



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: W.B. Construction and Sons, Inc.

File: B-405818; B-405818.2

Date: January 4, 2012

Lynn Patton Thompson, Esq., Biggs, Ingram, Solop & Carlson, PLLC, for the protester.

Howard Strackbein, Esq., Department of the Army, for the agency.

Nora K. Adkins, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Rejection of a bid as nonresponsive for failing to provide the price for one of many line items included in the bid schedule was improper, where the item for which the price was omitted is divisible from the solicitation's overall requirements, de minimis as to total cost, and would not affect the competitive standing of the bidders; the omission should be waived as a minor informality under such circumstances.

2. Rejection of a bid as nonresponsive because it was unbalanced is improper where the agency failed to conduct a risk analysis to determine whether the protester's unbalanced bid posed an unacceptable risk to the government, as required by Federal Acquisition Regulation § 15.404-1(g).

DECISION

W.B. Construction and Sons, Inc., of Pierre Part, Louisiana, protests the award of an indefinite-delivery/indefinite-quantity (ID/IQ) contract to Tanner Heavy Equipment Company, LLC, of Leesville, Louisiana, issued by the Department of the Army, U.S. Army Corps of Engineers under invitation for bids No. W9126G-11-B-0003 for road and drainage work at Fort Polk, Louisiana.

We sustain the protest.

BACKGROUND

The IFB, issued on August 2, 2011 as a total small business set-aside, contemplated the award of a fixed-price ID/IQ construction contract, for a base year with four

1-year option periods. The IFB required bidders to complete a bid schedule that listed 378 separate line items and included a description, an estimated quantity, and a unit of purchase for each item, as well as blank spaces for the bidders to insert their unit and extended prices. The IFB required bidders to submit pricing for all of the items. IFB at 9. The 378 line items included such work as removal of existing curbs and gutters, removal of trees and stumps, construction of various types of inlet structures, construction of manholes, and pavement replacement. The bid schedule prices were to be used for pricing the various task orders issued for work under the contract. The IFB indicated that the award would be made to the lowest-priced responsible bidder, based upon the total of the extended prices of all of the line items for the base period. IFB at 29, 42.

At bid opening on September 2, two bids were received and opened; only the bidders' total prices were read.¹ W.B. submitted the low bid of \$8,984,611.70 while Tanner's bid was \$9,291,020.50. AR, Tab 4, W.B. Bid, at 27; Tab 5, Tanner Bid, at 26.

After bid opening, the agency reviewed its independent government estimate (IGE) of \$13,910,534.06 and reduced it to \$10,304,987.10 based upon current advertised requirements and market conditions. The IGE included estimates for the unit prices for each of the 378 line items. Contracting Officer's (CO) Statement at 1-2.

On September 26, the agency rejected W.B.'s bid as nonresponsive and made award to Tanner. W.B.'s bid was rejected as nonresponsive for two reasons: (1) the bid failed to include a unit or extended price for one of the line items and (2) the bid contained unbalanced pricing in that a number of W.B.'s line item prices were significantly higher or lower than the prices contained in the revised IGE.

W.B. filed a protest with our Office on September 27 asserting that the agency unreasonably rejected its bid. W.B. claims the omission of the one line item price in its bid was a waivable minor informality and did not render the bid nonresponsive. W.B. also claims that the agency failed to conduct the risk analysis required by FAR § 15.404-1(g) before a bid can be rejected as unbalanced.²

¹ Even though this was a sealed bid procurement, bidders were not permitted to view the bids, and the unit prices for each of the 378 line items were not read or otherwise made public. The agency's failure to allow bidders the opportunity to view each other's bids is inconsistent with Federal Acquisition Regulation (FAR) § 14.402-1.

² W.B. also protests that the award could not include the options because prices were not specifically solicited for them, and that the contract failed to state a minimum and a maximum quantity to be ordered as required. However, the solicitation specifically indicated that although option prices were not solicited, the contract award would include options that would be priced based on an economic price adjustment. Whether the contract contained minimum and maximum quantities was also apparent from the face of the solicitation. Thus, these
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OMISSION OF LINE ITEM PRICE

There is no dispute that W.B. failed to submit a price for line item 0036 of the IFB's bid schedule. Line item 0036 requested a unit and extended price to "remove between 21 to 50 Trees (24 inches but < [less than] 36 inches)." IFB at 8. The estimated quantity for this line item was 40 trees. Id. This item was part of a series of tree removal line items (0021-0038), which were described in the IFB as follows:

These Bid items consist of removal and disposal of various size tress within the calipers indicated. Removal and off site disposal of each tree, stump, all roots larger than 4 inches in diameter, and backfilling of any holes are all included in this item as incidental to this work. Payment will be by each tree within the caliper range indicated.

IFB § 01 02 00, Description of Bid Items and Drawing Details, at 4.

