



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Engineering Technologies Associates, Inc.

**File:** B-250567

**Date:** February 10, 1993

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Brian S. Jablon, Esq., Smith, Somerville & Case, for the protester.

John Pettit, Esq., Department of the Air Force, for the agency.

Amy M. Shimamura, Esq., Office of the General Counsel, GAO, participated in the preparation of this decision.

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### DIGEST

A bid, although acknowledging an amendment providing a new schedule page and revising the specifications, was properly rejected as nonresponsive when the bid was submitted on the original schedule page and therefore raised doubt as to whether the bidder intended to comply with the revised specification or with the unamended specification as it was referenced on the original schedule page.

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### DECISION

Engineering Technologies Associates, Inc., (ETA) protests the rejection of its bid as nonresponsive and the award of the contract to Bildon, Inc., under Department of the Air Force Invitation for Bids (IFB) No. F07603-92-B8230, issued on August 6, 1992, for the replacement of heating fuel oil storage tanks for 140 units of family housing at Dover Air Force Base, Delaware. ETA contends that its failure to use the amended bid schedule was an immaterial defect which should have been waived as a minor informality.

We deny the protest.

The IFB required the contractor to provide all labor, equipment, tools, materials, supervision, and other items necessary to perform all work required in removing and disposing of thirty-seven 1,000-gallon underground heating fuel oil storage tanks and installing 140 above ground replacement tanks, each with a 275-gallon capacity. Line item 1 of the bid schedule required bidders to state a lump-sum amount for the required work. The schedule, as originally issued, also included line items 2 through 10 which required unit and extended prices for estimated quantities of various tasks associated with the removal of

the tanks. Prior to bid opening, two amendments were issued to clarify concerns raised by several potential bidders with regard to testing requirements and the removal of contaminated soil.

As originally issued, the bid schedule, line item 5, required the sampling and testing of soil and/or water and sludge, had an estimated quantity of 150, and referenced section 01415, paragraph 1.04 of the specifications. Under the specifications (sec. 01415, par. 1.02B), the contractor "is required to test all sites where there are visible signs of contamination such as fuel oil in the soil, hole(s) in the tanks, etc." The original, unamended paragraph 1.04 of section 01415 of the specifications reiterated the requirement of paragraph 1.02B that soil and/or water testing was required whenever contamination was found and went on to advise that the State of Delaware "may require additional testing after the first required sampling when soil is removed, as part of the tank site cleanup." Under the original provision covering the analytical methods for soil and water samples (sec. 01415, par. 3.08B), a test for total petroleum hydrocarbons (TPH) was required for samples associated with heating oil tanks and a scan for benzene, toluene, ethylbenzene, and xylene (BTEX) was required, in addition to a TPH test, for samples associated with kerosene tanks.

In response to concerns expressed by prospective bidders during a site visit, the Air Force issued Amendment No. 1 to clarify testing requirements by adding a new bid schedule and incorporating changes to the specifications. In the amended bid schedule, the original line item 5 requirement for testing an estimated quantity of 150 units of soil and/or water and sludge samples was divided into sampling and testing of an estimated 100 units of sludge (new line item 5) and additional sampling and testing with an estimated quantity of 50 (new line item 6). As amended, line item 5 referenced the existing specification provision which dealt specifically with the handling and testing of sludge in tanks (sec. 02040, par. 3.01 O).

The new line item 6 required the bidder to provide a unit and aggregate price for 50 units of "additional sampling and testing," referencing the amended paragraph 1.04 in section 01415. As amended, section 01415 continued to require testing where there are visible signs of contamination (par. 1.02B) and where additional testing is required by the state (par. 1.04B). Amendment No. 1 also changed section 01415, paragraph 3.08B, to provide that the contractor should conduct both the test for TPH and the BTEX scan for units of soil and/or water samples associated with heating fuel oil tanks. (The specifications originally required the BTEX

scan only for units of soil and water samples associated with tanks storing kerosene.)

Twenty-two bids were received by the September 9, 1992 bid opening date. The bids ranged in price from ETA's low bid of \$152,386 to \$486,943.70, with a government estimate of \$242,800. Five bids, including ETA's, were rejected for failure to use the amended bid schedule. Prior to bid opening, ETA realized that it had submitted its bid on the original bid schedule; it then requested, but was denied, permission to submit its bid on the amended bid schedule by facsimile transmission. After a determination of responsibility, the contract was awarded to Bildon, Inc., the second low bidder, at \$180,032.50. Contract performance has been stayed pending the outcome of this protest.

