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P.L. #2

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-190975

DATE: May 2, 1978

MATTER OF: Industrial Maintenance Services, Inc.

DIGEST:

Failure of bidder to timely acknowledge receipt of IFB amendment which merely clarified, but did not alter work requirements set out in solicitation, may be waived as minor informality, since bidder, upon acceptance of bid, would be legally bound to perform all work specified by solicitation notwithstanding failure to acknowledge amendment.

Industrial Maintenance Services, Inc. (Industrial) protests the prospective award of a contract to Chavez Food Service, Inc. (Chavez) under invitation for bids (IFB) F08637-78-B-0004, issued by Tyndall Air Force Base, Florida to provide food attendant services at the base.

Chavez was the fifth low bidder and Industrial the seventh low bidder. The bids of the first through fourth low bidders, as well as that of the sixth low bidder, were disqualified for various reasons, leaving Chavez and Industrial as the low and second low eligible bidders, respectively.

Industrial contends that Chavez' bid must be rejected as nonresponsive for its failure to acknowledge, prior to bid opening, the sixth and seventh amendments to the IFB (P006 and P007). (The Chavez bid had been submitted prior to issuance of the amendments; Chavez, upon receipt of the amendments, sent an acknowledgment of them by mail, which was received by the procuring activity the day after bid opening.)

Amendment P006 merely stated that bid opening date was extended indefinitely.

Amendment P007, the major source of contention, stated:

"a) Reference Description/Specifications Paragraph IIE entitled Work Force. Bidders are cautioned that minimum manning called for by this paragraph is not all inclusive. Many cleaning and other tasks called for in the specifications will have to be performed, which was not taken into consideration for minimum manning. The exact amount of labor required is the prerogative of the contractor. While the exact amount of labor necessary is a decision for the bidder to make, each bidder should include an allowance for the area in his bid.

"b) Bid Opening Date is established at 78 Jan. 12 at 3:00 P.M. Prevailing Local Time."

The contracting officer has determined the failure of Chavez to timely acknowledge the two amendments to be a minor informality that may be waived in accordance with Armed Services Procurement Regulation (ASPR) § 2-405(iv)(B) (1976 ed.) which permits waiver where:

"the amendment clearly would have no effect or merely a trivial or negligible effect on price, quality, quantity, delivery, or the relative standing of bidders * * *"

With respect to Amendment P006, we have expressly held that a bidder's failure to acknowledge receipt of an amendment which merely postpones bid opening date indefinitely is waivable as a minor informality under ASPR § 2-405 (iv)(B). Artisan, Inc., B-186601, August 6, 1976, 76-2 CPD 132.

With regard to Amendment P007, the contracting agency takes the position that the amendment is

immaterial in its effect, and that it was issued only to clarify "the original specifications and Amendment #5" in response to a protest received from Industrial. The contracting agency maintains that:

"* * * Amendment number seven was issued in response to a request for clarification from the protester. (That fact alone does not give substance to the amendment as the protester argues.) The amendment does not change the amount of required manning, the hours to be manned or the tasks to be performed. The amendment merely reiterates in different language the warning found in the previous amendments and the IFB that the manning requirements do not diminish the contractor's obligation to furnish whatever labor is needed to perform all requirements of the contract. It points out that there are other tasks in the requirements that were not included in the minimum manning requirement. However, no new or additional tasks were added by the amendment. A comparison of the tasks specified in the manning requirements portion of the specifications (Section IIB) with the sections of the specifications which describe cleaning requirements and other requirements clearly indicates that certain tasks were not included in the minimum manning requirements. Amendment seven merely restated requirements found in the IFB and prior amendments. An amendment which merely reiterates instructions already included in the IFB and imposes no additional obligations on the bidders does not materially affect price, quality, quantity or delivery."

Industrial contends that the amendment must be considered material because, in its absence, the specifications of the IFB were misleading in that they set forth minimum manhour requirements but did not clearly indicate that the minimums covered only a portion of the work, i.e.-serving food, and not other additional contractor responsibilities such as post-meal clean-up and set-up before meals. Therefore, it is argued, without the amendment the IFB was defective and at variance with applicable procurement statutes, regulations, judicial precedents and prior decisions of this Office holding in general that specifications must be drawn clearly and precisely to permit the submission and evaluation of bids on a common basis. In support of its position, Industrial cites Industrial Maintenance Services, Inc., et al., B-189303, B-189425, December 15, 1977, 77-2 CPD 466 as involving "precisely the situation in the instant case."

The next argument advanced is that the failure to acknowledge the amendment gives Chavez an option, after bid opening, to accept or refuse the award. It is claimed that Chavez, as awardee, would be bound to perform the contract only according to the terms of the IFB as modified through the first five amendments but could not be legally bound to perform the additional cleaning and other work requirements which Industrial alleges were added by P007. In this regard, Industrial claims that Chavez was misled by the minimum manning requirements of the IFB as amended prior to P007, and that Chavez's bid could not have contemplated the provision of personnel in excess of those stated as minimums by the IFB prior to issuance of amendment P007.

