

## DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:	)	
	)	
MXI Environmental Services, LLC	)	CAB No. P-0897
	)	
Solicitation No. DCKT-2011-B-0147	)	

For the Protester: Marc Kodrowski, *pro se*. For the District of Columbia Government:  
Jon N. Kulish, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Administrative Judge Monica C. Parchment, with Chief Administrative Judge  
Marc D. Loud, Sr. and Administrative Judge Maxine E. McBean, concurring.

### OPINION

*Filing ID 41633712*

The protester, MXI Environmental Services, LLC (“MXI”), challenges the contracting officer’s determination that its bid for household hazardous waste collection and disposal related services under Invitation for Bids No. DCKT-2011-B-0147 (“IFB”) was nonresponsive to the IFB’s two separate employee training requirements. The protester asserts that its bid clearly offered to meet the two distinct types of required employee training and should not have been rejected as nonresponsive.

The Board, however, finds that the contracting officer’s nonresponsiveness determination reasonably concluded that the protester’s bid for training services included an alternative unit price structure, other than what was requested by the IFB, primarily because the protester used ambiguous supplemental language in its proposed unit price bid. For these reasons, the protest is denied.

### BACKGROUND

The District’s Department of Public Works (“DPW”) issued the subject IFB on August 23, 2011, for the award of a requirements type contract to a contractor that would provide household hazardous waste collection and disposal related services to DPW. (Agency Report (“AR”) Ex. 1.) The services required under the IFB were detailed with specificity under four Contract Line Item Numbers (“CLINs”), including CLINs 0001-0004 for the base year. (*Id.*) The IFB also extended these same services across four option year CLINs for the contract. (*Id.*) A single contract was to be awarded to the lowest responsive and responsible bidder based upon the bidder’s total proposed price for the contract base and option year periods. (*Id.*)<sup>1</sup>

---

<sup>1</sup> Additionally, an amendment to the IFB was issued on September 1, 2011, which answered prospective bidder questions, revised two provisions, and extended the bid opening date from September 6, 2011, to September 13, 2011. (AR Ex. 2.)

### ***The Training Requirement***

The IFB also included a mandatory DPW employee training requirement that had to be met in each offeror's bid. Specifically, Section C.4.12 of the IFB mandated that the awardee perform the following types of employee training: (a) on-site yearly training for at least three District employees in overall household hazardous waste work related activities, in compliance with all federal, state, and local laws, including training on hazardous waste packing procedures and completion of proper documentation (IFB Section C.4.12.1); and (b) off-site training for up to two employees of the Department of Public Works Solid Waste Management Administration in accordance with 29 CFR 1910.120 to include all costs incurred, and lodging travel per diem for each contract year (IFB Section C.4.12.2). (*Id.*)<sup>2</sup> Thus, by virtue of IFB Sections C.4.12.1 and C.4.12.2, the District required the awardee to provide two separate categories of DPW employee training that substantially differed with respect to the number of employees to be trained by the awardee, the type of training required to be provided by the awardee, and the location where the awardee was to conduct the training. (*Id.*)

The training requirements under IFB Sections C.4.12.1 and C.4.12.2 corresponded to the proposed pricing required by the IFB for this training under CLIN 0003 for the base year, as well as for CLINs 1003, 2003, 3003, and 4003 across the four option year periods of the contract. (*Id.*) For these particular training CLINs, the IFB directed offerors to propose both a "unit" price and then a total proposed "estimated amount" for providing the two distinct types of employee training, in connection with IFB Sections C.4.12.1 and C.4.12.2, over the base and option years of the contract. (*Id.*)<sup>3</sup> Further, the IFB pricing grid expressly indicated, by inserting a number "1" under estimated quantity, that for each contract base and option year, DPW estimated that it would only order 1 unit of the two types of C.4.12 training under CLINS 0003, 1003, 2003, 3003, and 4003.<sup>4</sup> (*Id.*)

---

<sup>2</sup> 29 CFR 1910.120 refers to federal Occupational Safety and Health Administration ("OSHA") prescribed training for the handling of hazardous materials.

<sup>3</sup> Throughout this protest, the District appears to interchangeably refer to the IFB's requirement for a total "estimated amount" as a request for a "lump sum" price for a full year of training. The protester takes issue with this characterization of there being a per se "lump sum" requirement although the Board finds this issue to be immaterial to its ultimate decision in this matter.

