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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** C&D Construction, Inc.

**File:** B-408930.2

**Date:** February 14, 2014

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Curtis Deen and Gregg Galzerano, C&D Construction, Inc., for the protester.  
James E. Krause, Esq., James E. Krause, P.A., for RUSH Construction, Inc., the  
intervenor.

Susan E. Symanski, Esq., and Charles T. Pino, Esq., Department of the Army,  
Corps of Engineers, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

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### DIGEST

Protest is sustained where agency improperly waived bidder's failure to submit bid for option work because, by labeling both pages of bid schedule as applying to base requirement, bid did not clearly commit bidder to perform optional scope of work.

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### DECISION

C&D Construction, Inc., of Cocoa, Florida, a small business, protests the award of a contract to RUSH Construction, Inc., of Titusville, Florida, under invitation for bids (IFB) No. W912EP-13-B-0007, issued by the Department of the Army, Corps of Engineers, for construction services to repair the Canaveral Lock East and West timber approach walls to restore the walls to an operational condition, at the Canaveral Lock and Barge Canal, in Brevard County, Florida. IFB Synopsis at 1. C&D argues that the Corps of Engineers should have rejected RUSH's bid as nonresponsive.

We sustain the protest.

The Corps of Engineers issued the IFB on August 2, 2013, as a small business set-aside, to obtain bids to provide needed repairs to the Canaveral Lock, as described in the accompanying construction specifications. As issued, the IFB divided the work into a base requirement for repairs to the west wall, and an option requirement for repairs to the east wall. IFB at 10A-1 to 10A-2. Among the bid schedule line

items, lines 0001AH and 0002AH required prices for fender replacement (for the west and east walls, respectively).

The IFB incorporated the provision at Federal Acquisition Regulation (FAR) § 52.217-5, which generally provides for evaluation of price as the sum of all base and optional prices. IFB at 100-4. The IFB also provided that the option could be exercised “within 30 days [of] demobilization of equipment.” IFB at 700-19.

The agency issued five amendments to the IFB, the last of which, amendment 5, was issued on September 6. Amendment 5 provided a revised bid schedule form and changed the specifications in several other respects, including updated drawings and revisions to the specifications for fenders and walkways. Contracting Officer’s Statement at 2; see generally IFB amend. 5 at 2 (synopsis of changes in attached amendment pages). The revised schedule in IFB amendment 5 consisted of two pages. The first page listed 14 line items (0001AA through 0001AP) for the basic requirement, and was labeled as “West Approach Wall Repair.” The second page listed 13 line items (0002AA through 0002AN) for the option, and was labeled as “East Approach Wall Repair.”<sup>1</sup> IFB at 3-4. Several of the contract line items also referenced, by number, one or more of an accompanying set of notes.

Amendment 5 also made several changes that are relevant to the protest. In particular, the amendment changed the reference under base requirement line item “0001AH Fender Installation” from “See Note 6” to “See Note 9,” while option line item “0002AH Fender Installation” referred to Note 6.<sup>2</sup> IFB amend. 5 at 10A-1 to 10A-2. Amendment 5 also changed the text of Note 6 to specify that for the option (east wall) fender installation only, the contractor would reuse and reinstall approximately 1,190 linear feet of fender material and would supply the remainder as new fender material. The amendment also added a new Note 9, which specified that for the base requirement (west wall), the contractor was to supply the entire requirement as new fender material. IFB amend. 5 at 10A-3.

On September 13, the Corps of Engineers held a public bid opening, where it received 11 bids, including bids submitted by C&D and by RUSH. Upon opening RUSH’s bid, the contracting officer remarked that its bid schedule was different than the one provided in the amended IFB.<sup>3</sup> Contracting Officer’s Statement at 3.

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<sup>1</sup> The IFB’s bid schedule omitted lines 0001AI, 0001AO, and 0002AI, presumably to avoid confusion (that is, mistaking I for a one, or mistaking O for a zero).

<sup>2</sup> Before amendment 5, both line items referred to Note 6. See IFB Amend. 4 at 10A-1 to 10A-2.

<sup>3</sup> It appears that the contracting office did not allow inspection of original bids or duplicates under FAR § 14.402-1(c), so C&D based its protest on this statement by the contracting officer at the bid opening.

