



Comptroller General
of the United States

Washington, D.C. 20548

145046

Decision

Matter of: Cascade General, Inc.

File: B-244395

Date: October 17, 1991

Loy Kahler for the protester,
John T. Jozwick, Esq., Bryan Schiffrin & Hopkins, for West
State, Inc., an interested party,
Joe S. Macey, Esq., Maritime Administration, for the agency.
Stephen J. Gary, Esq., David Ashen, Esq., and John M.
Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Prospective bidder's failure to receive solicitation amendment does not warrant disturbing the award where there is no indication that the cause of the nonreceipt was the contracting agency's failure to comply with the Federal Acquisition Regulation requirements for notice and distribution of amendments.

2. Where an amendment to an invitation for bids for ship repair and maintenance imposes a new obligation on prospective contractors, by adding a requirement that the ship's sea chests be inspected, cleaned, and painted, and such work is both essential and integral to performance of the overall contract, the amendment is material, and an agency properly may reject a bid as nonresponsive for failure to acknowledge the amendment.

DECISION

Cascade General, Inc. protests the award of a contract to West State, Inc. (WSI) under invitation for bids (IFB) No. DTMA-94-91-B-10000, issued by the Maritime Administration (MARAD), Department of Transportation, for drydocking the Grand Canyon State. Cascade argues that MARAD improperly failed to send it an amendment to the IFB until after bid opening, that the amendment was not material, and that therefore the agency's rejection of its bid as nonresponsive for failure to acknowledge the amendment was improper.

We deny the protest.

The solicitation provided for the drydocking of the Grand Canyon State, a reserve fleet ship being prepared for activation by MARAD for use by the Military Sealift Command. The IFB specified various repair and maintenance tasks, comprising contract line item Nos. 1 through 23, for which bidders were required to submit separate prices with their bids. Each line item referenced detailed specifications, which included sandblasting and painting the hull with antifouling and anti-corrosive paints, and replacing zinc anodes used to prevent hull corrosion.

Amendment 1, issued on April 19, 1991, added line item 24, "Sea Chests," which called for the following work:

"Furnish necessary labor and material to remove sea chest strainer grids for inspection and any necessary cleaning. Sea chests are to be inspected by [the contracting agency] . . . and U.S. Coast Guard. After inspection, sea chests are to be recoated, as per the hull coating item . . . , with two coats of anti-corrosive and three coats of anti-fouling paint. After anode installation . . . and recoating is completed, sea chest strainers are to be closed in good order using new fasteners and locking devices, as required. The following is a list of sea chest strainers: . . . (17 locations in all)."

Sea chests are boxlike spaces that are located inside of and behind the exterior hull of the ship; they serve as collecting areas for seawater that is pumped through a system of valves and pipes originating in the sea chests to various parts of the ship, and used for purposes such as cooling shipboard equipment. The openings of the sea chests onto the hull are covered with strainer grids, a screen-like device whose purpose is to keep debris from entering and fouling the valves and pipes located in the sea chests. Zinc anodes are located throughout the exterior of the ship to prevent corrosion from seawater; some anodes, as indicated in the amendment above, also are located inside the sea chests.

When bids were opened, MARAD determined that Cascade, the apparent low bidder, had not acknowledged the amendment and had not bid on line item 24. When the agency advised Cascade of this apparent defect in its bid, the firm responded that it had never received the amendment; the agency then provided Cascade with the amendment, which Cascade returned with a bid price of \$1,800 for item 24. Even after the addition of \$1,800 to its price, Cascade's bid, at \$785,391, was still the apparent low bid, compared to WSI's next low bid of \$898,311. Subsequently, however, MARAD determined that it had been mistaken in allowing

Cascade to bid on item 24 after bids had been opened, and advised Cascade that its bid was being rejected as nonresponsive for failure to acknowledge the amendment prior to bid opening. When MARAD then awarded the contract to WSI as the next low bidder, Cascade filed this protest with our Office.

Cascade argues that its failure to respond to the amendment was due solely to negligence on the part of MARAD, which, according to the protester, failed to send it the amendment until after bids had been opened. In any event, Cascade argues that the amendment had only a negligible effect on price, and was essentially a clarification of work already required under the IFB as issued; since, according to Cascade, most if not all of the work pertaining to sea chests that was specified by the amendment was already required by the solicitation provisions relating to the replacement of anodes and the painting of the ship's hull, the amendment was not material and did not have to be acknowledged.

In response, MARAD reports that it mailed the amendment to Cascade and all other prospective bidders to whom the IFB had been issued on April 19, 1991. MARAD asserts that, notwithstanding the fact that the work required by the amendment had a relatively small impact on the total contract price, the amendment imposed a significant new legal obligation on the contractor that was not previously imposed by the IFB. According to the agency, the work on sea chests specified by the amendment is included as a matter of course in solicitations such as this for the drydocking of reserve fleet vessels; MARAD reports that the agency's failure to include the line item in the IFB as issued was due to an oversight. MARAD states that sea chests and strainer grids are an essential and integral part of the maintenance that must be performed while a ship is in drydock. If not done at that time, the work would be much more expensive to undertake since it would entail a new drydocking. Further, according to the agency, if sea chests are not maintained as specified in the amendment, the ship is at risk of sinking; if the steel interior of the sea chests is not properly inspected, cleaned, and painted with several coats of special protective paint, there is a danger of holes developing undetected in the sea chests which, since they communicate directly with the sea, could cause the ship to sink. MARAD concludes that the amendment therefore was material and had to be acknowledged in order for a bid to be found responsive.

