

DECISION

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

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FILE: B-213459

DATE: March 12, 1984

MATTER OF: Four Seasons Maintenance, Inc.

DIGEST:

A solicitation amendment stating that housing would be occupied during renovation work was not material, and the contracting agency should not have rejected the low bid as non-responsive based on the low bidder's failure to acknowledge it, where the solicitation as issued contained language sufficient to notify bidders of the occupancy requirement, and the contractor thus would be obligated to perform under this requirement even without the amendment.

Four Seasons Maintenance, Inc. protests the rejection of its bid as nonresponsive to invitation for bids (IFB) No. N62467-83-B-0310, issued by the Department of the Navy for work on bathrooms in Capehart housing at the Naval Air Station, Meridian, Mississippi. The Navy rejected Four Seasons' bid because it did not contain an acknowledgment of IFB Amendment 0001. We sustain the protest.

The IFB called for replacement of tubs and tiles in 2 units and installation of tub liners and fixtures in 318 units. The work was to be performed while the housing was occupied, but the IFB did not expressly state this requirement and the Navy considered it unclear to bidders whether the housing would be occupied. It thus issued Amendment 0001 on August 25, 1983 which, in addition to some minor clarifications not in issue, added the following paragraph to the IFB:

"3.7 Schedule and Sequence of Work: The work shall be prosecuted in such a manner as to cause the least interference with the normal functions of the Government activity. Certain areas will be vacated for periods of time as necessary for the Contractor to perform certain work; however, the building will be occupied during the

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course of the work. Prior to beginning any work, the Contractor shall meet with the Contracting Officer in order that an approved schedule and sequence of work may be arranged."

The Navy considers this amendment material, based on its judgment that occupancy during performance would increase the cost of performing by an estimated \$20,000 due to work scheduling uncertainties which would occur. Since Four Seasons' low bid of \$108,000 did not acknowledge receipt of Amendment 0001 (Four Seasons claims it never received the amendment), the Navy considered it unclear whether Four Seasons' bid was based on occupancy. The Navy thus rejected the bid as nonresponsive and made award to Howard Ferriell & Sons, the only other bidder, at a price of \$158,046.

A bidder's failure to acknowledge a material IFB amendment renders the bid nonresponsive and thus unacceptable 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. See Jose Lopez & Sons Wholesale Fumigators, Inc., B-200849, February 12, 1981, 81-1 CPD 97. An amendment is material, however, only if it would have more than a trivial impact on the price, quantity, quality, delivery, or the relative standing of the bidders. Defense Acquisition Regulation § 2-405(iv)(b). An amendment is not material where it merely clarifies an existing IFB requirement. A bidder's failure to acknowledge such an amendment is waivable as a minor informality. See AMS Manufacturing Incorporated, B-205492, April 15, 1982, 82-1 CPD 346.

Four Seasons does not question the Navy's position that the cost of performing in occupied housing would be significantly greater than performing in unoccupied housing. Rather, it argues that the IFB as issued was adequate to obligate the contractor to perform in occupied housing, and that the amendment therefore made no significant change to the IFB and was not material. We agree.

While the original IFB did not state in so many words that the housing would be occupied, paragraph 3.7 (redesignated 3.7.1 under the amendment) did state as follows:

"3.7 Work Sequence: No work may be started on a unit until all material required to complete the work is on the site. Initially, two units will be released to the Contractor for replacement of the tubs and patching of ceramic tile. When the Contractor is prepared to commence work on the remaining units, a maximum of eight units will be made available at all times. Upon completion of a unit and acceptance by the Government, another unit will be made available to the Contractor. It is intended that disruption of use of facilities to occupants of Capehart Housing units will be held to an absolute minimum." (Underlining added.)

We find that the underlined sentence in this paragraph constituted sufficient notice to bidders that the housing would be occupied during performance. In our opinion, it necessarily follows from a requirement for minimum disruption of occupants' use of housing facilities that those occupants will be occupying the housing facilities. Four Seasons states it based its bid on the housing being occupied, and we think it is reasonable to assume that other bidders have done the same based on what we consider the most reasonable reading of the underlined sentence. Consequently, we believe this sentence was sufficient to establish Four Seasons' obligation to perform in occupied housing at its bid price.

Given our conclusion that the original IFB established the occupancy requirement, Amendment 0001 must be characterized as a mere clarification which imposed no additional or different obligations on bidders. As such, the amendment was not material and Four Seasons' failure to acknowledge it should have been waived as a minor informality. See AMS Manufacturing Incorporated, supra; Dynaweld, Incorporated, B-209091.2, August 15, 1983, 83-2 CPD 207.

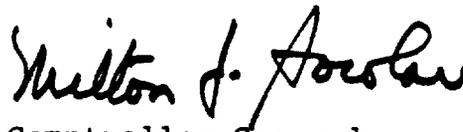
The Navy makes an additional argument that the amendment was material because it eliminated the possibility that the contractor could seek a contract price adjustment for increased costs due to occupancy, and thus "changed the legal relationship of the parties." While we have held that a change in the contractual relationship renders an amendment material, see Versailles Maintenance Contractors, Inc., B-203324, October 9, 1981, 81-2 CPD 314 (cited by the Navy), this principle clearly does not apply

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here. Given our finding that the original IFB established the occupancy requirement, the eventual contractor would have no basis for such a claim with or without the amendment. Thus, the amendment in no way changed the government's contractual relationship with the contractor.

We conclude that Four Seasons' low bid was responsive and should have been considered for award. While we recognize that award was made to Ferriell on September 26 with a 270 calendar day performance period, we nevertheless are recommending that the Navy consider the feasibility of terminating Ferriell's contract for convenience and awarding a contract to Four Seasons if that firm is found to be responsible. By letter of today, we are advising the Secretary of our findings and recommendation.

The protest is sustained.

for 
Comptroller General
of the United States