<sup>4</sup> Specifically, the IFB pre-populated the "estimated quantity" column with the number "1" thereby confirming that, for both the base and option years, DPW estimated that it would order 1 unit of the IFB Section C.4.12 training based upon the awardee's proposed unit price for these services. Offerors would, therefore, theoretically, calculate the total estimated amount for the training requirement CLIN in their proposal by multiplying their proposed unit price by the District's estimated unit quantity (i.e., 1 unit) to calculate the final estimated amount for training under these training CLINs.

### ***The Evaluation of Bids***

In response to the IFB, the contracting officer (“CO”) received two bids, one from the protester, MXI, and one from the later putative awardee, Care Environmental Corporation. (AR Exs. 3, 8.) Upon bid opening, the bids were manually recorded on a bid tabulation sheet. (AR Ex. 5.) This sheet was later corrected twice by DPW and ultimately showed a total bid price of \$1,002,947.50 for Care Environmental and \$998,485.00 for MXI. (AR Ex. 6.)

Additionally, the CO and the contract specialist reviewed MXI’s bid under CLINs 0003, 1003, 2003, 3003 and 4003 with respect to the pricing that it was required to provide for the two distinct categories of employee training mandated under IFB Section C.4.12. (AR Ex. 11.) The CO and contract specialist noted that, under the CLIN pricing column calling for MXI to provide a “unit” price for these two types of Section C.4.12 training for the base year, MXI inserted the number \$1000 followed directly by the words “per day.”<sup>5</sup> (*Id.*) Further, in the corresponding pricing column calling for the total estimated amount for this same IFB Section C.4.12 training, MXI’s bid inserted the number \$1000 as the total estimated amount for this training for the contract year. (AR Exs. 3, 11.)

Thus, because MXI expressly qualified its unit price bid for the Section C.4.12 training with the words “per day,” which were not otherwise called for by the terms of the IFB, the CO and contract specialist concluded at the time of bid opening that MXI’s bid did not unequivocally offer to perform the two distinct categories of training required by IFB Section C.4.12 at a determinable unit price. (AR Ex. 11.) Accordingly, the CO and the contract specialist determined that MXI’s training offer under IFB Section C.4.12 was nonresponsive to the training requirement and, further violated Section L.2.4 of the IFB, which prohibits bidders from making changes to the requirements in the solicitation. (AR Exs. 1, 11.)

On September 21, 2011, the CO advised MXI by letter correspondence that its bid was rejected as nonresponsive under IFB Section C.4.12 as described herein. (AR Ex. 4.) MXI then filed the present protest on September 29, 2011.

### **DISCUSSION**

We exercise jurisdiction over this protest and its underlying allegations pursuant to D.C. Code §2-360.03(a)(1).

In its protest, MXI challenges the CO’s determination that its bid was nonresponsive based upon its alleged failure to unambiguously offer to provide all training required by IFB Section C.4.12 at a specific unit price.<sup>6</sup> (Protest 3.) The protester maintains that its bid was unambiguous in that it offered to perform both distinct types of required IFB Section C.4.12

---

<sup>5</sup> While MXI’s base year unit price started at \$1000 per day for these training services, each subsequent option year CLIN for this training requirement incorporated a minor \$100 escalation in the “per day” unit price offered by MXI.

<sup>6</sup> Initially, MXI also appeared to be challenging the clarity of the training provision terms in the IFB but subsequently clarified that it was not making such a challenge in this protest. (Protest 1; Protester Resp. to AR 4.)

training at the proposed cost of \$1000 per day, and at a total cost of \$1000 in the base year, regardless of the fact that these two required training sessions were different in nature, were to take place at different locations, and potentially involved differing numbers of employees. (Protester Resp. to AR 5-6.)