The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(a)(1)(A) (1988), requires contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to

ensure that a procurement is open to all responsible sources and to provide the government with the opportunity to receive fair and reasonable prices. In pursuit of these goals, a contracting agency must use reasonable methods to disseminate solicitation materials to prospective competitors. See Republic Floors, Inc., B-242962, June 18, 1991, 91-1 CPD ¶ 579; Power Eng'g Contractors, Inc., B-11341, Feb. 6, 1991, 91-1 CPD ¶ 123. In particular, the government is required by regulation to add to the solicitation mailing list all firms that have been furnished invitations in response to their requests, so that they will be furnished copies of any amendments, unless it is known that the request was made by an entity which is not a prospective bidder. See Power Eng'g Contractors, Inc., supra; Federal Acquisition Regulation (FAR) § 14.205-1(c).

This, however, does not make the contracting agency a guarantor that these documents will be received in every instance and, concurrent with the agency's obligations in this regard, prospective contractors have the duty to avail themselves of every reasonable opportunity to obtain solicitation documents, especially in a sealed bid procurement. Thus, a prospective contractor normally bears the risk of not receiving a solicitation amendment unless there is evidence (other than non-receipt by the protester) establishing that the agency failed to comply with the FAR requirements for notice and distribution of amendments, provided that the prospective contractor availed itself of reasonable opportunities to obtain the documents. See Power Eng'g Contractors, Inc., supra.

Here, the record indicates, and Cascade has presented no evidence to the contrary, that the agency mailed the amendment to all three firms that had requested the solicitation, including Cascade, and received bids that acknowledged the amendment from all except the protester. We therefore see nothing in the record to indicate that agency procedures for disseminating the amendment were defective. See Power Eng'g Contractors, Inc., supra (agency procedures held sufficient where record indicated agency mailed amendment to all firms on solicitation requestors list, including protester, and of three bids submitted only protester's did not acknowledge receipt of amendment); see also Western Roofing Serv., B-232666.4, Mar. 5, 1991, 70 Comp. Gen. _____, 91-1 CPD ¶ 242, aff'd, B-232666.5, June 13, 1991, 91-1 CPD ¶ 566 (protest based on nonreceipt of amendment denied, where protester presented no evidence that any other offeror failed to receive amendment or that it made diligent efforts to obtain any new amendments). Under the circumstances, we see no basis for disturbing the award to WSI on the basis of Cascade's failure to receive the amendment.

We further disagree with Cascade's argument that the amendment was not material. 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 nonresponsive. Gulf Elec. Constr. Co., Inc., 68 Comp. Gen. 719 (1989), 89-2 CPD ¶ 272. The Federal Acquisition Regulation (FAR) provides that an amendment is material where it would have more than a negligible impact on price, quantity, quality, or delivery of the item solicited. See FAR § 14.405(d)(2). An amendment is material where, among other things, it would impose legal obligations on a prospective contractor that were not contained in the original solicitation. See, e.g., American Sein-Pro, B-231823, Aug. 31, 1988, 88-2 CPD ¶ 209.

The cost impact of this amendment was relatively small in the context of the contract as a whole. See Pittman Mechanical Contractors, B-225486, Feb. 25, 1987, 87-1 CPD ¶ 218. (The agency's original estimate of the cost of the work specified in the amendment was \$7,500, and the awardee's price for the item was \$6,235, less than 1 percent of the total contract price of \$898,311.) However, the materiality of an amendment that imposes new legal obligations on the contractor is not diminished by the circumstance that the amendment may have little effect on the bid price or the work to be performed. American Sein-Pro, supra. Here, notwithstanding its relatively small impact on price, we find that the amendment imposed a significant additional obligation not already imposed by the IFB as issued, and that it was therefore material.

The solicitation as issued called for the inspection and replacement where necessary of zinc anodes throughout the ship; Cascade argues that since some of these anodes are located inside the sea chests, the required inspection of those anodes necessitates removal of the strainer grids which cover the sea chest openings. Once the strainer grids have been opened, Cascade claims, relatively little additional effort would be required to clean the strainer grids and to paint the sea chest interiors as well, particularly since the amendment called for the same anticorrosive and antifouling paints as were already required for use on the entire hull. Thus, according to Cascade, the amendment in effect was merely a clarification of what is already required by the solicitation as issued.

Contrary to Cascade's contention, however, the solicitation requirement for cleaning and painting the hull did not obligate the contractor to inspect, clean, and paint the sea chests, which are not part of the exterior hull, but instead are located behind and within the hull. (In this connection, even the locations of the sea chests were not

indicated in the IFB, but instead were set forth for the first time in the amendment.) As for the original requirement to inspect zinc anodes, including those located in sea chests, this did not encompass the inspection and cleaning of strainer grids. Thus, rather than merely clarify existing requirements, the amendment clearly added a new requirement for cleaning the strainer grids and painting the sea chests, as well as for providing new fasteners and locking devices for the strainers to the extent necessary.

Cascade does not dispute MARAD's position that the sea chests and strainer grids are vital elements of the ship whose maintenance must be performed adequately at drydocking to assure the proper functioning of the ship. We therefore conclude that the amendment added a significant, and therefore material, obligation to those previously required by the IFB, such that Cascade's failure to acknowledge the amendment rendered its bid nonresponsive. See MIBO Constr. Co., B-224744, Dec. 17, 1986, 86-2 CPD ¶ 678 (given the inherently hazardous nature of asbestos, an amendment deleting the optional use of asbestos roofing material was a material change, regardless of its possible impact on bid price, and a bidder's failure to acknowledge the amendment rendered its bid nonresponsive); MTC Indus. & Research Carmiel, B-227163, Aug. 18, 1987, 87-2 CPD ¶ 174 (amendment material where requirement added by unacknowledged amendment was integral part of contract performance, since it was essential to enable government to perform necessary maintenance).

The protest is denied.


for James F. Hinchman
General Counsel