

R. White



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mid-East Contractors, Inc.

File: B-242435

Date: March 29, 1991

Phil B. Abernethy, Esq., Butler, Snow, O'Mara, Stevens & Cannada, for the protester.
David W. Mockbee, Esq., Phelps Dunbar, for Lampkin Construction Company, Inc., and Todd Roberts for Southern Rock, Inc., interested parties.
Lester Edelman, Esq. and Lanny R. Robinson, Esq., Department of the Army, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Bidder's argument that amendment adding a requirement to complete a certificate of procurement integrity is not a material change to the solicitation is denied where the certification requirement binds the contractor to detect and report violations of the procurement integrity provisions and thus imposes a substantial legal burden on the bidder.
2. Contention that acknowledgment of amendment adding requirement to complete certificate of procurement integrity was sufficient to commit bidder and that completion of certification should be permitted up to time of award is denied where completion of certificate imposes substantial legal burdens on contractor and is properly viewed as matter of responsiveness.
3. Contracting officer reasonably added requirement for certification of procurement integrity to invitation for bids prior to reinstatement of statutory requirement for such certification since bid opening and contract award would occur after the effective date of the statute requiring certification.

DECISION

Mid-East Contractors, Inc. protests the rejection of its bid as nonresponsive for failure to include a completed Certificate of Procurement Integrity as required by invitation for bids (IFB) No. DACW38-91-B-0005, issued by the U.S. Army Corps of Engineers for erosion control projects along the

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banks of certain creeks and watersheds in Mississippi. Mid-East argues that the certification requirement involves a matter of responsibility, not responsiveness, which can be addressed any time before award, and, alternatively, that it complied with the requirement at bid opening by properly acknowledging receipt of the amendment adding the certification requirement, even though it neglected to complete the certification itself.

We deny the protest.

The IFB, issued November 13, 1990, sought bids for the projects by December 13. On November 26, the Army amended the IFB to: (1) accelerate the performance initiation date; (2) indicate that the quantities shown on the bid schedule are estimates; (3) change the terms of the Drug-Free Workplace Certification; and (4) add a requirement for a Certificate of Procurement Integrity. With respect to the new requirement for a certificate of procurement integrity, the amendment set forth the full text of the clause found at Federal Acquisition Regulation (FAR) § 52.203-8, which includes instructions to bidders and offerors on how to execute a certificate of procurement integrity, as well as the applicable certificate. The text of the clause requires submission of the signed certificate with the bid, and explicitly advises that "[f]ailure of a bidder to submit the signed certificate with its bid shall render the bid nonresponsive."

Seven bids were received by the bid opening date of December 13, with Mid-East the apparent low bidder. Upon review, Mid-East's bid was rejected as nonresponsive for failure to include a signed certificate of procurement integrity, although Mid-East acknowledged receipt of the amendment adding the certification requirement. By letter dated December 17, Mid-East was notified that its bid had been rejected, and this protest followed. Award to any other bidder has been withheld pending the outcome of this protest.

DISCUSSION

The certificate of procurement integrity clause (FAR § 52.203-8), added by amendment to the IFB, is required by FAR § 3.104-10 to be included in all solicitations where the resulting contract is expected to exceed \$100,000. The clause implements 41 U.S.C.A. § 423(e)(1) (West Supp. 1990), a statute that bars agencies from awarding contracts unless a bidder or offeror certifies in writing that neither it nor its employees has any information concerning violations or possible violations of the Office of Federal Procurement Policy (OFPP) Act provisions set forth elsewhere in 41 U.S.C. § 423. The OFPP Act provisions requiring this certification

became effective, for the second time, on December 1, 1990.^{1/} The activities prohibited by the OFPP Act involve soliciting or discussing post-government employment, offering or accepting a gratuity, and soliciting or disclosing proprietary or source selection information.

