



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Christolow Fire Protection Systems

File: B-286585

Date: January 12, 2001

Christos Christolow for the protester.

Wilson J. Campbell, Esq., Department of the Navy, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Amendment to an invitation for bids for the inspection, maintenance and repair of fire protection systems was material, and a bid which failed to acknowledge the amendment was properly rejected as nonresponsive, where the amendment revised inaccurate information set forth in the bid schedule regarding the number and types of, and response times applicable to, service calls to be performed under the contract.

DECISION

Christolow Fire Protection Systems protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. N62472-00-B-4741, issued by the Department of the Navy, for the inspection, maintenance and repair of certain fire protection systems at the Naval Air Station, Brunswick, Maine.

We deny the protest.

The IFB, issued on August 14, 2000, contemplated the award of a fixed-price contract for a base period of 1 year with four 1-year options. The contractor will be required to provide all labor, materials, and equipment necessary to provide inspection, maintenance, repair, and alteration services for the Naval Air Station's fire protection systems, which include automatic sprinkler systems, as well as foam, gaseous, and dry and wet extinguishing systems.

The bid schedule set forth contract line items for the base and each option year of the contract. Contract line item numbers (CLIN) 0001 (base period), 0003 (first option), 0005 (second option), 0007 (third option), and 0009 (fourth option)

were each comprised of 19 sub-CLINs, with each sub-CLIN setting forth a definite quantity of work to be performed.¹ For example, sub-CLIN 0001AA was for quarterly maintenance on 280 automatic sprinkler systems during the base period. The solicitation also included “Fixed Price Service Call Work” as definite quantity sub-CLINs, listing emergency, urgent, and routine service call work as three separate sub-CLINs, each with an estimated quantity of 10. According to the schedule, emergency calls required a 4-hour response, urgent calls required a 24-hour response and routine calls required a 14-day response. The IFB explained with regard to this work as follows:

Performance of quality and thorough preventative maintenance on all equipment and quality and thorough service calls will significantly reduce the estimated quantity of work. Less than quality and thorough service call work will likely result in the stated estimated quantity being low and the Contractor having to respond to more service calls than estimated. . . . Since the cost of service call work is included in the firm fixed price portion of the contract, the total price (extended amount) bid for all service call work is not subject to change regardless of the actual number of service calls performed for the duration of the contract.

IFB at C-21. The IFB included a description of “service call classifications,” which essentially set forth criteria for determining whether a particular service call would be considered either an “emergency call” or “routine call.” *Id.* at C-23. According to these provisions, emergency calls required a 4-hour response and routine calls required a 7-day response (in contrast to the 14-day response required by the schedule). The IFB did not contain any criteria for determining whether a service call would be classified as “urgent,” or mention urgent service calls at all, with the exception of the sub-CLINs discussed previously pertaining to urgent service calls.

On August 29, the agency issued amendment No. 0001 to the solicitation. This amendment provided replacements for the pages of the bid schedule on which CLINs 0001, 0003, 0005, 0007, and 0009 were set forth. In this regard, the amendment revised the sub-CLINs pertaining to service calls by deleting the sub-CLIN for “urgent” service calls, increasing the quantity of emergency and routine service calls from 10 each to 24 each, stating in the schedule that routine calls required a 7-day response, and noting on the schedule that “[a]ctual service call count is not used in determining the payment to the contractor.” This amendment also added to the list

¹ CLINs 0002 (base period), 0004 (first option), 0006 (second option), 0008 (third option), and 0010 (fourth option) were included as “indefinite quantity work,” and each was comprised of six sub-CLINs that set forth an estimated quantity of work to be performed. Because the fixed-price, indefinite-quantity portion of the solicitation is not relevant to the resolution of this protest, it will not be discussed further.

of equipment to be serviced a wet chemical extinguishing system located in another building at the Naval Air Station. On September 8, the agency issued amendment No. 0002 to the solicitation.

The agency received four bids by the September 19 bid opening date, with the protester submitting the apparent low bid of \$643,362 and Southern Maine Sprinkler submitting the next low bid of \$838,400. Agency Report, Tab 4, Abstract of Bids. The contracting officer noted on the abstract of bids that the protester had not acknowledged amendment No. 0001. Id. In reviewing the bids submitted, the contracting officer found that the protester had used the bid schedule that had been included in the solicitation as initially issued, rather than the bid schedule as revised by amendment No. 0001. The contracting officer concluded that, because amendment No. 0001 increased the scope of work by adding the wet chemical system in another building, and increased the estimated number of emergency and routine service calls from 10 each to 24 each, the amendment was material. Agency Report, Tab 6, Determinations and Findings Regarding Rejection of Bid Due to Failure to Acknowledge Amendment 0001 to IFB. Accordingly, the agency rejected the protester's bid as nonresponsive. This protest followed.

