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DECISION

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

19798

FILE: B-203324 DATE: October 19, 1981

MATTER OF: Versailles Maintenance Contractors, Inc.

DIGEST:

1. Bidder bears risk of nonreceipt of amendments which are timely mailed. Procuring activity is not an insurer of bidding documents to prospective bidders.

2. If bidder does not receive and acknowledge a material amendment to IFB and such failure is not result of conscious and deliberate effort to exclude bidder from participating in competition, bid must be rejected as nonresponsive.

3. Amendment to IFB for building maintenance services adding snow removal tasks is material because it imposes additional work requirements and thereby changes legal relationship between the parties.

Versailles Maintenance Contractors, Inc. (Versailles) protests the rejection of its bid submitted in response to invitation for bids (IFB) GS-03-81-B-0040, issued by the General Services Administration (GSA), Region 3, Philadelphia, Pennsylvania for the provision of custodial services at the Internal Revenue Service Payment Center, Philadelphia, Pennsylvania. Versailles' bid was rejected as nonresponsive because the firm failed to acknowledge receipt of an amendment which added certain snow removal tasks to the contractor's responsibilities. For the reasons stated below, we conclude that GSA properly rejected the bid and the protest is denied.

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At the outset, we believe we should address the protester's contention that the GSA has "blatantly" misled our Office as to the facts of the case in that, according to the protester, the snow removal tasks were part of the solicitation prior to any amendment. In support of this contention, the protester has supplied us with a piece of paper on which the snow removal clause appears, which document, it says, was copied from the solicitation. The protester suggests that since snow removal was already included in the original solicitation, its failure to acknowledge the amendment could be waived as immaterial.

We believe this contention by the protester rests upon a misunderstanding of the record. The solicitation, as originally issued on March 12, 1981, provided in Part 6, paragraph 1.C. that "in case snow and ice removal is required" or some other emergency condition exists, "the contractor shall divert his force * * * from their normal assigned duties to meet the condition." After the employees were "no longer needed for special work" they were to return to their normal duties and the contractor was not to be penalized for neglecting the normal daily work which otherwise would have been performed. As can be seen, this provision left unanswered several questions, such as what would constitute "meeting the condition"; what methods of snow removal would be acceptable; and who would be responsible for furnishing the necessary tools and supplies.

A pre-bid conference was held on March 26 at which, GSA states, the question of snow removal was discussed. Several days later, on March 31, GSA's building manager sent a memorandum to the contracting office in which he recommended several changes to the solicitation as a result of the pre-bid conference. Among the recommendations was the addition of a snow removal clause which was typed on a sheet of paper attached to the memorandum. It is this sheet of paper which the protester identifies as part of the original solicitation. On the same day, the contracting officer issued an amendment to the solicitation which, among other things, added to the solicitation the snow removal clause recommended by the building manager. This clause required the contractor to establish

a snow and ice removal plan satisfactory to the building manager; to remove, during weekdays, snow and ice from the approaches to the building before its occupants reported for work; to remove snow and ice on weekends and holidays as directed by the building manager; to use only approved materials; to organize snow removal crews; and to be responsible for acquiring all tools and supplies needed for snow removal.

It is clear from this record that there was no snow removal clause in the original solicitation and that the document which the protester identified as having been part of the original solicitation in fact was the clause proposed by the building manager and subsequently contained in the amendment. There is no question but that the snow removal clause placed upon the contractor some specific responsibilities which were not originally required. The question before us is whether the protester's bid was properly rejected for failing to include an acknowledgement of that amendment, particularly in view of two circumstances: (1) the protester states it never received the amendment and (2) the dollar value of the work required by the amendment is small when compared to the contract as a whole.

The amendment of March 31 left intact the originally scheduled bid opening date of April 10. Eleven bids were received: the three low bidders, of which Versailles was the second, failed to acknowledge receipt of the amendment. Versailles states that after the bid opening, and at the request of the contracting officer, it provided a letter explaining its failure to acknowledge receipt of the amendment and verifying that its bid price remained unchanged despite the amendment. On May 12, 1981, however, Versailles was notified that its bid was rejected as nonresponsive for failure to acknowledge receipt of the amendment. Versailles protested, alleging essentially the following: (1) that it was not informed of any amendment prior to the bid opening; (2) that the change to the original solicitation was not material enough to affect its bid which was firm and reconfirmed upon request of the contracting officer; and (3) that GSA intentionally withheld the amendment from all the bidders except A&C Building and Industrial Maintenance Corporation (A&C) in order to direct the award to that firm. In addition, Versailles maintains that insufficient time was afforded bidders to consider the amendment.