Mid-East protests that its bid should not be rejected as nonresponsive for failure to submit a signed certificate of procurement integrity. Mid-East first argues that the provision of the IFB amendment requiring that bidders certify their compliance with the procurement integrity provisions of the OFPP Act does not add a material requirement to the IFB. Mid-East contends that the requirement to certify is not material because it is not related to the substance of the bid--i.e., has no effect on price, quality, quantity, or delivery--and should therefore be treated as a matter of responsibility to be established at any time prior to award. Mid-East next argues that even if the amendment adding the certification requirement is material, a bidder's acknowledgment of the amendment, even without completing the certificate itself, is sufficient to indicate the bidder's acceptance of the terms of the certificate. According to Mid-East, the act of completing the certification involves no additional commitment by the bidder above the commitment made by acknowledging receipt of the amendment adding the certification requirement.

As explained in our prior cases, a responsive bid unequivocally offers to provide the exact thing called for in the IFB, such that acceptance of the bid will bind the contractor in accordance with all the IFB's material terms and conditions. Stay, Inc., B-237073, Dec. 22, 1989, 89-2 CPD ¶ 586, aff'd, 69 Comp. Gen. 296 (1990), 90-1 CPD ¶ 225. Deficiencies or deviations which go to the substance of a bid, by affecting price, quality, quantity, or delivery, are material and require that the bid be rejected. Seaboard Electronics Co., B-237352, Jan. 26, 1990, 90-1 CPD ¶ 115; see also FAR § 14.402-2. Deviations or defects in a bid that change or call into question the legal relationship between the parties are also material and justify rejection of the bid as nonresponsive. 50 Comp. Gen. 11 (1970) (bidder's failure to acknowledge receipt of an amendment granting contractual

^{1/} After extending the original effective date of these provisions to July 16, 1989, see Woodington Corp., B-235957, Oct. 11, 1989, 89-2 CPD ¶ 339, recon. dismissed, B-235957.2, Nov. 15, 1989, 89-2 CPD ¶ 461, Congress suspended them, including the certification requirement at issue here, for 12 months beginning December 1, 1989. See section 507 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, 1759 (1989).

authority to an agency to make price adjustments for defective cost or pricing data changed the legal relationship between the parties and was a material defect in the bid).^{2/} Responsibility, on the other hand, refers to a bidder's capacity to perform all contract requirements, and is determined not at bid opening, but at any time prior to award based on information received by the agency up to that time. D.M. Wilson, Lumber, Inc.--Recon., B-239136.2, May 18, 1990, 90-1 CPD ¶ 489.

As explained above, to determine whether a requirement is material, and hence a matter of responsiveness, we look, in part, to whether that requirement substantially changes the legal relationship between the parties. 50 Comp. Gen. 11, supra. When considering certification requirements, our review focuses principally on the effect of certification on the obligation of the bidder if it received the award. A certification requirement is necessary for a bid to be responsive only if the certification provision imposes requirements materially different from those to which the bidder is otherwise bound, either by its offer or by law. Tennier Indus., Inc., B-239025, July 11, 1990, 90-2 CPD ¶ 25. Here, we find that the certification provision implements several requirements of the OFPP Act and imposes a substantial legal obligation on the contractor.

The certification requirements obligate a named individual--the officer or employee of the contractor responsible for the bid or offer--to become familiar with the prohibitions of the OFPP Act, and impose on the bidder, and its representative, a requirement to make full disclosure of any possible violations of the OFPP Act, and to certify to the veracity of that disclosure. In addition, the signer of the certificate is required to collect similar certifications from all other individuals involved in the preparation of bids or offers. The certification provisions also prescribe specific contract remedies--including withholding of profits from payments and

^{2/} See also Mak's Cuisine, B-227017, June 11, 1987, 87-1 CPD ¶ 586 (failure to acknowledge receipt of an amendment adding new anti-kickback procedures was a material deficiency in the bid because the amendment changed the legal relationship between the parties); McKenzie Road Serv., Inc., B-192327, Oct. 31, 1978, 78-2 CPD ¶ 310 (failure to acknowledge receipt of amendment changing minority employment goals under the Equal Employment Opportunity Program was a material deficiency because the amendment changed the legal relationship between the parties).

terminating errant contractors for default--not otherwise available. These provisions are materially different from those to which the bidders otherwise are bound; accordingly, we find that the certification requirement is a material term of the IFB, and is properly treated as a matter of responsiveness. See Hampton Roads Leasing, Inc.--Recon., B-236564.3, Apr. 4, 1990, 90-1 CPD ¶ 357, aff'd, B-236564.4, Aug. 6, 1990, 90-2 CPD ¶ 103; Woodington Corp., B-235957, supra.^{3/}

Mid-East next argues that, even if one views the certification requirement found in the IFB amendment as material, Mid-East's acknowledgment of that amendment was sufficient to indicate its intended compliance with the OFPP Act. According to Mid-East, completion of the certification should be permitted up to the time of contract award.