While W.B.'s bid omitted the price for line item 0036, it provided prices for all other of the tree removal line items as follows:

For 10 trees or less:

Line Item	Size of tree	Estimated Quantity	Unit Price	Extended Price
0021	6 inches	10	\$165	\$1,650
0022	6 to <12	10	\$185.90	\$1,859
0023	12 to <24	10	\$330	\$3,300
0024	24 to <36	10	\$715	\$7,150

For 11 to 20 trees:

Line Item	Size of tree	Estimated Quantity	Unit Price	Extended Price
0027	6 inches	40	\$165	\$6,600
0028	6 to <12	40	\$165	\$6,600
0029	12 to <24	40	\$198	\$7,920
0030	24 to <36	40	\$275	\$11,000

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contentions are untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2011), and will not be considered, because they were not protested prior to bid opening.

For 21 to 50 trees:

Line Item	Size of tree	Estimated Quantity	Unit Price	Extended Price
0033	6 inches	40	\$110	\$4,400
0034	6 to <12	40	\$132	\$5,280
0035	12 to <24	40	\$165	\$6,600
0036	24 to <36	40	-	-

AR, Tab 4, W.B. Bid, at 7-8.

The agency rejected W.B.'s bid as nonresponsive in part because it failed to provide a price for line item 0036, and thus, the bid did not obligate W.B. to provide this item. The agency stated that this omission affected the price and the bidder's overall obligations under the contract and could not be waived as a minor informality. AR, Tab 9, Agency Letter Rejecting W.B.'s Bid (Sept. 26, 2011). The protester asserts that this omission was immaterial and was required to be waived as a minor informality. We find that the agency unreasonably determined that that W.B.'s bid was nonresponsive. We also find that W.B.'s omission of line item 0036 could properly be waived as a minor informality.

To be responsive a bid must constitute an unequivocal offer to perform the exact thing called for in the solicitation such that acceptance of the bid will bind the contractor in accordance with the material terms and conditions of the solicitation. Custom Env'tl. Serv., Inc., B-234774, May 24, 1989, 89-1 CPD ¶ 501 at 3. Because the failure to include a price for an item evidences a bidder's intent not to be bound to perform the item, as a general rule, a bid must be rejected as non-responsive if the bid, as submitted, does not include a price for every item requested by the IFB. Spectrum Leasing Corp., B-216615, Feb. 19, 1985, 85-1 CPD ¶ 211 at 3.

However, where the omission pertains to some immaterial defect in or variation of a bid from the exact requirements of the IFB, it can be corrected or waived where it is not prejudicial to other bidders.³ FAR § 14.405. A defect or variation is immaterial if the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the services being acquired. *Id.* Thus, a contracting agency may waive the failure to bid on an item as a minor informality if the item for which the price is omitted is divisible from the solicitation's overall requirements, *de minimis* as to total cost, and would not affect the competitive standing of the bidders. Giberson Plumbing & Excavating, Inc., B-245798, Dec. 27, 1991, 91-2 CPD ¶ 589 at 2-3; TECOM, Inc., B-236929.2, May 11, 1990, 90-1 CPD ¶ 463 at 3-4; Custom Env'tl. Serv., Inc., *supra* at 3-4; Leslie & Elliott Co., B-216676, Feb. 19, 1985, 85-1 CPD ¶ 212 at 3.

³ The IFB included FAR § 52.214-19(b), which provides "The Government may reject any or all bids, and waive informalities or minor irregularities in bids received."

We first note that line item 0036 is divisible from the overall ID/IQ contract requirement because the work to be accomplished under the ID/IQ contract will be ordered through the issuance of individual task orders. Because the agency was not obligated to order any of indefinite-quantity work, this line item cannot be reasonably said to be an essential or integral part of the overall contract. See TECOM, Inc., supra; cf. HH&K Builders, B-232140, Oct. 20, 1988, 88-2 CPD ¶ 379 at 3. (omission of a price for a material requirement, which is not divisible from the remainder of the solicitation, cannot be waived as minor informality.)

Moreover, the price for line item 0036 is de minimis as to the total cost and would not affect the competitive standing of the bidders. In this regard, the estimate in the revised IGE for line item 0036 was \$187 per tree with an extended price of \$7,480. AR, Tab 8, Revised IGE, at 2. This amount represents less than .07 percent of the IGE for the total contract cost of \$10,304,987.10.

In addition, it is evident from W.B.'s bid pricing W.B. priced its tree removal services in an economy of scale fashion, that is, its unit prices per tree were lower as the total quantities of trees became higher. Thus, it would be logical to assume that W.B.'s bid for the removal of 21 to 50 trees would be lower than its bid for 11 to 20 trees. However, even assuming that W.B. would have priced line item 0036 at the same price as for removal of 11 to 20 of the same-sized trees (line item 0030), that is, \$275, the maximum total price for this line item would be \$11,000, which is .12 percent of W.B.'s overall bid price of \$8,984,611.70.

Considering that the price of line item 0036 in comparison to the overall contract cost is much less than 1 percent, W.B.'s omission of the line item pricing for item 0036 is clearly de minimis as to the total cost. Furthermore, the competitive standing of the bidders would also not be affected because Tanner's total price is \$306,408.80 greater than W.B.'s.