Because of the imminent need to acquire custodial services before expiration of the then-existing contract, an award was made to the fourth low bidder, A&C, despite the pendency of Versailles' protest.

It is the position of this Office, concerning the failure to receive an amendment, that the procuring activity is not an insurer of delivery of bidding documents to prospective bidders. The bidder bears the risk of nonreceipt of solicitations and amendments. G&H Aircraft, B-189264, October 28, 1977, 77-2 CPD 329. Generally, if a bidder does not receive and acknowledge a material amendment to an IFB and such failure is not the result of a conscious and deliberate effort to exclude the bidder from participating in the competition, the bid must be rejected as nonresponsive.

In its protest, Versailles takes issue with both these elements: it claims that not only it, but all other bidders except A&C, were deliberately not sent the amendment as part of an effort to direct the contract to A&C and that the amendment was not material.

Versailles has offered no proof in support of its contention that the amendment was sent to only one bidder, while GSA has provided us with a statement of its employee who prepared the amendment and placed it in envelopes which he addressed "to each contractor appearing on the bidders list along with any others who may have requested a copy of the solicitation * * *." In addition, the Abstract of Bids reflects that eight of the eleven bidders acknowledged receipt of the amendment. The protester has not established that GSA engaged in a deliberate effort to preclude it and other bidders from competing.

As for whether the amendment was a material one, GSA concedes its dollar value was small. GSA estimates the cost of complying with the amendment to range from $577 to $1,553, depending on whether the contractor uses sand or calcium chloride to reduce the hazard from snow and ice. These figures include the cost of tools and supplies and could increase if conditions required the expenditure of labor hours beyond that provided by the contract. The total value of the one-year contract was approximately $740,000.

For the following reasons, however, we find the dollar value of the amendment as compared with the total value of the procurement is not dispositive of the question of the materiality of the amendment. This Office has stated that where an amendment changes the legal relationship between the parties, it is a material defect which cannot be waived even if the impact on price is trivial. See 50 Comp. Gen. 11 (1970), in which we held that because the amendment made certain contract provisions mandatory rather than discretionary, it imposed additional obligations not legally enforceable under the prior provision, and thus was material even though the effect on price may have been trivial. Similarly, in Hutto Appliance & Refrigeration Service, B-201585, June 16, 1981, 81-1 CPD 495, a bidder failed to acknowledge receipt of an amendment which relaxed one requirement but made another more stringent and added a third. Even though the net effect of the amendment upon cost may have been trivial, we found the amendment to have been material because:

> " * * * one effect of the amendment was to impose additional work requirements which the [agency] considers as affecting the quality of performance under the contract and which may increase the cost of performance. Nevertheless, Hutto's bid did not contain a commitment to these requirements. * * * Thus Hutto's failure to acknowledge the amendment may not be waived."

Here, too, the amendment is material because it imposes on the contractor specific work requirements not contained in the original solicitation. Particularly significant are the requirements that snow be removed on weekends and holidays, when the contractor ordinarily would have on duty a small work force, and that snow be removed before the building occupants reported to work.

Since the amendment was material, the failure of Versailles to acknowledge it could not be waived by the contracting officer. Consequently, the award of the contract to A&C, the lowest responsible bidder was proper.

In arriving at this conclusion, we have considered Versailles' contentions that insufficient time was permitted for bidders to take the amendment into account, and that its confirmation of its bid after opening, at the request of GSA, should stand as a waiver of its failure to acknowledge the amendment.

The relevant regulation, 41 C.F.R. § 5B-2.207(a), provides that amendments shall not be issued later than 10 days before the date set for receipt of bids. As the record indicates, the amendment met this requirement. To the extent that Versailles is contending that communication between it and the contracting officer subsequent to bid opening may serve as a waiver of the requirement to acknowledge amendments, the applicable regulations permit the procuring activity to waive the failure of a bidder to acknowledge an amendment only if the bid received clearly indicates that the bidder received the amendment or that the amendment involves only a matter of form or is one which has either no effect or merely a trivial or negligible effect on price. Federal Procurement Regulations § 1-2.405(d). An amendment which is more than a mere formality or has more than a trivial effect on price is considered material and a failure to acknowledge it is not waivable. The basis for this rule is the principle that the acceptance of a bid which disregards a material provision of an invitation, as amended, would be prejudicial to other bidders. Since we have concluded that the amendment was material, the protester's failure to acknowledge it could not be waived by the contracting officer.

Milton J. Socolar

for Comptroller General
of the United States