

BID IS NONRESPONSIVE (NONCONFORMING) WHEN IT ADDS COVID 19 FORCE MAJEURE CLAUSE

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Consider these statements on sealed bidding in the Federal Acquisition Regulation (“FAR”):

[In sealed bidding procurement pursuant to FAR Part 14] After bids are publicly opened, an award will be made with reasonable promptness to that responsible bidder whose bid, conforming to the invitation for bids [“IFB”], will be most advantageous to the Government, considering only price and the price-related factors included in the solicitation.

FAR14.101(e).

Any bid that fails to conform to the essential requirements of the invitation for bid shall be rejected... Any bid shall be rejected when the bidder imposes conditions that would modify requirements of the invitation or limit the bidder’s liability to the Government, since to allow the bidder to impose such conditions would be prejudicial to other bidders [several examples are then given].

FAR 14.404-2(a) & (d).

In *American Mine Servs.*, B-420138, Dec. 3, 2021, the GAO considered an IFB issued by the Corps of Engineers for two new service gates at a dam in New Hampshire. There were four timely bids, including that of American Mine Service (“AMS”). However, AMS included the following statement in the “Clarification and Exceptions” section of its bid:

For purposes of this bid, COVID-19 is considered a Force-Majeure Event along with any other similar disease, epidemic or pandemic event. If any of the aforementioned events occur and affect the project, AMS reserves its rights for additional time.

The Army rejected AMS’s bid as nonresponsive (nonconforming) because the bid failed to conform to the essential requirements of the solicitation. FAR 14-402(d). AMS protested the rejection.

The GAO began its analysis by noting that “a responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. If a bidder, in its bid, attempts to impose conditions that would modify material requirements of the IFB, limit its liability to the government, or limits the rights of the government under any contract clause, then the bid must be rejected.” The GAO found that AMS’s language both imposed conditions and limited the rights under the contract, and was therefore nonresponsive. The IFB included FAR 52.249-10, which was materially modified by AMS’s bid to specifically include “COVID 19, or any similar disease” as a possible cause of excusable delay. Also, AMS’s addition to the contract language would impermissibly make these events per se unforeseeable causes of unforeseeable delay, whereas FAR 52.249-10 leaves that issue to the judgment of the Contracting Officer. This language of AMS’s bid imposed conditions that limited the rights of the government.

The GAO denied AMS's protest.

Takeaway. Sealed bidding is very "formulaic." You can't modify the solicitation to impose conditions or make material changes. The best approach to sealed bidding is to provide only what the solicitation requests (usually prices and perhaps some past performance information). Adding clauses is not advisable because your bid may be deemed nonresponsive (nonconforming).

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