Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Stanger Industries, Inc.

File: B-279380

Date: June 4, 1998

Sharon K. Stanger for the protester.
Monica Allison Ceruti, Esq., Department of the Air Force, for the agency.
Linda C. Glass, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly rejected as nonresponsive a low bid that acknowledged all amendments to an invitation for bids (IFB), but used an unamended bid schedule which had been corrected by amendment to indicate that a requirement for periodic preventive maintenance should contain a monthly unit price entry and an extended price entry for the 9-month requirement rather than simply a lump-sum entry, where the bid commits the contractor to perform in accordance with the precise IFB requirements at the low price.

DECISION

Stanger Industries, Inc. protests the rejection of its bid under invitation for bids (IFB) No. F41689-98-B-0001, issued by the Department of the Air Force, Air Educational and Training Command Contracting Squadron, Randolph Air Force Base, Texas, for commissary refrigeration upgrade and periodic preventive maintenance and emergency repair for commissary refrigeration systems and heating ventilating and air conditioning systems at Hanscom Air Force Base, Massachusetts.

We sustain the protest.

The IFB, issued on November 17, 1997, contemplated the award of a fixed-price contract and contained a bid schedule listing five line items with a description of the required work, a quantity and unit designation, and spaces labeled "unit price" and "amount" for each item, along with one space calling for a total of the "amount" entries as the bid total. Line item No. 0002 was for providing all necessary equipment to perform the contract and line item No. 0003 was for periodic preventive maintenance in accordance with the solicitation requirement at section 15995 that preventive maintenance commence 60 days after the notice to proceed was issued by the contracting officer and continue until 90 days after the final

acceptance date of the construction contract. In addition, the solicitation specified a 180-day period of performance for the upgrade.

Prior to bid opening, a prospective bidder notified the contracting officer that there appeared to be a transposition error in the bid schedule with respect to line items Nos. 0002 and 0003. The extant bid schedule indicated a 9-month quantity for performing the refrigeration upgrade requirements (line item No. 0002), and a lump-sum quantity of 1 for the periodic preventive maintenance (line item No. 0003). After examining the bid schedule, the contracting officer concluded it did contain an error and issued amendment No. 0002 on January 6, 1998, which changed the quantity and unit entries for line item No. 0002 from 9 months to one "LS" (lump sum), and for line item No. 0003 from one lump sum to 9 months.

Four bids were received by the January 8 bid opening. Stanger's bid of $691,291 was low and Nelson Refrigeration's bid of $733,874 was next low. Although Stanger acknowledged all amendments, it submitted its bid on the original bid schedule and, as a result, entered a lump-sum entry only for line item No. 0003, and for 0002 as well. Nelson's bid contained a unit (monthly) entry of $5,740 and a total of $51,660 for line item No. 0003. The contracting officer notified Stanger that the government suspected a mistake in its bid and asked Stanger to verify its bid. On January 8, Stanger verified its bid. Because Stanger's verification was not specific, Stanger was again notified of a suspected mistake with respect to line items Nos. 0002 and 0003. By letter dated January 13, Stanger stated that it understood that line item No. 0002 was a lump-sum amount and fully understood that line item No. 0003 was a 9-month periodic maintenance amount. Stanger also stated that it intended to include the amended bid schedule as part of its bid package but erroneously used the incorrect bid schedule. By letter dated February 18, the Air Force informed Stanger that its bid had been rejected as nonresponsive because of Stanger's use of the superseded bid schedule. On February 27, Stanger protested to our Office. The agency reports that it will not award the contract until the protest is resolved.

Stanger argues that its bid as submitted was responsive because the original bid schedule was nearly identical to the amended bid schedule, and its failure to use the amended schedule was a minor informality. Stanger also maintains that the correction or waiver of its mistake would not affect the relative standing of, or be otherwise prejudicial to, other bidders.[1]

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[1]Stanger also asserts that the solicitation was ambiguous and that the amendment was received too close to the bid opening date. Both of these issues should have been raised prior to the January 8 bid opening date. Protests alleging improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1998).

The Air Force takes the position that Stanger's failure to submit its bid on the amended bid schedule renders the bid nonresponsive because it is unclear "whether Stanger intended to be committed to the amendment's larger quantities or the original schedule's lesser quantity." The agency's position is that Stanger's stated lump-sum price for the "lesser quantity" of one for line item No. 0003 does not commit Stanger to provide the "greater quantity" of 9 months as required by amendment No. 0002. The agency also maintains that Stanger's omission of a unit price for line item No. 0003 creates an ambiguity as to the unit price to be used to calculate payment for line item No. 0003. The agency points out that, in accordance with the specifications, the period of performance for line item No. 0003 is dependent upon completion of the construction portion of the contract, with payment calculated on a monthly basis. Additionally, the agency maintains that if the period of performance for line item No. 0003 is actually 5 months or less, the second low bid would be less than Stanger's.