The District, however, contends in this protest that the protester's bid for the training services was ambiguous because it was subject to two different interpretations primarily resulting from the fact that MXI qualified its unit price bid with the words "per day" and also because it only offered to perform one day of training at a total estimated price of \$1000. (District Resp. to Protester's Reply to AR 5-8.) Thus, the District argues that it was unclear, upon bid opening, whether MXI was offering either: 1) a bid to perform all required OSHA training under IFB Section C.4.12.2, as well as the separate requirement for employee on the job training under IFB Section C.4.12.1 both in a single day for the cost of only \$1000 despite the differing nature and extent of these two types of training; or, alternatively, 2) a restricted bid for some incomplete or partial combination of the required OSHA training and/or the required on the job training, in one day, given the differing nature and extent of these two types of training. (*Id.*) Consequently, based upon the information which was only available to the CO from the face of the protester's bid at bid opening, the CO was unable to conclusively determine that MXI's bid offered to provide the exact type and extent of the training required by the IFB and was, thus, deemed to be nonresponsive. (*Id.*)

The Board has previously held that in order to be considered responsive to an IFB, a bid must be an unequivocal offer to provide the exact items called for by the solicitation. *Barcode Technologies, Inc.*, CAB No. P-524, 45 D.C. Reg. 8723 (Feb. 11, 1998); *S. Md. Restoration, Inc.*, CAB No. P-241, 39 D.C. Reg. 4268 (Aug. 7, 1991). In this regard, we have affirmed that uncertain or ambiguous bids are properly rejected as nonresponsive. *Mont "T" Que Inc.*, CAB No. P-0725, 54 D.C. Reg. 2008 (Apr. 6, 2006) (ancillary notations made by protester on its bid made it susceptible to two different interpretations and, thus, the bid was reasonably rejected as ambiguous and nonresponsive).

Accordingly, based upon the foregoing legal standard, the Board finds that, in this case, the CO and contract specialist acted reasonably in determining that MXI's inclusion of the words "per day" following the number \$1000 under its proposed unit price bid qualified its unit price offer in a way that made it questionable as to whether the protester was offering to meet the exact training requirements of the IFB.<sup>7</sup> Clearly, on its face, the IFB contemplated and directed the offerors to simply include a number amount for the proposed unit price as there is no other direction in the IFB that the required unit price could be converted to a "per day" rate. The decision to qualify its proposed unit price in this way was the protester's independent decision alone.

---

<sup>7</sup> In fact, the numerous filings that the protester has made in these proceedings have been largely dedicated to explaining what its "per day" unit price bid was allegedly intended to unequivocally offer in terms of pricing which, in the Board's view, further underscores the fact that the exact terms of its price proposal were reasonably deemed ambiguous on their face at the time of bid opening.

Moreover, this uncertainty created by MXI's use of the qualifying words "per day" was further exacerbated by the fact that the IFB required the offerors to provide two very distinct types of employee training, and pricing for the same, that substantially differed with respect to the number of employees to be trained, the type of training required to be provided, the location where the training was to occur, and even the lodging travel per diem expenses that would potentially be incurred by the awardee in connection with the training. (District Resp. to Protester's Reply to AR 5-8.) It was, therefore, reasonable for the contracting officials to be uncertain, from the face of MXI's bid, as to whether it was offering to provide all of this required training in only one day, or whether it was only offering to provide a portion of the required training. Thus, in light of these factors, the Board finds it reasonable that the CO found the protester's bid to be ambiguous in responding to the IFB Section C.4.12 training requirements because of MXI's inclusion of an alternative "per day" unit pricing structure other than what was called for by the IFB.

Additionally, while MXI has provided very extensive explanations during these protest proceedings to better clarify the intent behind the training offer outlined in its bid, these post-award statements cannot be used to supplement or correct deviations contained within its bid at the time of bid opening. *Configuration Inc.*, CAB No. P-0819, 57 D.C. Reg. 687 (Nov. 9, 2009) (bid deviation cannot be corrected after bids have been opened). Indeed, allowing a protester to make a nonresponsive bid responsive after the bids have been opened would essentially permit the submission of a new bid. *Dist. Healthcare and Janitorial Supply Co.*, CAB No. P-317, 40 D.C. Reg. 4704 (Nov. 16, 1992).

Based upon the facts discussed herein, we find that the CO reasonably found MXI's proposal to be nonresponsive to the IFB employee training requirements and properly rejected MXI from receiving the contract award. Accordingly, we deny the protest.

# **SO ORDERED.**

DATED: December 30, 2011

/s/ Monica C. Parchment  
MONICA C. PARCHMENT  
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.  
MARC D. LOUD, SR.  
Chief Administrative Judge

/s/Maxine E. McBean  
MAXINE E. MCBEAN  
Administrative Judge