Section F of the original specifications set out with great specificity, over more than 40 pages, the various responsibilities which the contractor was to assume. In addition to the processing and serving of food at specified times, the contractor was required to perform a myriad of general house-keeping duties such as post-meal clean-ups, wall

and ceiling cleaning, vacuuming and spot cleaning of carpets, cleaning planer boxes, windows, fans, holiday decorations, maintenance of ice machines, replacement of burnt out lamp bulbs, snow and ice removal, grass cutting, watering of shrubs, and countless other such tasks. A required minimum manning schedule was set out specifying the minimum number of personnel, and hours that would be required for various classified positions. At the bottom of the manning schedule was the admonition:

"The above required minimum manning does not in any way minimize the contractor's obligation to use as many employees as are necessary for proper contract performance."

Amendments P001, P003, and P005, advised of anticipated increased feeding requirements and set out adjusted minimum manning requirements to reflect the anticipated increases. Each of these three amendments carried the foregoing admonition that the required minimum manning did not minimize the contractor's obligation to use as many employees as were necessary for proper contract performance. Amendments P003 and P005 further stated that "[r]minimum manning pertains to minimum number of personnel required at times cited."

As amended by Amendment P005, the IFB set forth minimum manning by position, hours, and number required. For example, for the weekday breakfast meal, the specifications identified 0500-0730 as the hours for serving the meal and set forth the following minimum manning requirements:

<u>Position</u>	<u>Hours</u>	<u>Number Required</u>
Cashier	0500-0730	1
Mess Attendant (Setup line/servers)	0430-0745	2
Mess Attendant (Servers/Setup line)	0500-0745	2
Mess Attendant (Table bussers/Line backers)	0500-0730	5
Mess Attendant (Dishwasher)	0500-0800	1
Mess Attendant (Dishwasher)	0530-0800	1
Mess Attendant (Pots & Pans/Outside)	0700-0930	1
Mess Attendant (Pots & Pans/Outside)	0700-1030	1

There were similar listings for lunch, dinner, and a midnight meal.

We think it should have been obvious from a fair reading of the IFB that the minimum manning schedule was not and could not be all inclusive. For example, the specifications require dining room clean-up to be completed within two hours after weekday serving lines are closed and within an hour and a half after weekend and holiday serving lines are closed, but do not permit final cleaning until all patrons have departed the dining area, which obviously may be some time after the close of the serving lines. The manning schedule, however, does not specify mess attendant personnel for clean-up duties for the designated clean-up period although, as indicated above, there is a multitude of cleaning tasks required, to be accomplished either on a daily basis or after each meal. Thus, and especially in view of the statement following the minimum manning schedule, we think potential bidders were on notice that the contractor was required to perform certain tasks and that the minimum manning levels set forth in the IFB were not based on all of those tasks.

Accordingly, we agree with the contracting officer that neither the minimum manning nor other requirements theretofore specified by the IFB were increased by Amendment P007, and that P007 merely clarified what was already set out in the solicitation.

In this regard, we have held that while a bidder's failure to acknowledge a material amendment renders its bid nonresponsive, where the amendment does no more than reiterate what is already in the IFB, so that a bidder is bound to all material requirements without regard to the amendment, the bidder's failure to acknowledge such an amendment does not require rejection of the bid. Dependable Janitorial Service and Supply Company, B-188812, July 13, 1977, 77-2 CPD 20. see 51 Comp. Gen. 293 (1971); Genest Baking, Inc., B-180999, July 12, 1974, 74-2 CPD 25. Consequently, since we find that Amendment P007 added nothing to what the IFB already required of the successful bidder, we believe Chavez was legally bound to comply with all the specifications of the solicitation and therefore its failure to acknowledge Amendment P007 in a timely manner properly was waived by the contracting officer.

We do not regard this conclusion as inconsistent with the decision in Industrial Maintenance Services, Inc., et al., supra. In that case, the IFB set forth minimum manning requirements for certain buildings for each of three shifts. However, the IFB listed the required hours for each shift only for one building, and we regarded the solicitation as ambiguous because it was not clear if those shift hours were intended to apply to the other buildings. In this case, however, we see no ambiguity concerning the legal obligations that would result from the specifications. Tasks were spelled out, only a minimum manning level was specified, and bidders were warned that the contractor could not rely on the minimum manning chart, but had to use as many employees as necessary to properly perform all aspects of the contract.

To the extent that Industrial contends that Chavez' bid contained a mistake because it could not have contemplated the provision of personnel in excess of the specified minimums, we note that Chavez has confirmed its bid price and that it has been determined that Chavez can perform at its offered price, with the consequence that award of a legal and binding contract to that bidder may be made.

The protest is denied.

Deputy

R. F. Koffman
Comptroller General
of the United States