Corps of Engineers, for the agency.

Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency properly rejected bid as nonresponsive where the bid required agency to exercise the first and second option year at time of award where the solicitation did not call for the agency to do so, and thus materially altered the rights of the contracting agency.

DECISION

DLH Construction and Trucking Company, Inc. protests the rejection of its bid as nonresponsive and the subsequent award of a contract to Holly Marine Towing, Inc. under invitation for bids (IFB) No. DACW23-03-B-0001, issued by the Army Corps of Engineers, Chicago District, for various quantities of stone material. DLH contends that the Corps erroneously rejected its bid as nonresponsive.

We deny the protest.

The IFB, which was issued on February 11, 2003 and amended three times prior to bid opening, provided for the award of an indefinite-delivery/indefinite-quantity fixed-price contract for a base period with four 1-year option periods. IFB at 38. The successful contractor is required to furnish, deliver and unload the stone material onto a government-furnished stone dock located on the Calumet River in Chicago, Illinois. The stone material furnished under this procurement will be used to repair various navigation structures located in Illinois and Indiana and as set forth in the statement of work (SOW) is divided into three size categories: Type A stone

(8-15 tons), Type B stone (3-7 tons), and Type C stone (1-100 pounds). IFB amend. 1, SOW at 3.

The bid schedule set forth contract line items (CLINs) for the base and each option year requirements and bidders were required to offer unit and extended prices for each. CLIN 0001 required Types A and B stone to be furnished, delivered, and unloaded during the base period. CLIN 0002, the first option period (October 1, 2003 through September 30, 2004), also required Types A and B stone. CLINs 0003-0005, the second (October 1, 2004 through September 30, 2005), third and fourth option periods, respectively, each required Types A, B, and C stone to be furnished, delivered, and unloaded onto the dock on the Calumet River. IFB Schedule. The IFB provided that for purposes of award, the agency would add the total price for all options to the total price for the base requirements and cautioned bidders that evaluation of the options would not obligate the agency to exercise the option periods. IFB at 20. The IFB also stated:

Failure to submit a unit price for all items listed will be considered as a material deviation from the requirements of the solicitation and the bid will be rejected. Notwithstanding any other provision of these specifications concerning the method of award, the solicitation will be awarded as a whole to the lowest responsive, responsible bidder.

IFB at 44.

Six bids were received and opened on the March 18 opening date. The four lowest evaluated bids were as follows:

<u>Bidder</u>	<u>Total Bid</u>
Specification Stone Products	\$10,093,000
DLH	\$10,346,550
Kadinger Marine Service	\$10,925,900
Holly Marine	\$11,125,850

Agency Report (AR) exh. A, Abstract of Bids.

DLH became the apparent low eligible bidder after Specification Stone Products' bid was rejected for reasons not relevant here. Upon review of DLH's bid package, the contracting officer discovered that DLH's bid was accompanied by a cover letter, which stated among other things, that "[DLH] will only accept award of A, B, and C together." AR exh. B, Protester's Cover Letter (Mar. 18, 2003). This reference to "A,

B, and C” was not elsewhere explained in the bid package.¹ Since Type C stone would not be purchased until the second option year, the contracting officer concluded that DLH had imposed a condition for award (that is, award of at least the base, first, and second option year requirements) that effectively limited the agency’s rights under the options provision of the IFB which gives the agency the discretion to exercise or not exercise option year requirements. Consequently, the contracting officer determined that DLH’s bid was nonresponsive. On June 25, the contracting officer awarded a contract to Holly Marine as the lowest responsive, responsible bidder.² This protest followed.

DLH explains that the condition was included in its bid package because the firm wanted “to inform the Corps of Engineers that DLH’s bid was contingent upon one bidder being awarded all items” to ensure that “the items not be awarded piecemeal to multiple bidders.” Protest at 5, 7; Protester’s Comments at 5. Moreover, the protester insists that the condition was never intended to restrict the agency’s discretion to exercise the option requirements set forth in the solicitation in any manner it chose. DLH contends that, in any event, the agency should have waived this condition as a minor informality in the interest of obtaining the most cost savings to the government. Protest 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 advertised in the IFB. Interstate Constr., Inc., B-281465, Feb. 10, 1999, 99-1 CPD ¶ 31 at 2. Therefore, in order to be responsive and considered for award a bid, including any unsolicited information such as cover letters or extraneous documents submitted with the bid, must contain an unequivocal offer to perform, without exception, the exact thing called for in the IFB, in total conformance to the material terms of the solicitation. Vista Scientific Corp., B-233114, Jan. 24, 1989, 89-1 CPD ¶ 69 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. Walashek Indus. & Marine, B-281577,

¹The record includes post-bid opening correspondence between the agency and the protester in which the contracting officer sought clarification from the protester regarding this statement in its bid cover letter. However, DLH’s post-bid opening explanations cannot change the status of its bid with respect to whether it was responsive on its face at the time of bid opening. We note however, that DLH’s initial clarification letter stated that “our pricing was premised upon the award . . . of both A, B, and C stone throughout the duration of the contract.” AR exh. C, Protester’s Letter (June 3, 2003).

²The contracting officer rejected the next low bid submitted by Kadinger Marine Service because the bidder declined to extend its bid acceptance period.

Jan. 29, 1999, 99-1 CPD ¶ 30 at 3. Further, the responsiveness of a bid must be ascertained from the bid documents themselves, not from post-bid opening clarifications or corrections. To permit explanations after bid opening would be tantamount to granting an opportunity to submit a new bid that could be responsive or nonresponsive at the bidder's option based on information available to the bidder after bid opening. Interstate Constr., Inc., *supra*, at 5.

Here, the contracting officer reasonably concluded that the effect of the condition set forth in DLH's bid cover letter was to alter the rights of the agency by conditioning the protester's acceptance of an award on the Corps exercising at least the first and second year option periods at the time the contract was awarded.³ The protester insists that the condition in its bid is immaterial and could be waived because the stated condition was simply intended to prevent the Corps from making multiple awards rather than restricting the agency's discretion to exercise its rights under the options provision in the IFB. This argument is untenable. The IFB provision quoted above make it clear that the Corps intended to make a single award to the lowest responsive, responsible bidder and there is no indication in the solicitation that multiple awards are contemplated.⁴ The agency reasonably concluded that the condition in the protester's bid was material because it provided that DLH would not accept an award unless the contract included at least the first two option year requirements. Accordingly, the language in DLH's cover letter limited the rights of the agency with regard to exercising the options. Walashek Indus. & Marine, *supra*. Award on the basis of this language would extend benefits to DLH that were not available to any other bidder. *Id.* Under these circumstances, DLH's bid was properly rejected as nonresponsive.

The protest is denied.

Anthony H. Gamboa
General Counsel

³DLH does not disagree that under the terms of the solicitation only Types A and B stone were required for the base period and that the supply and delivery of Type C stone would not be required until the second option period.

⁴To the extent DLH believes the IFB permitted multiple awards this would create a material inconsistency with the express terms of the solicitation that called for a single award; the resulting alleged ambiguity should have been protested prior to bid opening. Bid Protest Regulations, 4 C.F.R. §21.2(a)(1) (2003).