As a general matter, where a bidder does not submit its price on a revised bid schedule listing additional work, but instead submits its bid on the original schedule, the mere acknowledgment of the amendment containing the revised bid schedule is not sufficient to bind the bidder to perform the additional work because it is not clear that the bidder has committed itself to perform the extra work for the price set forth in its bid. 3W American Enters., Inc., B-274410.2, Dec. 27, 1996, 96-2 CPD ¶ 242 at 3. On the other hand, a lower bidder's failure to acknowledge an amendment that is not material should be waived as a minor informality. Innovative Refrigeration Concepts, B-271072, June 12, 1996, 96-1 CPD ¶ 277 at 2. In this regard, Federal Acquisition Regulation (FAR) § 14.405 provides that a contracting officer shall give a bidder an opportunity to cure a deficiency resulting from a minor informality or irregularity in its bid including the failure to acknowledge an amendment which has no, or merely a negligible, effect on price, quantity, quality, or delivery of the item being acquired. The contracting officer may also waive such a minor informality or irregularity. Where the record does not establish that price is meaningfully affected by an amendment, for the amendment to be material, something about the change must reflect a legitimate need of the agency such that its requirements will not be met if the contractor performs to the unamended specifications. Doty Bros. Equip. Co., B-274634, Dec. 19, 1996, 96-2 CPD ¶ 234 at 4.

Here, Stanger acknowledged amendment No. 0002, but failed to provide its pricing on the revised bid schedule. The agency maintains that amendment No. 0002 changed the "quantity" of preventive maintenance to be provided from one lump sum to 9 months. In fact, this does not constitute any substantive change in the required quantity of preventive maintenance. Notwithstanding Stanger's failure to submit the requested monthly unit price for item No. 0003, it is clear from Stanger's bid that Stanger is committed to perform the preventive maintenance requirement in the manner required by the solicitation and for the duration required. Both the original and revised bid schedules require that periodic preventive

maintenance and emergency repair be performed in accordance with section 15995 of the specifications. Section 15995 provides that preventive maintenance is to commence 60 days after the notice to proceed is issued and continue until 90 days after the final acceptance date of the construction contract. Stanger acknowledged all amendments and clearly intended to obligate itself to perform this required preventive maintenance at its entered price of $27,000. By using the old schedule form without a unit price entry, Stanger's low bid simply provided a lump-sum price for the 9 months of preventive maintenance.[2]

The agency also argues that Stanger's omission of the unit price for item No. 0003 by itself renders its bid nonresponsive. However, the omission of a unit price does not render a bid nonresponsive when the low bid can be evaluated on a basis common to all bids; under these circumstances, the omission constitutes a minor informality that should be waived under FAR § 14.405. GEM Eng'g Co., Inc., B-231605.2, Sept. 16, 1988, 88-2 CPD ¶ 252 at 2. Here, the IFB did not provide that bids without unit prices would be rejected as nonresponsive and there is no doubt that Stanger's low bid commits the firm to perform the exact work required at a fixed price for the specified period of performance.

The agency errs in asserting that, if the performance period is actually 5 months or less, then the second low bid would be lower than Stanger's. As noted above, Stanger's total bid was $691,291 and the second low bid was $733,874, a difference of $42,583. The second low bidder offered a price of $5,740 per month for a total of $51,660 for the required 9 months of preventive maintenance. If preventive maintenance were needed for only 5 months, this would reduce the second low bid by only $22,960 ($5,740 monthly rate x 4 months fewer than the anticipated 9 months)--not nearly enough to bring that bidder's price below Stanger's, even if we assume, for the purposes of this analysis, that Stanger's bid for any period of preventive maintenance was a lump sum amount of $27,000. Indeed, the second low bid would become low only if the preventive maintenance is needed for less than 2 months. Since the specifications call for preventive maintenance to be performed for at least 90 days after the final acceptance date of the construction contract, the minimum period for which preventive maintenance will be required is 3 months, so that Stanger's bid would be low under any foreseeable circumstances.

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[2]If, in fact, the period of required prevention maintenance varies from the anticipated 9 months, a monthly unit price is readily ascertainable from Stanger's lump-sum bid. Stanger's bid verification explicitly confirmed Stanger's recognition of the IFB requirement for 9 months of preventive maintenance, and simple division permits the ascertainment of a $3,000 per month unit price. See Aqua Marine Constructors, B-212790, Oct. 20, 1983, 83-2 CPD ¶ 471 at 2.

In short, amendment No. 0002 did not require bidders to perform any additional work and was not otherwise material; either Stanger's failure to use the amended bid schedule and provide the requested unit price should have been waived by the contracting officer as a minor informality or Stanger should have been given an opportunity to cure the deficiency. FAR § 14.405; Aqua Marine Constructors, supra. Because the contracting officer instead improperly rejected the bid as nonresponsive, we sustain the protest.

We recommend that the contract be awarded to Stanger, if it is otherwise eligible for award. We also recommend that Stanger be reimbursed its costs of filing and pursuing this protest. 4 C.F.R. § 21.8(d)(1). Stanger should submit its certified claim for costs, detailing the time expended and costs incurred, to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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