Acknowledgment of an amendment adding a certification requirement establishes a bidder's commitment to comply with the additional requirements when certification is accomplished by the act of signing one's bid. See Tennier Indus., Inc., B-239025, supra (citing FAR § 52.203-11, which establishes that signing a bid or offer constitutes certification that no federal appropriated funds have been paid to any person to influence certain federal acts). However, when bidders are required to complete separate certificates, we will look to whether failure to complete the certificate is a material deficiency by examining the obligations found in the certificate itself. If the text of a certificate imposes a substantial legal obligation on a bidder, and without completion of the certificate the bidder's commitment to be obligated remains unclear, completion of such certificates are material terms of an IFB with which compliance must be established at the time of bid opening. See, e.g., 52 Comp. Gen. 874 (1973); 51 Comp. Gen. 329 (1971). Permitting a bidder to decide after bid opening whether to comply with a material term of an IFB strains the integrity of the competitive bidding system by giving otherwise successful bidders a second opportunity to walk away from a low bid. See 38 Comp. Gen. 532 (1959).

Mid-East's contention that its failure to complete the certificate should be treated as a matter of responsibility ignores the framework of the procurement integrity provisions of the OFPP Act, which relies on certification to impose

^{3/} In addition, now that the requirement for the certification has been reinstated, the FAR has been amended to specifically direct that a bidder's failure to submit a signed certificate of procurement integrity with its bid shall render the bid nonresponsive. FAR § 14.404-2(m).

responsibilities and obligations. Certification imposes on one individual representative of the bidder a direct obligation to become familiar with the OFPP Act's prohibitions against certain conduct. Since the OFPP Act imposes this and other duties on the individual who certifies for the bidder, failure to complete the certificate leaves unresolved the identity and commitment of the individual who will be the focus for the OFPP Act's other obligations.

The certifying individual also attests that every officer, employee, agent, representative or consultant of the contractor involved in preparation of the bid or offer is familiar with the requirements of the OFPP Act and has filed a certification indicating no knowledge of any possible violation. In addition, the certifying individual must represent that all individuals involved in the preparation of the bid or offer will report any information concerning a possible violation of the OFPP Act to the officer or employee signing the certification. For these reasons, we conclude that failure to complete the certificate itself is a material deficiency in a bid requiring that the bid be rejected as nonresponsive. See FAR § 14.404-2(m); Atlas Roofing Co., Inc., B-237692, Feb. 23, 1990, 90-1 CPD ¶ 216 (bidder's failure to acknowledge amendment adding requirement for certification of procurement integrity was not a material deficiency, since the requirement was already included in the IFB, yet bidder's failure to complete and submit certificate properly resulted in determination that bid was nonresponsive).

Finally, Mid-East argues that since the OFPP Act was suspended at the time both the solicitation and amendment were issued, the contracting officer could not impose the requirements of the OFPP Act on this solicitation. We disagree. After a 1-year suspension, the certification provisions of the OFPP Act were automatically reinstated on December 1, 1990. After that date, the contracting officer was statutorily barred from awarding any contract valued at more than \$100,000 without the accompanying certification of procurement integrity. 41 U.S.C. § 423(e). Thus, the contracting officer acted reasonably in amending the outstanding solicitation well in advance of the December 13 bid opening date to ensure that the bids received would comply with the statute.

CONCLUSION

As a result of the substantial legal obligations imposed by the certification, omission from a bid of a signed certificate of procurement integrity--whether from failing to acknowledge an amendment adding the certification, from acknowledging the amendment but failing to return the signed certification, or from improperly completing the certification in such a way as

to call into question the bidder's commitment to the requirements--leaves unresolved a bidder's agreement to comply with a material requirement of the IFB. Accordingly, such bids, like Mid-East's, are nonresponsive and must be rejected.

The protest is denied.

for Robert T. Murphy
James F. Hinchman
General Counsel