Accordingly, the agency's rejection of W.B.'s bid as nonresponsive, because it did not include a price for line item 0036, was improper.

UNBALANCED PRICING

The agency also concluded that 33 line items in W.B.'s bid were 50 percent over the revised IGE, 59 items were 30 percent over the revised IGE, and 54 items were more than 50 percent under the revised IGE. AR, Tab 3B Price Comparison, at 1-28. The contracting officer determined that this analysis provided sufficient evidence to indicate the presence of unbalanced pricing in W.B.'s bid and that the bid should be rejected as nonresponsive. AR, Tab 15, Award Memorandum, at 2. W.B. argues that the rejection of its bid on this basis did not comply with FAR § 15.404-1(g).

The IFB included the clause at FAR § 52.214-19(d), which provides in pertinent part:

The Government may reject a bid as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.

FAR § 14.404-2(g) provides that “any bid may be rejected if the prices for any line items or subline items are materially unbalanced (see 15.404-1(g)).” FAR § 14.404-2(g). FAR § 15.404-1(g)(1) provides that unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated or understated, as indicated by the application of cost or price analysis techniques. While unbalanced pricing may increase risk to the government, agencies are not required to reject an offer solely because it is unbalanced. L. W. Matteson, Inc., B-290224, May 28, 2002, 2002 CPD ¶ 89 at 3. Rather, where the contracting officer receives an unbalanced bid or offer, the contracting officer is required to consider the risks to the government associated with the unbalanced pricing in making the award decision, and whether a contract will result in unreasonably high prices for contract performance. FAR § 15.404-1(g)(2). An offer properly may be rejected if the contracting officer determines that the lack of balance in the bid or offer poses an unacceptable risk to the government. FAR § 15.404-1(g)(3); L. W. Matteson, Inc., supra at 3. Our Office will review for reasonableness both an agency’s determination as to whether an offeror’s prices are unbalanced, and an agency’s determination as to whether an offeror’s unbalanced prices pose an unacceptable risk to the government. Semont Travel, Inc., B-291179, Nov. 20, 2002, 2002 CPD ¶ 200 at 3; L. W. Matteson, Inc., supra, at 4; Enco Dredging, B-284107, Feb. 22, 2000, 2000 CPD ¶ 44 at 6.

The record shows that the contracting officer’s determination that W.B.’s bid was unbalanced was reasonable, given the numerous line items where W.B.’s prices were significantly higher or lower than the IGE. However, a bid or offer may not be rejected merely because it is unbalanced. See Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 7-8. Instead, FAR § 15.404-1(g)(2), (3) requires that the contracting officer consider the risks associated with the unbalanced pricing and only reject an unbalanced bid or offer where it is determined that the lack of balance posed an unacceptable risk. Id.; see Burney & Burney Constr. Co., Inc., B-292458.2, Mar. 19, 2004, 2004 CPD ¶ 49 at 2-3 (rejecting unbalanced quotation based upon risk analysis); Semont Travel, Inc., supra at 3-5 (accepting unbalanced bid based upon risk analysis); L. W. Matteson, Inc., supra at 4-5 (rejecting unbalanced bid based upon risk analysis).

Here, there is no contemporaneous documentation indicating that the contracting officer determined that W.B.'s bid was materially unbalanced in accordance with FAR § 52.214-19(d),⁴ or that this lack of balance posed an unacceptable risk in accordance with FAR § 15.404-1(g). The only further explanation of the contracting officer's determination here is provided in an affidavit provided in response to this protest, where the contracting officer simply stated that "[t]he number of such items and the reasonable potential for greater cost of ordering significantly higher cost items caused me to reasonably doubt that the Protester's bid would result in the lowest overall cost to the Government, even though it may have been the lower evaluated bid." AR, Tab 13, Contracting Officer Affidavit, at 2. Thus, the record is devoid of any evidence to show that the contracting officer conducted any type of analysis of the unbalanced line items to consider the risks to the government associated with the unbalanced pricing in making the award decision.

Accordingly, we find unreasonable the agency's rejection of W.B.'s bid as materially unbalanced because the contracting officer failed to perform the risk analysis required by FAR § 15.404-1(g).

We sustain the protest.

RECOMMENDATION

We recommend that the agency re-evaluate W.B.'s bid to determine if the lack of balance in its bid posed an unacceptable risk to the government. If the agency determines that the lack of balance does not pose an unacceptable risk, the agency should make award to W.B. after waiving W.B.'s bid's omission of the one line item price as a minor informality. We further recommend that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receiving this decision.

Lynn H. Gibson
General Counsel

⁴ Reading the various FAR provisions together, we think that if a bid is determined to be materially unbalanced in accordance with FAR § 52.214-19(d), an agency can consider this as one of the "risks to the government associated with the unbalanced pricing in making the award decision" under FAR § 15.404-1(g)(2).