



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Executive Conference Center, Inc. d/b/a Holiday Inn-Atlanta Central

File: B-275882.2

Date: April 10, 1997

Alan Rousseau, Specialized Contract Services, Inc., for the protester.
Phillip E. Johnson, Federal Contract Specialists, Inc., for Ashok Kumar d/b/a Hotel Castlegate Howard Johnson Midtown, an intervenor.
Col. Nicholas P. Retson, Capt. Philip T. McCaffrey, and Timothy G. Goblirsch, Esq., Department of the Army, for the agency.
Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

An amendment to the statement of work in a solicitation which specifies the food transportation equipment the contractor is to use to transport meals to a military entrance processing station is material where it imposes additional obligations on the contractor to protect the food from contamination which were not required in the invitation for bids as issued or already imposed by applicable state and local food safety regulations.

DECISION

Executive Conference Center, Inc. d/b/a Holiday Inn-Atlanta Central protests the Department of the Army's decision to terminate its award of contract No. DABT23-97-D-0016, and the Army's proposed award of the contract to Ashok Kumar d/b/a Hotel Castlegate Howard Johnson Midtown, under invitation for bids (IFB) No. DABT23-97-B-0013 to provide lunch (noon) meals for armed forces applicants at the Military Entrance Processing Station (MEPS) in Atlanta, Georgia.

We sustain the protest.¹

The IFB was issued November 20, 1996, by the Fort Knox Directorate of Contracting. Facsimile bids were not authorized by the IFB. The IFB contemplated the award of a firm, fixed-price requirements contract for a base year (January 1, 1997, through December 31, 1997) and 4 option years.

¹This decision is made under our express option procedures, Bid Protest Regulations, 4 C.F.R. § 21.10 (1997).

The IFB's statement of work (SOW) specified that the contractor shall provide meals consisting of submarine sandwiches with potato chips and a beverage to the MEPS, which has a government-furnished dining and serving area. The SOW specified that the sandwiches could be on either white or whole wheat submarine-style bread, with a choice of sliced ham (baked or boiled), turkey, or roast beef, a choice of sliced swiss, provolone, or american cheese, and served with fresh sliced tomatoes and fresh shredded lettuce. Besides canned soft drinks, the contractor is to provide ice water, iced tea (10 oz. cup), and whole milk (half pint) upon request. The contractor will also provide disposable plates, knives, forks, spoons, cups, etc. with the meals as well as various condiments, including catsup, mustard, mayonnaise, pickles, relish, onions, salt and pepper, and oil and vinegar.

The IFB informed bidders that no food preparation facility was available at the MEPS and that the contractor's food preparation facility must be within 18 miles of the MEPS in order to be considered for award. The bid schedule requested unit and extended prices based on an estimated quantity of 13,450 meals for the base period and each option year, with award to be made based on the aggregate amount. The contractor is to perform the contract in accordance with written delivery orders to be issued by the contracting activity. The IFB scheduled bid opening for 11:00 a.m. on December 20, 1996, and required bidders to return an original signed copy of the completed bid.

On December 10, 1996, the Army issued Amendment 0001, the only amendment to the IFB. The amendment was issued on Standard Form (SF) 30 and a continuation sheet, and indicated that the hour and date specified in the IFB for bid opening had not been extended. The amendment deleted paragraphs of the SOW requiring medical examinations for food handlers and paragraphs relating to the dining and serving areas. The amendment also added the following new paragraphs to the SOW:

"5.1.1.7.5 FOOD TRANSPORTATION EQUIPMENT. In those cases where the contract calls for the preparation of food at the contractor's facility and the serving of food at the MEPS site, the following equipment shall be used when transporting food.

"5.1.1.7.5.1 Insulated and hermetically sealed food containers shall be used to transport hot food items and perishable food items.

"5.1.1.7.5.2 All other food items shall be transported in closed containers to protect food from contamination.

"5.1.1.7.5.3 Enclosed and clean vehicles shall be used for the transportation of food.

"5.1.1.7.5.4 Vehicles used to transport food shall meet all Federal, State and local health, safety, licensing and insurance requirements."

The pre-printed language on the amendment form required that offerors acknowledge receipt of the amendment prior to the hour and date specified in the solicitation by one of the following methods: (a) by completing and signing the form and returning a copy of the amendment; (b) by acknowledging receipt on each copy of the offer submitted; or (c) by separate letter or telegram which includes a reference to the solicitation and amendment numbers. The form warned bidders that "FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER."

On December 17, Howard Johnson's agent asked the contracting officer whether any amendments had been issued and was told that an amendment had been mailed to the firms, including the agent, on the bidders' list. Since Howard Johnson's agent had not yet received the amendment, the agent arranged for overnight delivery of another copy of the amendment which arrived the following day. The agent then transmitted Howard Johnson's acknowledgment of the amendment--a completed and signed copy of the SF 30--by facsimile to the contracting office prior to bid opening. On the facsimile transmission cover sheet to the contracting office, Howard Johnson's agent explained that the acknowledgment was being transmitted by facsimile because Howard Johnson's bid had already been mailed and the amendment "may be a material modification."

