

Lebowitz



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gulf Electric Construction Co., Inc.

File: B-235635

Date: September 26, 1989

DIGEST

Bidder's failure to acknowledge an amendment which increased by \$650 the estimated cost of performance rendered the bid nonresponsive because the cost impact amounted to more than two times the difference between the low bid and the second low bid and more than 30 percent of the difference between the low bid and the protester's responsive bid. Such an amendment had a material impact on cost, and therefore the agency erred in allowing the apparent low bidder to acknowledge the amendment after bid opening.

DECISION

Gulf Electric Construction Co., Inc., protests the award of a contract to Atlantic Electric Co., Inc. under invitation for bids (IFB) No. F09650-89-B-0005, issued by the Department of the Air Force for the repair and upgrading of lighting fixtures in a building at Robins Air Force Base, Georgia. Gulf argues that the agency should have rejected Atlantic's bid as nonresponsive because Atlantic failed to acknowledge a material amendment to the IFB prior to bid opening.

We sustain the protest.

The IFB was issued on February 14, 1989, with bid opening scheduled for March 16. Amendment No. 0001, issued March 14, extended the bid opening date indefinitely. Amendment No. 0002, issued March 24, rescheduled bid opening for April 3 and incorporated addendum No. 0001 to the IFB which made six changes to the specifications. The addendum changed the material required for construction of the electrical raceways from "rigid steel conduit" to "EMT conduit," resulting in a \$2,640 decrease in the government's

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estimated cost of performance,^{1/} and it required a chase to be added from a panel to the second floor, resulting in a \$650 increase in the estimated cost of performance.^{2/} The other four changes to the specifications had no effect on the estimated cost of performance, or on the quantity, quality, or delivery of the items to be provided, and the protester does not argue otherwise.

Eleven bids were received by April 3. With respect to this protest, the following bids are relevant:

Atlantic Electric Co., Inc.	\$87,987
Barnes Electric Co., Inc.	\$88,295
Gulf Electric Construction Co., Inc.	\$90,076

Atlantic, the apparent low bidder, had not, however, acknowledged amendment No. 0002 to the IFB prior to bid opening.^{3/} The contracting officer determined that because the net effect of the specification changes in the second amendment was to decrease the cost of performance by \$1,990, Atlantic's failure to acknowledge this amendment was a minor informality, having a negligible effect on the price of the items to be provided. By letter dated April 26, Atlantic confirmed that its bid was correct and acknowledged receipt of the amendment. On May 11, after determining Atlantic to be the low, responsive and responsible bidder, the agency awarded the contract to Atlantic. This protest followed.

Generally, a bid which does not include an acknowledgment of a material amendment must be rejected because absent such an acknowledgment, the bidder is not obligated to comply with the terms of the amendment and its bid is thus

^{1/} The agency has advised that rigid steel conduit, a thicker, more expensive metal, is generally used in hazardous locations to protect the wires from physical damage. Here, the agency relaxed the requirement and requested the use of a thinner, less expensive metal because the wires would not be in close proximity to hazardous locations.

^{2/} The agency has advised that a chase, or opening, was needed through the ceiling in this area.

^{3/} Barnes, the apparent second low bidder, also failed to acknowledge amendment No. 0002 prior to bid opening. Hence, our analysis of Atlantic's failure to acknowledge this amendment prior to bid opening equally applies to Barnes.

nonresponsive. O'Brien's Fire Protection Co., Inc., B-233248, Nov. 3, 1988, 88-2 CPD ¶ 437; Loren Preheim, B-220569, Jan. 13, 1986, 86-1 CPD ¶ 29. However, the failure of a bidder to acknowledge receipt of an amendment may be waived or allowed to be cured by the bidder where the amendment has either no effect or merely a negligible effect on price, quantity, quality, or delivery of the item bid upon. Federal Acquisition Regulation (FAR) § 14.405(d)(2) (FAC 84-12); Gentex Corp., B-216724, Feb. 25, 1985, 85-1 CPD ¶ 231.

In this case, the two primary changes to the specifications in amendment No. 0002 caused a concurrent increase and decrease in the estimated cost of performance. In cases involving an amendment which both increases and decreases the contract requirements, we determine the materiality of the amendment by considering the increasing portion of the amendment separately. See G.C. Smith Construction Co., B-213525, July 24, 1984, 84-2 CPD ¶ 100; Northwestern Construction, Inc., B-186191, Nov. 23, 1976, 76-2 CPD ¶ 442. Further, whether the value of an unacknowledged amendment is trivial or negligible depends on the amendment's estimated impact on bid price and the relationship of that impact to the difference between the two low bids. Both parts of this test must be satisfied in order to permit waiver or correction of the failure to acknowledge the amendment. See Marino Construction Co., 61 Comp. Gen. 269 (1982), 82-1 CPD ¶ 167.

Here, the cost impact of the increasing portion of the amendment is \$650, more than two times the difference between Atlantic's bid and the second low bid, and it is more than 30 percent of the difference between Atlantic's bid and Gulf's responsive bid.^{4/} Such an impact clearly makes the amendment a material one. See Marino Construction Co., 61 Comp. Gen. 269, *supra*; Power Systems Diesel, Inc., B-224635, Nov. 24, 1986, 86-2 CPD ¶ 604. Therefore, the agency erred in allowing Atlantic to acknowledge this amendment subsequent to bid opening.

Accordingly, we recommend that the Air Force terminate the contract awarded to Atlantic and award the contract to Gulf,

^{4/} The difference between Atlantic's low bid and the second low bid is only \$308; the difference between the second low bid and Gulf's bid is \$1,781.

if otherwise appropriate. Further, we find that Gulf is entitled to its protest costs. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1989).

The protest is sustained.

for 
Comptroller General
of the United States