

Final Order



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Lake City Management

File: B-233986

Date: March 9, 1989

DIGEST

1. Where an amendment to a solicitation imposes an additional obligation on the prospective contractor, the amendment is material, and a contracting agency may properly reject a bid as nonresponsive for failure to acknowledge the amendment.

2. The fact that a bidder may not have received a solicitation amendment until after bid opening is irrelevant absent evidence that the failure to receive the amendment in a timely fashion resulted from a deliberate attempt by the contracting agency to exclude the bidder from competition or that the agency failed to furnish the amendment inadvertently after the bidder availed itself of every reasonable opportunity to obtain the amendment.

DECISION

Lake City Management protests the rejection of its bid under invitation for bids (IFB) No. DAHC44-88-B-0028, issued as a 100-percent set aside for disadvantaged small businesses by the Army Troop Support Agency, Fort Lee, Virginia, for Commissary shelf stocking and custodial services. Lake City's bid was rejected as nonresponsive because it failed to acknowledge IFB amendment No. 0002. Lake City contends its failure to acknowledge the amendment should be waived as a minor informality since the amendment did not affect price or performance of the contract.

We deny the protest.

The IFB was issued on July 1, 1988, with bid opening scheduled for August 11. Lake City signed, and apparently submitted its bid on August 10. As a result, the bid as submitted contained no acknowledgment of amendment No. 0002.

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That amendment, which was issued on August 9, extended the bid opening date to August 31, changed the required custodial services and indicated that the Commissary's hours had been extended, thus requiring the performance of an additional 4 hours per week of shelf stocking. Lake City states that it did not receive the amendment until after bid opening. Twenty-six bids were received by August 31. The low bid was rejected because the bidder did not qualify as a disadvantaged small business. Lake City's bid, the second low, was also rejected. Award was made on November 25 to the third low bidder.

Lake City argues that its failure to acknowledge the amendment should have been waived as a minor informality. The contracting officer states that the amendment was material, since it increased the number of hours that shelves had to be stocked each week (and also modified the custodial services) and that the rejection of Lake City's bid was proper. In any event, the contracting officer contends that, since Lake City was advised on December 5 or 6 of the reason its bid was rejected, its protest filed with our Office on December 27 was untimely and should, therefore, be dismissed. Lake City contests this statement and states that it had no knowledge of the reason for the rejection until it was advised of the reason by the agency on December 13.

Our Bid Protest Regulations require that protests like the one here of an allegedly improper agency action be filed within 10 working days after the basis for protest is known or should have been known whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1988). It is our practice to resolve doubts about timeliness in favor of the protester. Instruments & Controls Service Co., 65 Comp. Gen. 685 (1986), 86-2 CPD ¶ 16. Since the protester denies that the agency advised it on December 5 or 6 of the reason for the rejection of its bid and since the protester submitted its protest on the ninth working day after the date (December 13) on which it states it was informed by the agency, we resolve the doubt as to timeliness in the protester's favor and will consider the protest.

Lake City contends that its failure to acknowledge the amendment should have been waived as a minor informality because it did not affect Lake City's bid price or its ability to perform the contract. We disagree.

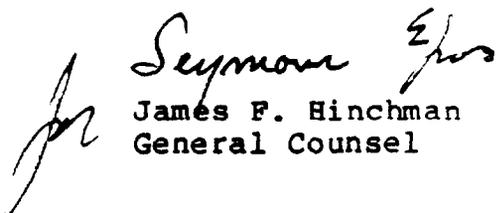
Under the Regulations, contracting agencies may waive a failure to acknowledge receipt of an amendment to an IFB if the amendment involves only a matter of form or has either no effect or merely a negligible effect on price, quantity,

quality, or delivery of the item or services solicited. Federal Acquisition Regulation § 14.405(d)(2). In applying this provision, we have held that an amendment is material where, among other things, it would have an impact on the relative standing of bidders or would impose legal obligations on a prospective contractor that were not contained in the original solicitation. The materiality of an amendment that imposes new legal obligations on the contractor is not necessarily diminished by the circumstance that the amendment may have little or no effect on the bid price or the work to be performed. American Sein-Pro, B-231823, Aug. 31, 1988, 88-2 CPD ¶ 209.

Under both the original and the amended IFB, the contractor would be required to make available day stocking personnel during all operating hours of the Commissary. Amendment No. 0002 indicated that the operating hours of the Commissary had been increased by 1 hour per day, 4 days per week over those set forth in the original IFB. Because of this, we agree with the agency that the amendment imposed an additional obligation on the prospective contractor and that the amendment must be considered material. Lake City's failure to acknowledge the amendment, therefore, rendered its bid nonresponsive. American Sein-Pro, B-231823, supra.

Finally, while Lake City's protest is unclear as to whether it received amendment No. 0002 after the original or amended bid opening date, a bidder bears the risk of not receiving IFB amendments unless it is shown that the contracting agency made a deliberate effort to exclude the bidder from competing or unless it is shown that the agency failed to furnish the amendment inadvertently after the bidder availed itself of every reasonable opportunity to obtain the amendment. Southern Technologies, Inc., B-228716, Jan. 21, 1988, 88-1 CPD ¶ 57. Lake City does not contend that either of these circumstances existed here.

The protest is denied.


James F. Hinchman
General Counsel