At the December 20 bid opening, Howard Johnson was the low bidder at \$356,425 (\$71,285 per year based on \$5.30 per meal). The bid opening officer noted on the abstract of offers that Howard Johnson had acknowledged the amendment by facsimile. Holiday Inn was the second low bidder at \$359,787.50 (\$71,957.50 per year based on \$5.35 per meal), and had acknowledged the amendment by returning a completed and signed original copy of the amendment with its bid. Both Howard Johnson and Holiday Inn indicated in their bids that their respective food preparation facilities were located within 18 miles of the MEPS, as required.

Because Howard Johnson had acknowledged the amendment via facsimile transmission, which was not an authorized means of acknowledgment under the IFB, the contracting officer concluded that the facsimile transmission did not constitute acknowledgment of the amendment. The contracting officer rejected Howard Johnson's bid as nonresponsive on December 31, and made award to Holiday Inn. Howard Johnson protested to our Office on January 3, 1997, contending that the amendment was not material since it did not have an impact on

the bidders' prices and, even if the amendment was material, its acknowledgment of the amendment by facsimile transmission was proper under the circumstances.²

In considering Howard Johnson's protest, the contracting officer concluded that the amendment was not material. First, the contracting officer noted that the amendment relaxed the SOW requirement for medical examinations for food handlers and deleted certain SOW paragraphs relating to the dining and serving areas as irrelevant because the government is furnishing the dining facility and the contractor is merely providing submarine sandwiches, chips, and beverages, as described above.

Regarding paragraph 5.1.1.7.5.1 added by the amendment, which requires that insulated and hermetically sealed food containers be used to transport hot food items and perishable food items, the contracting officer discovered, after Howard Johnson's protest was filed, that the applicable state and local food safety regulations, Ga. Comp. R. & Regs. r. 290-5-14-.03(1)(c) (1996); Fulton County Code § 30-2-2-5(1)(A) (1991), prohibit the use of food in hermetically sealed containers³ that were not prepared in a food processing establishment.⁴ The contracting officer thus viewed the specification requirement as unenforceable and determined that the other requirements of the paragraph 5.1.1.7.5.1 were not material because the SOW does not call for the serving of hot foods, and because the contractor is already

²Howard Johnson argues that it properly acknowledged Amendment 0001 by facsimile because it essentially complied with the pre-printed acknowledgment instructions on the SF 30 by completing and signing the form and "returning" a copy of the amendment before the hour and date specified for bid opening. However, we have consistently recognized that where, as here, the IFB did not authorize the submission of facsimile bids or the acknowledgement of amendments by facsimile, a facsimile transmission does not constitute acknowledgment of the amendment. The Hackney Group, B-261241, Sept. 5, 1995, 95-2 CPD ¶ 100 at 4; Recreonics Corp., B-246339, Mar. 2, 1992, 92-1 CPD ¶ 249 at 3, recon. denied, B-246339.2, July 15, 1992, 92-2 CPD ¶ 23.

³The state regulation defines a "Hermetically Sealed Container" as "a container designed and intended to be secure against the entry of microorganisms and to maintain the commercial sterility of its content after processing." Ga. Comp. R. & Regs. r. 290-5-14-.01(o) (1996).

⁴It does not appear that either bidder qualifies as a "Food-Processing Establishment," which is defined as "a commercial establishment in which food is manufactured or packaged for human consumption," but are rather considered "Food Service Establishments," which prepare and serve meals, including sandwiches. Ga. Comp. R. & Regs. r. 290-5-14-.01(l) and (m) (1996).

required by the state and local food safety regulations to ensure the safety of perishable food items.

The contracting officer also determined that the requirements of paragraph 5.1.1.7.5.2, that all other food items be transported in closed containers to protect food from contamination, and paragraph 5.1.1.7.5.3, that enclosed and clean vehicles be used for the transportation of food, were not material because the contractor is obligated by the state and local food safety regulations to protect food from contamination and spoilage during transportation, such as by wrapping or packaging the food, and thus these paragraphs added by the amendment do not impose any additional obligation on the contractor.

Since the contracting officer determined that the amendment was not material, the contracting officer decided to waive Howard Johnson's failure to properly acknowledge the amendment as a minor informality pursuant to Federal Acquisition Regulation (FAR) § 14.405(d)(2), which provides that a bidder's failure to acknowledge receipt of an amendment to an invitation for bids shall be waived if the amendment involves only a matter of form or has either no effect or merely a negligible effect on price, quantity, quality, or delivery of the item bid upon.

On February 3, the contracting officer informed Howard Johnson's agent that it would "set aside" the award of the contract to Holiday Inn effective February 9 and award the contract to Howard Johnson effective February 10. As a result, on February 4, Howard Johnson withdrew its protest.