ETA contends that its bid is responsive because it acknowledged both amendments and it is therefore committed to perform the contract in accordance with the solicitation's requirements.<sup>2</sup> ETA also contends that since it is bound to perform as required, its failure to use the amended bid schedule is an immaterial defect which should have been waived as a minor informality under Federal Acquisition Regulation (FAR) paragraph 14.405.<sup>3</sup>

Responsiveness concerns whether a bid constitutes an offer to perform, without exception, the exact thing called for in the IFB. 49 Comp. Gen. 553, 556 (1970). Unless something on the face of the bid, or specifically a part of it, limits, reduces or modifies the bidder's obligation to perform in accordance with the terms of the solicitation, the bid is responsive. Id. The required commitment to the terms of the IFB need not be made in the manner specified by

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<sup>1</sup>The Air Force properly refused to permit ETA to submit its bid on the amended bid schedule by facsimile transmission because the IFB did not authorize facsimile bids. See, e.g., G.D. Searle & Co., B-247077, April 30, 1992, 92-1 CPD ¶ 406.

<sup>2</sup>The second amendment revised the bid schedule and the technical specifications to require the removal and disposal of an estimated 100 cubic yards (CY), rather than an estimated 100 square yards (SY), of contaminated soil. We need not respond to ETA's argument that the changes made by the amendment are immaterial in light of our disposition of the other basis of its protest.

<sup>3</sup>FAR ¶ 14.405 authorizes the waiver of immaterial defects in bids as a minor informality when the effect on price, quantity, quality, or delivery is negligible.

the solicitation; all that is necessary is that the bidder, in some fashion, commit itself to the solicitation's material requirements. Fisher Berkeley Corp.; International Medical Industries, B-196432.2, Jan. 9, 1980, 80-1 CPD ¶ 26.

Amendment No. 1 made two changes to the specifications which are relevant to this protest. The first change provided for a breakdown of the estimated units of sludge and the estimated units of soil and/or water to be tested. The second change required both the TPH and BTEX tests (rather than just the TPH test) for soil and/or water samples associated with heating fuel oil tanks, and deleted the requirement for TPH and BTEX tests for samples associated with tanks storing kerosene. The purpose of the BTEX scan is to detect the lighter, more volatile hydrocarbons contained in kerosene.

ETA contends that it is contractually obligated to provide BTEX scans because it acknowledged Amendment No. 1 which provided for BTEX scans, and nothing in the amended bid schedule provided for BTEX scans.<sup>4</sup>

A bidder can bind itself to the contents of some amendments merely by acknowledging receipt thereof; however, when a bidder, despite acknowledging an amendment, otherwise creates doubt as to its commitment to perform pursuant to the amendment, the bid must be rejected. E.H. Morrill Co., 63 Comp. Gen. 348 (1984), 84-1 CPD ¶ 508. Although ETA acknowledged receipt of Amendment No. 1, which added the BTEX scan for soil and/or water samples associated with heating fuel oil tanks, under the circumstances here we do not think the acknowledgment of Amendment No. 1 is sufficient to show that ETA has committed itself to provide the scans.

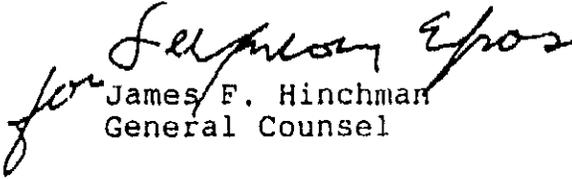
ETA's bid was submitted on the original bid schedule. That schedule referenced specifications which did not require the BTEX test for soil and/or water samples associated with heating fuel oil tanks. The revised schedule, dated August 13, 1992, referenced the same specification, but that specification was revised by an addendum also dated August 13, 1992 to require the BTEX test along with the

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<sup>4</sup>Although the bid schedule does not specifically reference the specification paragraph which provides for BTEX scans, line item 6 references section 01415, paragraph 1.04 which covers "additional sampling and testing"; testing requirements are set forth in section 01415, paragraph 3.08B, which requires BTEX scans for soil and water samples associated with heating fuel oil tanks.

previously-required TPH test. Although ETA acknowledged the amendment that revised the specification, by submitting its bid on the original bid schedule ETA could have been offering to comply only with the unrevised specification since it was the unamended specification that was referenced by that original schedule. In other words, we think ETA's bid was subject to reasonable doubt as to whether it was based on intended compliance with the revised specification or with the specification as it originally existed. See Ventura Mfg. Co., B-193258, Mar. 21, 1979, 79-1 CPD ¶ 194; E. H. Morrill Co., supra. Accordingly, rejection of the bid was proper.

The protest is denied.

*for*   
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General Counsel