RUSH's bid identified the IFB, and acknowledged each of the five amendments by its number and date. The first page of RUSH's bid schedule matched the schedule provided in IFB Amendment 5, but the second page did not. While the second page of the IFB schedule (from amendment 5) had numbered the optional line items for the east wall as 0002AA through 0002AN, the second page of the schedule in RUSH's bid identified that page as being for the "West Approach Wall Repair" (rather than East), and misnumbered the optional line items 0001AA through 0001AN. In addition, while the second page of the schedule in RUSH's bid identified a line item for "Fender Installation" as 5,371 linear feet (the correct quantity for that line item of the option),<sup>4</sup> it incorrectly referenced "Note 9" instead of "Note 6." Agency Report (AR), Tab 8, RUSH Original Bid Schedule, at 2. Finally, at the bottom of RUSH's second schedule page, the subtotal of the option lines was labeled as "OPTION 'A' (LINE ITEMS 0002 THRU 0002AN)," even though, as described above, the contract line items on the page were actually identified as being for the west wall, and were numbered at 0001AA through 0001AN. Id.

On September 17, the contracting officer prepared a memorandum for the record explaining her conclusions about RUSH's bid schedule, which described the discrepancy as follows:

The line item numbering for the option incorrectly included 0001 vs. 0002 for all line items. However, the title, quantities and all material aspects of the bid schedule was correct.

AR, Tab 9, Memorandum for Record, Sept. 17, 2013, at 1.

The memorandum went on to note that RUSH's bid expressly acknowledged all five amendments, and stated that the bid was consistent with the IFB in all material respects.<sup>5</sup> The contracting officer then stated her determination that, under Federal Acquisition Regulation (FAR) § 14.405, RUSH's bid schedule contained a minor informality that did not affect price, quantity, or quality, and could therefore be waived. Id. The contracting officer allowed RUSH to submit a corrected bid schedule, which accurately identified the second page as being the "East Approach Wall Repair," used the correct line numbering (0002AA through 0002AN), and made the proper reference on line 0002AH to "See Note 6." Id.; AR, Tab 10, RUSH Revised Bid Submission at 3-4.

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<sup>4</sup> As noted previously, however, RUSH misnumbered the option fender installation line as "0001AH," rather than 0002AH.

<sup>5</sup> The memorandum thus does not identify the other discrepancies in RUSH's bid schedule: that both pages of the schedule referred to the west wall (and neither page referred to the east wall), and that the fender installation line item on both pages referenced Note 9.

On November 7, the contracting officer awarded the contract to RUSH as the lowest bidder, at a total price of \$5.944 million.<sup>6</sup> C&D's bid was second-lowest, at a total price of \$5.949 million. AR, Tab 7, Abstract of Offers (Official Form 1419), at 1. On November 12, C&D filed this protest.

## ANALYSIS

C&D argues that RUSH's bid should have been rejected because the discrepancies in its bid schedule represent a non-responsive bid.<sup>7</sup> Protest at 2. More specifically, C&D argues that RUSH's original bid did not commit the firm to complying with Note 9 in performing the east wall fender installation. Protester's Comments at 2; Protester Response to Intervenor's Reply at 2. In response to an inquiry from our Office to all parties about the significance of both pages of RUSH's schedule referring to the west wall base requirement, C&D argues that this fact also rendered RUSH's bid ambiguous and unacceptable. Protester's Response to GAO Questions, Feb. 4, 2014, at 2-3.

The Corps and RUSH argue that the agency properly waived the discrepancies in RUSH's bid schedule, both because the bid did not reflect material variations from the IFB requirement, and because despite the discrepancies in the second page of the bid schedule, the page included the appropriate lines and quantities, and thus displayed RUSH's intention to offer a bid for each of the option contract line items. Intervenor's Reply Brief at 2; Intervenor's Response to GAO Questions, Feb. 4, 2014, at 2-3; Agency's Response to GAO Questions, Feb. 4, 2014, at 2-4.

As explained below, we agree with C&D that RUSH's bid schedule differed materially from the terms of the IFB. As a result, the discrepancies in RUSH's bid schedule could not be waived; rather, the contracting officer should have rejected RUSH's bid as nonresponsive.

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<sup>6</sup> C&D Construction filed a protest with our Office on September 19, arguing that RUSH's bid was unacceptable. Our Office dismissed the protest on September 30 on the basis that the Corps of Engineers had not awarded a contract, and was engaged in the process of assessing RUSH's responsibility, among other things. We viewed that protest as premature because the award of a contract had not been made (and an award was neither imminent nor a foregone conclusion).

<sup>7</sup> C&D also argued that it should have received award because its price for the base requirement was lower than RUSH's price for the base requirement, or because RUSH's subcontractor is not a small business. See Protest at 2. However, after receiving the agency report, C&D did not materially dispute the agency's explanation on these points. Our decision addresses only those issues that C&D continued to pursue in its comments on the agency report.

