



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Atlas Roofing Company, Inc.

File: B-237692

Date: February 23, 1990

Lisa S. Messing, Esq., Hendrick, Spanos & Phillips, for the protester.

George U. Lane, Esq., General Services Administration, for the agency.

Amy M. Shimamura, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where Certificate of Procurement Integrity clause requiring completion of Certificate is already incorporated in the solicitation, failure to acknowledge amendment that advises bidders to complete Certificate may be waived as a minor informality because amendment is immaterial since it imposes no new legal obligation.

2. General Accounting Office will not review contracting agency's rejection of a bidder who failed to complete the solicitation's Certificate of Procurement Integrity or disturb the contract award since the requirement for the Certificate has been suspended.

DECISION

Atlas Roofing Company, Inc., protests the rejection of its bid as nonresponsive for failure to acknowledge an amendment and to complete a Certificate relating to procurement integrity required by invitation for bids (IFB) No. GS-04P-89-EX-C0163, issued by the General Services Administration (GSA) for new roof coatings for the Internal Revenue Service Center, Chamblee, Georgia. Atlas contends that it never received the amendment; that, in any event, its failure to acknowledge the amendment should be waived as a minor informality since it merely advised bidders to complete the Certificate of Procurement Integrity that was already in the IFB; and that the completion of the Certificate is a matter of responsibility which may be satisfied any time prior to contract award.

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We deny the protest.

The IFB, issued on August 28, 1989, incorporated the Certificate of Procurement Integrity clause, Federal Acquisition Regulation (FAR) § 52.203-8, as required by FAR § 3.104-10. This clause implements 41 U.S.C.A § 423(d)(1) (West Supp. 1989), which essentially provides that an agency shall not award a contract unless a bidder or offeror certifies in writing that neither it nor its employees has any information concerning violations or possible violations of the OFPP Act provisions pertaining to the procurement. The activities prohibited by the Act involve soliciting or discussing post-government employment, offering or accepting a gratuity, and soliciting or disclosing proprietary or source selection information. Under FAR § 52.203-8, bidders are required to list all violations or possible violations of the Act, or enter "none" if none exists, on the Procurement Integrity Certificate and sign the document. The FAR clause specifically states that the certification must be submitted with bids exceeding \$100,000.

On September 21, GSA issued amendment No. 1 to the IFB which transmitted another copy of FAR § 52.203-8, the Certificate of Procurement Integrity, and advised bidders that the failure to complete and submit the Certificate with the bid would render the bid nonresponsive.

Twenty-two bids were received by bid opening on October 4. Five bidders failed to acknowledge the amendment. Atlas was the low bidder at \$109,777. However, Atlas and the next two low bidders were rejected as nonresponsive for failure to acknowledge the amendment. A contract then was awarded to Singleton Contracting Corporation, the fourth-low bidder at \$133,000.

Atlas contends that it never received the amendment, and that, in any event, the amendment was not material since the Certificate of Procurement Integrity was already incorporated in the IFB. We agree.

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. However, a bidder's failure to acknowledge receipt of an amendment may be waived or allowed to be cured by the bidder where the amendment involves only a matter of form or has merely a negligible effect on price, quantity, quality or delivery of the item bid upon, FAR § 14.405(d)(2), or where the amendment has no effect on the legal relationship

between the parties, i.e., it does not increase or change the contractor's obligation or responsibilities. Id.

Here, the amendment is not material because, as the agency concedes, it was a mere duplication of the original solicitation pages which already set out FAR § 52.203-8, "Requirement for Certificate of Procurement Integrity" and FAR § 52.203-9, "Requirement for Certificate of Procurement Integrity Modification." Additionally, the agency admits that the clause in the initial solicitation provides all the necessary direction regarding the requirement to submit the Certificate with bids; and that the amendment was issued merely to emphasize that bidders must comply with the new requirement. Since the amendment admittedly imposed no new requirement on bidders and had no effect on the price, quantity, quality or delivery of the item bid, the amendment was not material. In these circumstances, Atlas' failure to acknowledge the amendment may properly be waived as a minor informality.

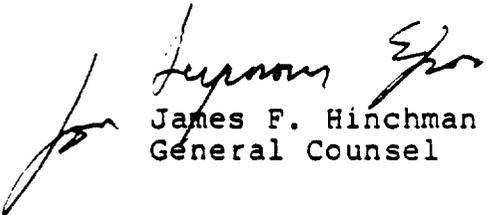
In addition to failing to acknowledge the amendment, however, Atlas also failed to complete and submit the Certificate with its bid as required by the IFB. The agency maintains that the certification requirement is a matter of responsiveness and thus that Atlas' bid was properly rejected as nonresponsive for failure to include a completed Certificate. Atlas contends that the requirement to complete and submit the Certificate is a matter of responsibility which may be satisfied any time prior to contract award and thus that its bid could not properly be rejected for failure to include the completed Certificate.

Effective December 1, 1989, 41 U.S.C.A. § 423(d), which contains the Certificate of Procurement Integrity requirements, was suspended by section 507 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, 1759 (1989), which provides that the procurement integrity legislation "shall have no force or effect during the period beginning on the day after the date of enactment of this Act and ending one year after such day." Recently, we denied a protest against the award of a contract to a bidder who failed to sign the Certificate at the time of bid opening, finding that in light of the suspension of the certification requirement, a bidder's failure to submit a signed Certificate with its bid was no longer material. Westmont Indus., B-237289, Jan. 5, 1990, 90-1 CPD ¶ _____. In contrast here, GSA concluded that the certification requirement constituted a matter of responsiveness rather than responsibility, and therefore the completed Certificate had to be submitted with the bid; since Atlas failed to do so, its bid was rejected as nonresponsive.

While the procurement integrity legislation was in effect, the contracting agencies were split on the issue of whether the certification requirement involved a matter of responsiveness or responsibility; for example, the Navy treated the requirement as a matter of responsibility in the Westmont case, while in this case GSA treated it as a matter of responsiveness. In our view, since completion of the Certificate bound the contractor to detect and report violations of the statute, an obligation not otherwise imposed by the the statute or regulations, the certification requirement could reasonably be interpreted as imposing a material legal obligation, and thus as a matter of responsiveness. Further, the FAR itself specified that a completed Certificate be submitted with the bid. FAR § 3.104-9(b)(2).

Under these circumstances, GSA acted reasonably in interpreting the certification requirement as a matter of responsiveness and rejecting Atlas' bid for failing to include a completed Certificate. While the procurement integrity legislation subsequently was suspended, we do not think the suspension retroactively invalidated GSA's decision, which was reasonable at the time it was made, when the certification requirement was still in effect. Accordingly, we see no basis to disturb GSA's decision to reject Atlas' bid and make award to Singleton.

The protest is denied.



James F. Hinchman
General Counsel