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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Lumus Construction, Inc.

File: B-287480

Date: June 25, 2001

Lewis R. Lear, Esq., City, Hayes, Meagher & Dissette, for the protester.
Wilson J. Campbell, Esq., Naval Facilities Engineering Command, for the agency.
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Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of award on basis that awardee failed to acknowledge solicitation amendment is denied where amendment provisions cited by protester merely clarified existing solicitation terms, and where any price difference attributable to those provisions is negligible; failure to acknowledge an amendment that is not material may be waived as a minor informality.

DECISION

Lumus Construction, Inc. protests the award of a contract to S&S Mechanical Contractors under invitation for bids (IFB) No. N62472-00-B-7515, issued by the Department of the Navy for the replacement of a heating system at Portsmouth Naval Shipyard in Kittery, Maine. The protester contends that S&S's bid should have been rejected as nonresponsive because S&S failed to acknowledge an amendment to the solicitation.

We deny the protest.

The IFB, issued on August 22, 2000, was amended twice. Amendment No. 1 provided answers to bidders' questions and extended the bid opening date; amendment No. 2 further extended the opening date.

Five bids were received at bid opening on October 12. S&S submitted the low bid of \$269,500; Lumus's bid of \$308,500 was second low. The S&S bid failed to acknowledge amendment No. 1. The agency determined that amendment No. 1 was not material and that S&S's failure to acknowledge it thus could be waived as a

minor informality. On March 16, 2001, the agency awarded a contract under the IFB to S&S. This protest followed.

Lumus generally contends that, since amendment No. 1 provided information that could affect a bidder's price, it is material, so that the awardee's failure to acknowledge the amendment cannot be waived. Specifically, the protester identifies two questions and answers (Q&A), Nos. 2 and 7, that were included in amendment No. 1 and which Lumus contends would have an effect on bid pricing. The first one cited by Lumus, Q&A No. 2, refers to a bidder's question about the meaning of a symbol (a small square with the letter P inside it) appearing on a schematic drawing included in the IFB; the agency responded that the symbol depicted a differential pressure switch. Amend. No. 1 at 2. The next Q&A cited by the protester, No. 7, relates to a bidder's inquiry as to the required distance of certain trench piping re-routing requirements; the agency responded that it was approximately 75 feet. Id.

The protester argues that, because the agency's response in Q&A No. 2 calls for use of a differential pressure switch, which Lumus contends is a more expensive piece of equipment than a pressure gauge (elsewhere depicted on the same drawing by another engineering symbol, a small circle with the letter P inside it), the agency's response necessarily affects bid pricing and is thus material. Lumus argues that bid pricing is similarly affected by the agency response in Q&A No. 7, since the bidder will need to provide approximately 75 feet of piping.

A bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive, since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Federal Constr., Inc., B-279638, B-279638.2, July 2, 1998, 98-2 CPD ¶ 5 at 2. A bidder's failure to acknowledge an amendment that is not material, however, may be waived as a minor informality. Federal Acquisition Regulation (FAR) § 14.405.¹ An amendment is not material if it would have only a negligible effect on the price, quantity, quality, or delivery of the item bid upon. FAR § 14.405(d)(2). Further, an amendment is also not material where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation; that is, where an amendment merely clarifies an existing requirement or

¹Lumus argues that, because the FAR contemplates issuance of an amendment only when the agency has "material reasons" for doing so, Comments at 3, the fact that the agency issued the amendment here necessarily means that the amendment is material. This argument is without merit. As noted above, the FAR explicitly provides that a bidder's failure to acknowledge an amendment may be waived where 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." FAR § 14.405(d)(2). Thus the FAR recognizes that not all amendments are per se material simply by virtue of their issuance.

is a matter of form, the failure to acknowledge the amendment should be waived and the bid should be accepted. Stanger Indus., Inc., B-279380, June 4, 1998, 98-1 CPD ¶ 157 at 3; Kalex Constr. & Dev., Inc., B-278076.2, Jan. 20, 1998, 98-1 CPD ¶ 25 at 2.

Our review of the record does not support the protester's position that amendment No. 1's incorporation of Q&A Nos. 2 and 7 rendered that amendment material. Since the bidder was already obligated to provide the required heating system in accordance with the IFB's drawings, which drawings were merely clarified by the terms of Q&A Nos. 2 and 7 in amendment No. 1, we cannot find, as the protester suggests, that the challenged amendment terms impose any additional legal obligations on the bidder. As to IFB drawing No. M-9, referenced in Q&A No. 2, the agency reports, and the protester does not refute, that the questioned symbol—i.e., the letter P in a small square—is customarily recognized in the construction industry as depicting a differential pressure switch; the amendment identifying it as such therefore only clarified an existing requirement.² Likewise, as to the questioned notation in drawing No. M-9, referenced in Q&A No. 7, the agency points out that drawing No. M-5, which also depicts the required trench piping work, was drawn to scale to show the required footage of that piping (approximately 75 feet).

Furthermore, even if the information in Q&A Nos. 2 and 7 introduced new obligations under the resulting contract, the record clearly shows, and the protester does not refute, that such items would have, at most, a negligible effect on the bidder's overall price. For example, the two differential pressure switches (at approximately \$422 each) and 75 feet of piping (at approximately \$16 per foot), would constitute only a de minimis amount (less than 1 percent) of the S&S bid price of \$269,500. Agency Report at 4-5. Accordingly, since the record does not support

² Lumus's contention that a differential pressure switch is more expensive than another item also depicted on the drawing, a pressure gauge, is simply not on point. As the agency points out, the drawing called for use of both items; there is nothing in the IFB to indicate, as Lumus appears to suggest, that bidders were to substitute the differential pressure switch for the pressure gauge. Moreover, as discussed below, the relatively modest cost of the differential pressure switch would have a negligible effect on price in any event.

the protester's position that amendment No. 1 contained material terms, we have no basis to question the agency's waiver of the awardee's failure to acknowledge that amendment.³

The protest is denied.

Anthony H. Gamboa
General Counsel

³In its comments responding to the agency report, Lumus, for the first time, cites additional Q&As in amendment No. 1 that it believes are material terms that allegedly affect the price, quantity, and quality of the work bid upon. These new contentions could have been raised at the time of Lumus's initial protest submission, but were not. Accordingly, the allegations raised for the first time in its report comments are untimely and will not be considered. Bid Protest Procedures, 4 C.F.R. § 21.2(a)(2) (2001). We note that, in any event, Lumus provides no specific support for its contention that the additional terms are material, other than the conclusory statement that they "are all material issues affecting quantity, quality and price." Comments at 2.