Other 33826

DECISION

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

FILE: B-221826 **DATE:** March 19, 1986

MATTER OF: Johnson Moving & Storage Co.

DIGEST:

1. Failure to acknowledge a material amendment which contains a Service Contract Act wage rate determination generally renders a bid nonresponsive.

2. A nonresponsive bidder is not an interested party under GAO Bid Protest Regulations to protest the responsiveness of the next low bid where there is another bid that could be accepted, so that the protester does not have a direct economic stake in the outcome of the matter.

Johnson Moving & Storage Co. (Johnson) protests the rejection of its low bid as nonresponsive under Department of the Air Force invitation for bids (IFB) No. F11602-85-B-0066. Johnson also contends that the next low bid should have been rejected as nonresponsive as well.

We deny the protest against the rejection of Johnson's bid, and we dismiss it as to the other bid.

The IFB, which was for packing, containerization, and drayage services for 39 counties in Illinois, was issued on October 23, 1985. Bids were invited on three schedules of items: Schedule I--Outbound Services; Schedule II--Inbound Services; and Schedule III--Intra-city and Intra-Moves. Bidders were required to bid on all items in a schedule to be eligible for award under that schedule. Also, bidders were advised that a single award might be made for all three schedules if it would result in the lowest overall cost to the government, and, in any case, only one contract would be awarded for Schedules I and II.

The Air Force issued three amendments to the IFB. Amendment 1 renumbered the two items of Schedule III and added a March 27, 1985, Department of Labor Service Contract Act wage determination for all moving and storage service employees in Champaign and Vermillion counties. In this respect, the solicitation as issued included a wage

determination, dated October 4, 1982, only for employees performing inbound services (Schedule II) at Chanute Air Force Base in Champaign County. Amendment 2 extended bid opening, in anticipation of changes to the invitation, which were accomplished by issuance of amendment 3. That amendment revised the performance work statement and various other solicitation provisions and included a new Schedule III with a bidding item, number 32, for estimated quantities of attempted, but unsuccessful, pickups and attempted, but unsuccessful, deliveries.

Of the three firms that submitted bids, Johnson was the low total bidder considering all schedules, at $192,839, with Lincoln Land Moving & Storage, Inc. (LL), second low at $210,300. Johnson, however, did not acknowledge amendment 1. Also, although Johnson acknowledged amendment 3, the firm submitted only the original Schedule III with its bid, so that the government was given no bid for the attempted pickup/delivery item added by that amendment. Based on these bidding deficiencies, the Air Force rejected Johnson's bid as nonresponsive.

Johnson first protests that its bid should not have been rejected because after bid opening the firm did return a signed copy of amendment 1, dated the bid opening date. Johnson argues that it therefore should be clear the amendment did not affect the firm's bid price, and that Johnson would comply with the subject wage determination if awarded the contract.

Responsiveness is determined as of the time of bid opening and involves whether the bid as submitted represents an unequivocal offer to provide the product or service as specified, so that acceptance of it would bind the contractor to meet the government's needs in all significant respects. Power Test, Inc., B-218123, Apr. 29, 1985, 85-1 C.P.D. ¶ 484. Any bid that is materially deficient in that regard must be rejected; a defect in a bid is material if it affects price, quality, quantity or delivery. See Ashland Chemical Co., B-216954, May 16, 1985, 85-1 C.P.D. ¶ 555. The failure to acknowledge an amendment that adds a wage rate determination is a material deviation that generally cannot be waived and, therefore, requires that the bid be rejected because, in the absence of such an acknowledgment, the bidder would not be legally obligated to pay the specified wages and provide the specified fringe benefits to its employees. See Action Porta Systems, B-220199.2, Nov. 8, 1985, 85-2 C.P.D. ¶ 533.

We have recognized, however, that the failure to acknowledge a wage rate amendment may be corrected after bid opening under very limited circumstances. See U.S. Department of the Interior--Request for Advance Decision, et al., 64 Comp. Gen. 189 (1985), 85-1 C.P.D. ¶ 34 (where the amendment revised a wage rate for one labor category and had a de minimis effect on price, amounting to only a 0.013-percent increase in the original bid price); Brutoco Engineering & Construction, Inc., 62 Comp. Gen. 111 (1983), 83-1 C.P.D. ¶ 9 (where the effect on bid price was de minimis, only 0.8 percent, and the bidder was otherwise obligated under a collective bargaining agreement to pay wages exceeding the revised wage rate). But see Grade-Way Construction v. United States, 7 Cl. Ct. 263 (1985). The protester does not allege that any of these circumstances exist here.

As stated above, the IFB as issued included a wage determination applicable to Schedule II (inbound) services at Chanute Air Force Base only. Thus, acceptance of Johnson's bid as submitted at bid opening would not have obligated the contractor to pay employees performing under Schedule II elsewhere, or under Schedules I and III, anything more than the federal minumum wage. See 41 U.S.C. § 351(b) (1982). That is, the firm legally could have paid those employees significantly lower wages than those required by the determination and no fringe benefits.

It is irrelevant that Johnson may have intended to comply with the wages in the amendment despite the lack of acknowledgment, or that the firm acknowledged the amendment in a submission after bid opening. A bidder's intent to be bound must be evident from the bidding documents themselves, so that post-bid-opening submissions or explanations cannot be used to make a nonresponsive bid responsive, even where the government could save money by permitting correction. Polan Industries, B-218720.2, May 30, 1985, 85-1 C.P.D. ¶ 617. The reason is that to allow such correction would give the firm the option to accept or reject the contract after bids have been exposed by acknowledging or choosing not to, as the bidder's own business interests dictate. See Mobile Drilling Company, Inc., B-216989, Feb. 14, 1985, 85-1 C.P.D. ¶ 199.

Accordingly, the Air Force properly rejected Johnson's bid as nonresponsive.

Johnson also protests that LL's bid should have been found nonresponsive because the firm did not complete section "K," which set forth various standard representations

and certifications (e.g., Contingent Fee Representation and Agreement, and Certification of Non-Segregated Facility.) Johnson, however, is not an interested party under our Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1985), to raise the issue. The reason is that since Johnson's bid properly was rejected, and since there is a bidder other than LL remaining in the competition that presumably would be awarded the contract if LL's contract were canceled, Johnson has no direct economic stake in the resolution of the matter. See Oklahoma City University, B-216702.2, Jan. 22, 1985, 85-1 C.P.D. ¶ 80.

In any event, there is no legal merit to Johnson's position. The certifications and representations in section "K" have no bearing on the material aspects of the bidder's offer. See K. P. B. Industrial Products, Inc., B-210445, May 24, 1983, 83-1 C.P.D. ¶ 561. Therefore, unlike the failure to acknowledge an amendment establishing wage rates and benefits for contract employees, a bidder's failure to complete section "K" does not affect bid responsiveness and may be waived, and later corrected, as a minor bidding irregularity. See R&R Roofing and Sheet Metal, Inc., B-220424, Nov. 21, 1985, 85-2 C.P.D. ¶ 587.

The protest is denied in part and dismissed in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel