



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Favino Mechanical Construction, Ltd.
File: B-237511
Date: February 9, 1990

Thomas Richelo, Esq., Peterson Young Self & Asselin, for the protester.
Larry B. Hollander, Esq., Hollander & Groner, for the interested party, Hercules Construction Corp.
Lester Edelman, Esq., Chief Counsel, U.S. Army Corps of Engineers, for the agency.
Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. An amendment which incorporates into an invitation for bids a Federal Acquisition Regulation provision detailing the order of precedence to be given in instances of conflicting contract interpretations is material since it gives the government the right to reconcile conflicts which otherwise would not be available to it and therefore changes the legal relationship between the parties.
2. A bidder's failure to acknowledge with its bid a material amendment to an invitation for bids renders the bid nonresponsive.
3. Bidder's failure to acknowledge a material amendment to a solicitation which also extended the bid opening date may not be waived where the bid contains only the previous bid opening date since the mere submission of the bid on the amended bid opening date is not sufficient to show that bidder intended to be bound by the terms of the amendment.

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DECISION

Favino Mechanical Construction, Ltd., protests the rejection of its bid and the subsequent award of a contract to Hercules Construction Corp., under invitation for bids (IFB) No. DACA51-89-B-0036, issued by the Army Corps of Engineers for the repair of a laundry boiler plant and steam distribution system at the United States Military Academy, West Point, New York. Favino's bid was rejected as nonresponsive because it failed to acknowledge an amendment to the IFB. Favino, the low bidder, contends that its failure to acknowledge the amendment should be waived as a minor informality.

We deny the protest.

The Army issued the IFB on August 8, 1989, with bid opening scheduled for September 7. Prior to bid opening, the Corps issued amendment No. 4, which extended the bid opening date to September 15 and incorporated into the IFB the standard order of precedence clause at Federal Acquisition Regulation (FAR) § 52.214-29. The amendment also contained a modification to the applicable wage rate determination which slightly increased the rates for the trades to be used on the job. Although Favino submitted its bid on the amended bid date, Favino failed to acknowledge the amendment. Based on its determination that the amendment was material, the Corps found Favino's bid nonresponsive for failure to acknowledge the amendment.

A bid that 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 thus its bid is nonresponsive. Woodington Corp., B-235957, Oct. 11, 1989, 89-2 CPD ¶ 339. Even where an amendment may not have a clear effect on price, quantity, or quality, it nonetheless is considered material where it changes the legal relationship between the parties, as, for example, if the amendment increases or changes the contractor's obligation or responsibilities. Mak's Cuisine, B-227017, June 11, 1987, 87-1 CPD ¶ 586. The materiality of an amendment which imposes new legal obligations on the contractor is not diminished by the fact that the amendment may have little or no effect on the bid price or the work to be performed. Adskon, Inc., B-224209, Dec. 10, 1986, 86-2 CPD ¶ 666.

Here, the original IFB provided the following with regard to issues of contract interpretation: "In case of difference between drawings and specifications, the specifications

shall govern." Amendment No. 4 added the following provision, the standard FAR order of precedence clause:

"Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications."

The effect of the order of precedence clause is to give the government the right and, thus, the protection--which otherwise would not be available to it--of having disputes regarding conflicting contract interpretations resolved according to the order of priority set forth in the clause. Under the IFB as originally issued, the government would be assured of having its intent with regard to contract interpretation carried out only in instances where there was a conflict between specifications and drawings; in comparison, the FAR clause added by amendment No. 4 specifies the order of precedence for each particular part of the IFB.

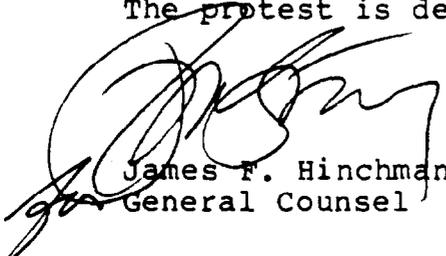
Further, contrary to the protester's suggestion, the clause does more than restate the general rule of contract interpretation. For example, whereas the general rule used when a contract contains conflicting provisions which cannot be reconciled is that a specific provision will prevail when there is a conflict between that provision and a more general one, see Donald W. Close Co. et al., 58 Comp. Gen. 297 (1979), 79-1 CPD ¶ 134, the FAR clause establishes a specified order of precedence for particular provisions in the IFB without regard to whether they are specific or general in nature. Thus, by incorporating the order of precedence clause into the IFB, the government avoids assuming the risk that its intention regarding the interpretation of conflicting provisions may not prevail if a dispute arises between it and the contractor; the amendment thus is a critical factor in resolving a potential conflict in those instances. Since the provision thus changes the legal relationship between the parties, the amendment incorporating it into the IFB was material. See Woodington Corp., B-235957, supra.

The protester also argues that it implicitly accepted the amendment to the IFB when it submitted its bid on the amended bid opening date. We have consistently held that while an amendment may be constructively acknowledged where a bid includes an essential requirement which appears only in the amendment, the submission of the bid on the extended bid opening date, without more, is not sufficient to show that the bidder agreed to comply with the terms of the

amendment. C Constr. Co., Inc., 67 Comp. Gen. 107 (1987), 87-2 CPD ¶ 534. Here, we see no basis to conclude that the bid, which contained only the original bid opening date, indicated Favino's agreement to the terms of the amendment simply because it was submitted on the revised opening date established by the amendment.

As noted above, the Army also concluded that the amendment was material because it incorporated a new wage rate determination; Favino challenges the Army's determination. We need not resolve this issue in view of our finding that the amendment was material based on the order of precedence clause, and thus that Favino's bid was properly rejected for failure to acknowledge the amendment.

The protest is denied.



James F. Hinchman
General Counsel