

DECISION

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

26262

FILE: B-211598**DATE:** September 19, 1983**MATTER OF:** Reliable Building Maintenance, Inc.**DIGEST:**

An amendment that imposes a legal obligation on the contractor that was not contained in the original solicitation is material and thus rejection of a bid as nonresponsive for failure to include acknowledgment of the amendment is proper.

Reliable Building Maintenance, Inc. protests the award of a contract to Nationwide Maintenance, Inc. for custodial services under solicitation No. JFJMD-83-B-0025 issued by the Department of Justice. Reliable maintains that the contracting officer improperly rejected the firm's bid as nonresponsive for failure to acknowledge an amendment to the solicitation.

We deny the protest.

Among other things, amendment P001 incorporated by reference two contract clauses into the solicitation's general provisions: a liquidated damages clause, providing for payment by the contractor of certain damages in the event of default; and a value engineering incentive clause, allowing the contractor to submit a proposal for reducing the overall projected cost of the contract to the agency. The amendment also added language stating that payment reductions agreed to by the parties due to contractor nonperformance on inadequate performance would neither limit the Government's rights and remedies nor relieve the contractor from fully performing. At bid opening, Reliable's bid failed to include an acknowledgment of the amendment. The contracting officer thereafter rejected Reliable's bid and awarded the contract to Nationwide.

Reliable contends that the amendment was not material. In this regard, the firm asserts that the amendment's provisions did not pertain specifically to the services sought. Reliable also argues that, since the amendment merely listed the two contract clauses without setting forth their actual wording, the contracting officer assumed contractor familiarity with them, and thus must have issued the amendment merely to correct an immaterial omission.

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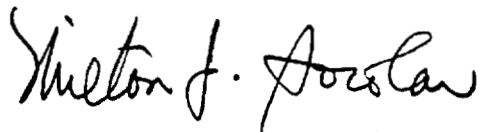
Finally, Reliable claims that the language concerning payment reductions did nothing more than reiterate the Government's existing rights and remedies.

The contracting officer asserts that the amendment was material. For example, he contends that the inclusion of the contract clauses placed further liabilities and requirements on the contractor and thus altered the legal relationship between the parties. Therefore, the contracting officer concludes, the amendment was material.

An amendment is material where it imposes legal obligations on the contractor that were not contained in the original solicitation. Versailles Maintenance Contractors, Inc., B-203324, October 19, 1981, 81-2 CPD 314. The materiality is not diminished by the fact that the amendment has little or no effect on the bid price or the work to be performed. 50 Comp. Gen. 11 (1970); Navaho Corporation, B-192620, January 16, 1979, 79-1 CPD 24. Here, the incorporation of the liquidated damages clause alone imposed a new legal obligation on the contractor. Thus, without Reliable's express agreement to the amendment, the firm would not be contractually bound to comply with that clause. We conclude therefore that the amendment was material and that the contracting officer properly rejected Reliable's bid as nonresponsive for failure to acknowledge the amendment.

We disagree with Reliable to the extent it argues that incorporation of the clause by reference rendered the amendment immaterial. Incorporation by reference is a recognized method of contract drafting and was used here to bind the parties legally to the terms of the clause even though the clause was only mentioned in the amendment. Thus, the question of whether or not bidders were familiar with the incorporated clause had no bearing on its materiality.

The protest is denied.

for 
Comptroller General
of the United States