On February 6, Holiday Inn filed its protest in our Office, contending that because the IFB did not permit acknowledgment of the amendment by facsimile and because the amendment was material, Howard Johnson's bid was properly rejected in the first place and the contract award should be reinstated to Holiday Inn.

A bid which does not include an acknowledgment of a material amendment to an IFB must be rejected as nonresponsive because, absent such an acknowledgment, the bid does not obligate the bidder to comply with the terms of the amendment. Eagle Constr. Servs., Inc., B-257841, Nov. 10, 1994, 94-2 CPD ¶ 181 at 2-3. An amendment is material where it imposes legal obligations on a prospective bidder that were not contained in the original solicitation, G. R. Sponaugle & Sons, Inc., B-257784, Nov. 7, 1994, 94-2 CPD ¶ 178 at 2, or if it would have more than a negligible impact on price, quantity, quality, or delivery of the item bid upon, or the relative standing of the bidders. See FAR § 14.405(d)(2); L & R Rail Serv., B-256341, June 10, 1994, 94-1 CPD ¶ 356 at 4. A bidder's failure to acknowledge receipt of an amendment that is material is not waivable as a minor informality. Specialty Contractors, Inc., B-258451, Jan. 24, 1995, 95-1 CPD ¶ 38 at 2. No precise rule exists to determine whether a change required by an amendment is more than

negligible; rather, that determination is based on the facts of each case. Coopers Constr., Inc., B-260364; B-260364.2, May 30, 1995, 95-1 CPD ¶ 268 at 3.

We think the amendment is material because it imposed new obligations on the contractor that did not exist in the IFB as issued, such as transporting the food in closed containers, as required by paragraph 5.1.1.7.5.2 of the amendment, and in an enclosed vehicle, as required by paragraph 5.1.1.7.5.3. While, as asserted by the Army, the contractor is obligated by the state and local food safety regulations to protect transported food from contamination, the contractor is not already so obligated by the state and local food safety regulations to transport food items in closed containers. Rather, the state and local regulations permit the contractor to instead completely wrap or package food that is being transported as an alternative to using covered containers. Ga. Comp. R. & Regs. r. 290-5-14-.03(6)(a) (1996); Fulton County Code § 30-2-2-5(3)(N) (1991).⁵ Further, the Army has not pointed to any applicable law or regulation that already obligates a contractor that is a "Food Service Establishment" to transport the food in an enclosed vehicle. As these additional obligations were of obvious importance to the Army at the time the amendment was issued in establishing what the Army thought should be the minimum standards for food transportation and the acceptable methods of such transportation by the contractor, standards that are stricter than the contractor was already obligated to provide to protect the food from contamination, the amendment was material.⁶ See Anacomp, Inc., B-256788, July 27, 1994, 94-2 CPD ¶ 44 at 3.

Since Howard Johnson did not acknowledge the amendment, Howard Johnson's bid does not represent a clear commitment by that firm to transport food items in accordance with the material SOW requirements added by the amendment, and, accordingly, the Army should not have waived Howard Johnson's failure to acknowledge the amendment as a minor informality but should have rejected the firm's bid as nonresponsive.

⁵The state regulation provides that "[d]uring transportation, food and food utensils shall be kept in covered containers or completely wrapped or packaged so as to be protected from contamination and spoilage." (Emphasis added.) The local regulation uses almost identical language.

⁶For example, without acknowledging the amendment and thus being obligated to transport the food in closed containers and in an enclosed and clean vehicle, the contractor could instead load wrapped or packaged food in the open back of a pick-up truck for transportation to the MEPS. It is apparent that the requirements added to the SOW by the amendment specifying closed containers and enclosed vehicles could have had a more than negligible impact on price under this very close price competition.

Ordinarily, we would recommend that award be made to Holiday Inn as the low responsive bidder. However, it appears from the Army's eventual acceptance of Howard Johnson's bid that the additional obligations imposed by the amendment may overstate the needs of the government, and that the contractor's compliance with existing state and local food safety regulations may be sufficient for meeting the agency's needs. In addition, it is also apparent that the IFB, as amended by the addition of paragraph 5.1.1.7.5.1, is defective in requiring the contractor to use hermetically sealed containers which the contractor is prohibited from doing by state and local food safety regulations.⁷

Accordingly, we recommend that the Army cancel the IFB and resolicit on the basis of a statement of work which accurately reflects the Army's needs. Bid Protest Regulations, 4 C.F.R. § 21.8(a); see West Alabama Remodeling, Inc., B-220574, Dec. 26, 1985, 85-2 CPD ¶ 718 at 2-3, aff'd B-220574.2, Feb. 7, 1986, 86-1 CPD ¶ 141 at 2. We also recommend that Holiday Inn be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). Holiday Inn's claim for such costs, detailing the time expended and costs incurred, should be submitted directly to the agency within 60 days after receipt of this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
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⁷Holiday Inn states that it "bought insulated, and hermetically sealed food containers, sleeved containers, and other equipment in order to be in compliance with the requirements of the amendment."