A bid that fails to include a price for every item required by the IFB generally must be rejected as nonresponsive. HH&K Builders, B-232140, Oct. 20, 1988, 88-2 CPD ¶ 379 at 2, recon. denied, B-232140.2, Nov. 30, 1988, 88-2 CPD ¶ 537. This includes a bidder's failure to provide a responsive bid for optional contract line items, which thus renders the entire bid nonresponsive. Massillon Constr. & Supply, Inc., B-407931, Mar. 28, 2013, 2013 CPD ¶ 85 at 3. This rule reflects the legal principle that a bidder who has failed to submit a price for an item generally cannot be said to be obligated to furnish that item. United Food Servs., B-218228.3, Dec. 30, 1985, 85-2 CPD ¶ 727 at 3. Therefore, where a page in a bidder's schedule does not clearly indicate that the prices apply to an option that the IFB requires to be priced, the bid is ambiguous and thus, nonresponsive. Thompson Metal Fab, Inc., B-293647, May 4, 2004, 2004 CPD ¶ 109 at 3.

The discrepancies in RUSH's bid here were not a mere minor informality. Both pages of RUSH's bid schedule identified the scope of work being bid as the west wall; neither identified any prices as applying to the east wall. The second page of the schedule, which should have contained prices for the east wall work identified Note 9 (the west wall fender installation note) as applicable, rather than Note 6 (which, as revised by Amendment 5, required the reuse of fender material).<sup>8</sup> As a result, at the time of bid opening, RUSH had not made a firm commitment to perform the east wall scope of work at specific line item prices.

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<sup>8</sup> We recognize that the possibility that the revised Note 6 requirement to reuse fender material might impose a less stringent obligation than Note 9's requirement to furnish all new material, which the Corps argues was reflected in lower per-foot pricing for that line item in 8 of the 11 bids. Agency Response to GAO Questions, Feb. 4, 2014, at 2. Failure to acknowledge an amendment may be waived where the amendment results in less stringent obligations on the bidder, since acceptance of a bid premised on the more stringent requirements in the original solicitation would not prejudice any other competitor. E.g., Pro Alarm Co., B-240137, Sept. 20, 1990, 90-2 CPD ¶ 242 at 3 (failure to acknowledge amendment that extended completion time did not render bid nonresponsive). However, even if some bidders offered lower per-foot pricing for the east wall fender installation, the record does not show that the Note 6 requirement was less stringent than Note 9. Rather (as C&D argues) removing existing fender material requires the contractor to take additional steps to ensure that the material is removed without damage, and stored while other repairs are made, and then reinstalled. See C&D Response to GAO Questions, Feb. 4, 2013, at 3. Since those additional steps would not be required if all new fender material were to be used, we have no basis to regard the fender reuse requirement of revised Note 6 to be less stringent than the all-new-material requirement of Note 9, so that reference to the incorrect note could be considered immaterial.

Although the contracting officer identified misnumbering on the second page of RUSH's bid schedule, and expressed her view that such a discrepancy could be waived as a minor informality, she did not identify the fact that RUSH's bid also referred only to the west wall base requirement, and referenced only Note 9 for fender installation. Since these discrepancies reflected material differences in the work and the manner of its performance, they could not be waived--even if the contracting officer had identified them. In short, the contracting officer improperly allowed RUSH to correct its nonresponsive bid.<sup>9</sup>

The protest is sustained.

#### RECOMMENDATION

We recommend that the Corps revoke the waiver of the discrepancies in RUSH's bid, reject RUSH's bid as nonresponsive, and terminate the contract for the convenience of the government. We recommend that the Corps identify the next lowest-priced responsive responsible bidder, and make award to that firm, if otherwise proper. We also recommend that C&D be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2013). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

Susan A. Poling  
General Counsel

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<sup>9</sup> The fact that the corrected bid (submitted by RUSH later) offered the same prices as its nonresponsive bid is immaterial. The integrity of the bidding system requires that all bidders be required to make a firm commitment to all material terms of the IFB at the time of bid opening. It is well-established that a procuring agency may not allow a firm that has submitted a nonresponsive bid schedule to correct a material defect by submitting a responsive bid schedule after bid opening; to do so would impair the integrity of the sealed bidding system. Newfield Constr., Inc., B-286912, Feb. 6, 2001, 2001 CPD ¶ 21 at 4.