



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Schuster Engineering, Inc.

File: B-275044

Date: January 17, 1997

Alan M. Grayson, Esq., and Victor A. Kubli, Esq., Alan M. Grayson and Associates, for the protester.

Col. Nicholas P. Retson, and Lt. Col. David S. Franke, Department of the Army, for the agency.

Robert Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly rejected protester's low bid for failure to acknowledge an amendment that only relaxed performance requirements.

DECISION

Schuster Engineering, Inc. protests the rejection of its low bid under invitation for bids (IFB) No. DABT23-96-B-0061, issued by the Department of the Army for replacement windows in military housing units at Fort Knox, Kentucky. The protester asserts that the contracting officer improperly rejected Schuster's low bid for failing to acknowledge an immaterial solicitation amendment.

We sustain the protest.

The IFB was issued on August 23, 1996. Section 8A of the specification read in pertinent part:

"Window units shall meet . . . performance requirements as specified in NWWDA I.S.2 [National Wood Window and Door Association Standard I.S.2]. Windows shall be Grade 60."

In response to a September 13 letter from a potential supplier concerning section 8A of the specification, the Army decided that the referenced standard and the associated "Grade 60" were obsolete. As a result, on September 17, the agency issued amendment No. 0002, which is the subject of this protest, amending section 8A as follows:

". . . [a]ll NWWDA references shall be changed to current NWWDA IS2-93 standard with a minimum Grade DP [design pressure] 35."

Five bids were received as of the amended September 27 opening date. Following the rejection of the lowest bid for failure to agree to the IFB's required bid acceptance period, the next two lowest bids were:

Schuster	\$2,473,889
Koch Corporation	\$2,647,496

Schuster's bid did not acknowledge receipt of amendment No. 0002 and, as a result, the bid was rejected and award was made to Koch on September 30. Schuster filed this protest on October 10, within 10 days after award, and contract performance has been stayed pending the issuance of this decision.

Schuster essentially maintains that the amendment which it failed to acknowledge is not material because it constitutes only a relaxation of the original solicitation requirements. Accordingly, Schuster submits that its failure to acknowledge the amendment should have been waived. For the reasons set forth below, we agree.

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 such factors as the price or the quality of the item being acquired; in the alternative, the contracting officer may waive such a minor informality or irregularity. There is no precise rule for determining whether a change in requirements is more than negligible, Innovative Refrigeration Concepts, B-271072, June 12, 1996, 96-1 CPD ¶ 277; rather, that determination is based on the facts of each case. Day and Night Janitorial and Maid and Other Servs., Inc., B-240881, Jan. 2, 1991, 91-1 CPD ¶ 1. The mere fact that requirements have been changed by an amendment does not render the amendment material and does not, therefore, provide a basis for rejecting a bid that does not acknowledge the amendment. See L & R Rail Serv., B-256341, June 10, 1994, 94-1 CPD ¶ 356 (protest sustained where agency did not provide support for its assertion that a change in requirements was material); Titan Mountain States Constr. Corp., B-183680, June 27, 1975, 75-1 CPD ¶ 393. In other words, in cases 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 minimum need of the agency such that its requirements will not be met if the contractor performs to the unamended specifications. See Doty Bros. Equip. Co., B-274634, Dec. 19, 1996, 96-2 CPD ¶ 234 (rejection of an offer for failure to acknowledge an amendment which relaxed a solicitation requirement is improper); accord, Pro Alarm Co., Inc., 69 Comp. Gen. 727 (1990), 90-2 CPD ¶ 242.

Because it did not acknowledge amendment No. 0002, Schuster committed itself to perform in accordance with NWWDA standard I.S.2, i.e., to provide Grade 60 windows under that standard. Had Schuster acknowledged the amendment, like Koch, it would have been obligated to provide, at a minimum, Grade DP 35 windows under NWWDA standard IS2-93. The agency has not argued, and the record contains no evidence, that there is any price differential associated with the switch to the new standard. The sole determinative question¹ presented for our review is whether or not Grade 60 windows under the previous standard meet or exceed the agency's requirements for Grade DP 35 windows.

First, the record shows that the design pressure required under the previous standard for Grade 60 windows was 40 pounds per square foot; as amended, however, the solicitation requires a minimum design pressure of 35 pounds per square foot. Thus, in terms of the most important measure of performance at issue, pressure resistance, it is clear that the unamended version of the solicitation is more stringent in terms of what is required to be provided by a contractor since it calls for a more durable product--that is, one which will resist a greater pressure. Next, the agency's reliance on a manufacturer's product performance data sheet, which shows that other factors, such as structural test pressure, water and air penetration allowance and the operating force that a particular window can withstand are the subjects of the new DP standard, is misplaced; the data sheet shows that for each factor identified by the Army as important to its needs, the Grade 60 window actually is required to meet higher standards than the Grade DP 35 window required by the amended solicitation.

It is clear, therefore, that Schuster was obligated to provide a window which was materially equal to or more durable than that required by the amended solicitation.

¹The agency has suggested that the amendment is material simply because it references a new, updated standard and reports that it has experienced unspecified and undefined problems in the recent past in using the obsolete standard with its reference to Grade 60 windows. Other than positing that the use of the obsolete standard creates some degree of uncertainty as to what type of windows must be provided by a contractor, the agency has not addressed the question of whether the amended solicitation imposes a more stringent standard on the contractor than that imposed by the unamended solicitation. The agency also argues that the materiality of the amendment is supported by the fact that Schuster's bid relied on a quotation from a supplier that took exception to the DP 35 requirement and proposed to furnish DP 30 grade windows; however, Schuster's bid submitted to the Army took no exception to the requirement and, in a sworn statement, Schuster reports that it received quotations from numerous suppliers and, in fact, intends to use a supplier other than the one identified by the agency.

Because the amendment effectively relaxed the agency's requirements in every category of standards identified as important by the agency, it cannot be viewed as material. Doty Bros. Equip. Co., supra. Since the contracting officer did not permit Schuster to cure its failure to acknowledge the amendment or simply waive the failure as required by FAR § 14.405, we sustain the protest.

We recommend that the contract to Koch be terminated and that award be made to Schuster if otherwise appropriate. We further recommend that Schuster be reimbursed for its reasonable costs of filing and pursuing the protest including attorney's fees. Bid Protest Regulations, section 21.8(a)(2), (a)(5), and (d)(1), 61 Fed. Reg. 39039, 39046 (1996) (to be codified at 4 C.F.R. § 21.8(a)(2), (a)(5), and (d)(1)). The protester should submit its certified claim for costs to the contracting agency within 60 days of receiving this decision. Section 21.8(f)(1), 61 Fed. Reg. supra (to be codified at 4 C.F.R. § 21.8(f)(1)).

The protest is sustained.

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