Generally, a bid that does not include an acknowledgment of a material amendment must be rejected, because absent such acknowledgment, acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Dyna Constr., Inc., B-275047, Jan. 21, 1997, 97-1 CPD ¶ 31 at 3. An amendment is material where it imposes legal obligations on the prospective bidder that were not contained in the original solicitation, or would have more than a negligible impact on price, quantity, quality, or delivery. Federal Acquisition Regulation §14.405(d); Overstreet Elec. Co., Inc., B-283830; B-283830.2, Dec. 30, 1999, 2000 CPD ¶ 8 at 7. No precise rule exists to determine whether an amendment is material; rather, that determination is based on the facts of each case. Dyna Constr., Inc., supra.

Here, the estimates for the service calls that were included in the bid schedule as initially issued understated the number of emergency and routine service calls required of the successful contractor by 14 each, or more than half. The initial schedule also included a classification of service calls—urgent—that was not defined or mentioned elsewhere in the solicitation. Also, the initial schedule conflicted with the IFB's specifications in that it provided for routine service calls to be performed within 14 days, rather than 7 days. In sum, the schedule provided inaccurate information regarding the number and types of service calls to be performed under the contract and the response time to routine service calls.

This information was especially important given the solicitation terms providing that the contractor would be paid for the number of service calls set forth in the schedule at the price bid, regardless of how many service calls the contractor actually performed. In the absence of amendment No. 0001, the winning contractor ultimately could have argued that it was entitled to a price increase because the

number and types of service calls set forth on the schedule were inaccurate and understated the estimated number of emergency, routine, and total service calls to be performed, or could have argued that it had 14 days to respond to routine service calls. See The Hackney Group, B-261241, Sept. 5, 1995, 95-2 CPD ¶ 100 at 5. A procuring agency is not required to enter into a contract which presents the potential for litigation stemming from an ambiguity or inaccuracy in the solicitation. Rather, an agency has an affirmative obligation to avoid potential litigation by resolving solicitation ambiguities or inaccuracies prior to bid opening. Amendments clarifying matters that could otherwise engender disputes during contract performance are generally material and must be acknowledged. Id. Accordingly, the agency acted properly in rejecting the protester's bid as nonresponsive because it failed to acknowledge amendment No. 0001 and was prepared using the initial bid schedule, rather than the amended bid schedule included in amendment No. 0001, that set forth accurate information regarding the number and types of, and response times for, the service calls to be performed.

The protester argues that it was improper for the agency to reject its bid as nonresponsive for failure to acknowledge amendment No. 0001 because, according to the protester, the bid package its representative obtained from the Navy failed to include the amendment. Protest at 1.

It is a contracting agency's affirmative obligation to use reasonable methods in disseminating solicitation documents to prospective competitors. However, a prospective bidder or offeror bears the risk of not receiving a solicitation amendment unless it is shown that the contracting agency made a deliberate attempt to exclude the firm from competing, or that the agency failed to furnish the amendment inadvertently after the firm availed itself of every reasonable opportunity to obtain the amendment. Sentinel Sec. & Patrol Servs., B-261018, Aug. 9, 1995, 95-2 CPD ¶ 67 at 3.

The protester knew or should have known that the bid package it obtained, which included the IFB and amendment No. 0002, was incomplete in that it did not include an amendment No. 0001. Under the circumstances, the protester, when confronted with a bid package that obviously was missing amendment No. 0001, had an obligation to contact the agency and obtain the missing amendment. Accordingly, because the protester did not avail itself of every reasonable opportunity to obtain the amendment, this aspect of the protest is denied.

The protester requests that it be allowed to now acknowledge amendment No. 0001. However, a bidder may not properly acknowledge an amendment after bid opening because this would allow the firm to decide after bid opening whether or not to render itself ineligible for award. Precise Constr. Management, B-277872, Dec. 4, 1997, 97-2 CPD ¶ 156 at 2.

Finally, the protester questions the awardee's responsibility. Our Office will not review an agency's affirmative determination of responsibility absent a showing of

fraud, bad faith, or misapplication of definitive responsibility criteria. 4 C.F.R. § 21.5(c); Valley Forge Flag Co., Inc., B-283130, Sept. 22, 1999, 99-2 CPD ¶ 54 at 4 n.4. Definitive responsibility criteria are not in issue, and the protester has not claimed, nor does the record suggest, that the contracting officer's determination that the Southern Maine Sprinkler was responsible was motivated by fraud or bad faith.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel