

Maeder



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: MDG Industries, Inc.
File: B-240506
Date: November 21, 1990

William Graham for the protester.
William R. Medsger, Esq., and Bernadine F. McGuire, Esq.,
Department of the Army, for the agency.
Jacqueline Maeder, Esq., and John F. Mitchell, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Amendment to an invitation for bids (IFB) which increases by more than 1,000 units the quantity required by the IFB is material and the bidder's failure to acknowledge such amendment renders its bid nonresponsive, even where protester alleges it never received the amendment.

DECISION

MDG Industries, Inc. protests the rejection of its bid and the subsequent award of a contract to Check-Mate Industries, Inc. under invitation for bids (IFB) No. DAAA09-89-B-0034, issued by the Army Materiel Command, Department of the Army, for the acquisition of fin assemblies for the 60mm M2 ammunition cartridge. MDG's bid was rejected as nonresponsive because it failed to acknowledge an amendment to the IFB.

We deny the protest.

The Army issued the IFB on August 16, 1989 with bid opening scheduled for September 15. The IFB was amended five times prior to bid opening. The protest concerns amendment No. 6,^{1/} which extended the bid opening date^{2/} to April 20, 1990 and increased the quantity of fin assemblies required from 32,445 to 33,791.

^{1/} Amendment No. 4 was never issued because of a computer malfunction.

^{2/} The agency had previously extended the bid opening date four times.

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Twelve bids were received by the amended bid opening date. The two low bids were determined to be nonresponsive. MDG, which bid \$5.61 per unit with first article approval and \$5.10 per unit without first article approval, was the third low bidder. The record indicates that the significance of MDG's failure to acknowledge receipt of amendment No. 6 did not become apparent to the agency until some 3 months after bid opening, after it had twice asked bidders to extend their bids and taken other actions which were about to result in an award to MDG. MDG's bid was then determined nonresponsive for failure to acknowledge a material amendment and award was made to Check-Mate, the fourth low bidder, at a unit price of \$5.80.

MDG admits that it failed to acknowledge amendment No. 6 but contends that was because it never received the amendment.^{3/} It states that it first learned of the amendment 2 months after bid opening during a telephone conversation with the agency contract specialist, who allegedly told MDG that the amendment increased the quantity of fins but that MDG's failure to acknowledge the amendment would not present a problem. MDG also questions the agency's delay in finding MDG's bid nonresponsive.

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 nonresponsive. Favino Mechanical Constr., Ltd., B-237511, Feb. 9, 1990, 90-1 CPD ¶ 174. An amendment is material if it would have more than a trivial impact on price, quantity, quality, delivery, or the relative standing of the bidders. Bonded Maintenance Co., Inc., B-235207, July 14, 1989, 89-2 CPD ¶ 51.

Moreover, a firm bears the risk of not receiving IFB amendments unless it is shown that the contracting officer made a

^{3/} Of the five amendments issued, the agency reports that it received acknowledgements from MDG for only amendment Nos. 1 and 2. MDG argues that it signed and returned amendment Nos. 1, 2, 3, and 5. Amendment No. 1 decreased the number of assemblies required to 32,445. Amendment No. 2 extended bid opening until January 25, 1990. Amendment No. 3 deleted certain procurement integrity-related clauses, added a prohibition against transmitting bids and modifications by facsimile, and extended the bid opening to February 28. Amendment No. 5 further extended the bid opening date to April 13.

deliberate effort to prevent the firm from competing. Crown Management Servs. Inc., B-232431.4, Apr. 20, 1989, 89-1 CPD ¶ 393. This rule stems from the principle that, from the government's point of view, the propriety of a particular procurement depends on whether adequate competition and reasonable prices are obtained, not on whether a particular firm was afforded an opportunity to compete. See Fast Elec. Contractors, Inc., B-223823, Dec. 2, 1986, 86-2 CPD ¶ 627.

The amendment in question increased the number of fin assemblies required from 32,445 to 33,791, an increase of 1,346. Such an increase in the quantity required is material. Just in Time Mfg., Inc., B-238998.4, Sept. 17, 1990, 90-2 CPD ¶ 220. Accordingly, the agency determination that MDG's bid was nonresponsive for failure to acknowledge this amendment was appropriate.

As to MDG's allegation that it never received amendment No. 6, there is no evidence that the Army deliberately did not send the amendment to MDG. The contracting officer states that all potential bidders on the mailing list, including MDG, were sent a copy of the amendment, and 5 bidders acknowledged the amendment. MDG has presented no evidence, other than nonreceipt, that the Army failed in its duty to mail the amendment. Although it is unfortunate that the agency did not sooner determine that MDG's bid was nonresponsive, the fact remains that the protester did not acknowledge the amendment and would not be bound to provide the additional fins required and its bid is thus nonresponsive. The advice which the protester alleges it was given by the contract specialist 2 months after bid opening that the protester's failure to acknowledge the amendment "would present no problem" is irrelevant to the issue of the responsiveness of the protester's bid which, as the protester itself recognizes, must be determined by the content of the bid as of when it was opened.

Accordingly, the protest is denied.



James F. Hinchman
General Counsel