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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Oregon Electric Construction, Inc. dba Integrated Systems Group

File: B-294279

Date: September 27, 2004

Darin D. Honn, Esq., and Jason W. Alexander, Esq., Sussman Shank, for the protester.

Mark G. Garrett, Esq., Department of Agriculture, 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

Agency properly rejected bid as nonresponsive where qualification in bid cover letter rendered bid ambiguous; qualification made it uncertain whether bidder unequivocally offered to perform in accordance with terms of solicitation amendment.

DECISION

Oregon Electric Construction, Inc. dba Integrated Systems Group (Integrated) protests the rejection of its apparent low bid as nonresponsive under invitation for bids (IFB) No. R6-9-04-07, issued by the Department of Agriculture, Forest Service, for improvement of the Quinault wastewater collection and treatment facility in Washington. Integrated contends that the agency unreasonably determined that its bid cover letter rendered uncertain whether the firm intended to perform in accordance with the solicitation's requirements for operation and maintenance by the contractor of the wastewater treatment plant.

We deny the protest.

The IFB, issued on March 5, 2004, contemplated the award of a fixed-price contract for a base item (for improvements to the wastewater treatment facility) and two option items (for grinder pump station improvements and drain field expansion). In addition, the amended IFB called for the operation and maintenance of the wastewater treatment plant. Specifically, amendment No. 3 to the IFB provided that

the contractor

shall be responsible for the operation and maintenance of the Quinault wastewater treatment plant from the effective date of the notice to proceed of the Base Item until 3 months after final acceptance by the Contracting Officer of the Base Item.

IFB amend. 3, ¶ C.6.

Integrated acknowledged receipt of amendment No. 3. Its bid cover letter, however, provided terms different from that amendment's plant operation terms. In particular, the bid cover letter provided that "[o]peration of the plant is included for duration of the construction project until 3 months after substantial completion." Integrated Bid Cover Letter, Apr. 27, 2004, at 1.

The agency found that the cover letter statement materially qualified Integrated's bid, specifically noting that the offered period—3 months after "substantial completion"—was materially different from the performance period called for by the amended IFB—3 months after final acceptance of the base item. The agency found that the different terms not only limited Integrated's performance risk, but also lessened the rights of the agency under the amended solicitation's "final acceptance" provision. In this regard, under the amended IFB, the agency was to maintain control of the timing of the termination of the contractor's plant operation period, since it was tied to an affirmative action by the agency—*i.e.*, final acceptance of the base item work. The agency determined that Integrated's bid was ambiguous and rejected it as nonresponsive. This protest followed.

To be responsive and considered for award, a bid must contain an unequivocal offer to perform, without exception, the exact thing called for in the solicitation, so that, upon acceptance, the contractor will be bound to perform in accordance with all of the IFB's material terms and conditions. If in its bid (including its bid cover letter), a bidder conditions or modifies a material solicitation requirement (such as a performance period), limits its liability to the government, or limits the rights of the government under a resulting contract, then the bid must be rejected as nonresponsive. See Tel-Instrument Elecs. Corp., B-291309, B-291309.2, Nov. 20, 2002, 2002 CPD ¶ 203 at 2-3; Interstate Constr., Inc., B-281465, Feb. 10, 1999, 99-1 CPD ¶ 31 at 2; Balantine's South Bay Caterers, Inc., B-250223, Jan. 13, 1993, 93-1 CPD ¶ 39 at 3-4. Further, a bid that is nonresponsive on its face may not be made into a responsive bid through post-bid-opening clarifications, and mistake-in-bid procedures may not be used to render the bid responsive. See National Office World, Inc., B-224120, Sept. 5, 1986, 86-2 CPD ¶ 270 at 2.

Here, although the protester acknowledged receipt of amendment No. 3, its bid cover letter offered a materially different performance period than was required under the amendment. As the agency points out, Integrated's cover letter is based on

a subjective, indefinite standard--“substantial completion” of unidentified work. As a result, the cover letter limits the agency’s right under amendment No. 3 to require the contractor to operate the plant until final acceptance of the base item.¹ The cover letter thus qualifies a performance term of the amended IFB, materially affecting the rights and obligations of the contractor and agency. Accordingly, the agency properly rejected the bid as nonresponsive.²

The protest is denied.

Anthony H. Gamboa
General Counsel

¹ Integrated argues that the clear meaning of the language in its cover letter is that the contractor would operate the plant until 3 months after “substantial completion” of the entire “construction project,” consisting of the base item and both option items--in the protester’s view, this provides for a period of operation that in fact is longer than the period called for by the amendment (3 months after acceptance of the base item alone). The protester’s argument is unpersuasive. It simply is not clear that “substantial completion” of the “construction project” represents a point equivalent to (or beyond) the point at which the agency takes final acceptance of the base item. Thus at best the language in the cover letter is ambiguous as to the offered performance period.

² Contrary to the protester’s contention, it is also irrelevant that the firm submitted its price for the plant operation work based on the same estimated amount of time (18 months) for operating the plant as was provided on the bid schedule and used by all of the bidders. As discussed above, the protester’s bid was rendered nonresponsive due to its cover letter’s qualification of the required performance period, a defect which is not cured by its bid schedule pricing.