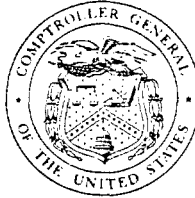


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PA-11

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

8869

FILE: B-192620

DATE: January 16, 1979

MATTER OF: Navaho Corporation

[Bid Is Rejected Which Does Not Contain Acknowledgment of Amendment to IFB]

DIGEST:

Rejection of bid which does not contain acknowledgment of amendment which imposed durability testing requirement was proper since estimated value of amendment, constituting 13.34 percent of difference between two low bids, was not negligible and since testing requirement appears to be material requirement related to quality assurance needs of Government.

DLG
00630

Navaho Corporation (Navaho) has protested the rejection of its bid as nonresponsive by the Army Troop Support and Aviation Readiness Command (TSARCOM) because the bid did not contain an acknowledgment of an amendment to invitation for bids (IFB) No. DAAK01-77-B-5472. Navaho asserts that the amendment had a trivial or negligible effect on price and therefore the failure to acknowledge it should have been waived as a minor deviation.

AGC00917

The IFB was issued on June 20, 1977, for the purchase of 135 inflatable single section shelters, 1 preproduction shelter, and related documentation. The IFB provided that bid opening would take place on December 16, 1977. Thereafter TSARCOM issued amendments 0001 and 0002 which made revisions to the IFB but did not extend the date of bid opening. On December 15, 1977, Navaho submitted its bid which acknowledged receipt of amendments 0001 and 0002. However, before bid opening could take place, it was postponed and on December 20, 1977, TSARCOM issued amendment 0003 which made changes to the IFB specifications and made January 17, 1978, the new bid opening date. Navaho thereafter acknowledged receipt of amendment 0003. Once again TSARCOM postponed bid opening and on February 9, 1978, issued amendment 0004 which required the shelters to be able to withstand a durability test of 1440 hours and postponed bid opening until March 15, 1978. TSARCOM subsequently issued amendments 0005

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all

and 0006 which did not constitute material amendments but which did postpone bid opening until April 28, 1978. Although Navaho acknowledged the first amendment (0003) which was issued after Navaho submitted its bid, Navaho failed to acknowledge any of the succeeding amendments (0004, 0005 and 0006).

DLG
00542

When bids were opened on April 28, 1978, Navaho's bid was evaluated at \$2,031,102.10 and B.F. Goodrich Company's (B.F. Goodrich) bid was evaluated at \$2,068,515.16. Although Navaho's bid was low, it was declared nonresponsive because it was not accompanied by an acknowledgment of amendment 0004, which imposed the durability testing requirement.

TSARCOM determined that the durability testing requirement would increase the unit price of the shelters by \$36.71 or \$4,992.56 for 136 shelters (135 units plus 1 preproduction unit), since a reasonable contractor would increase his bid price to compensate for assuming the increased risk of not meeting the durability requirements. The estimated increase was based on actual experience under an existing contract where after award TSARCOM imposed the durability testing requirement and the contractor requested an adjustment in its contract price.

This amount represents only a .25 percent (1/4 of 1 percent) increase in Navaho's bid, but is 13.34 percent of the difference between the two low bids. In view of the latter, TSARCOM determined that the amendment had more than a trivial or negligible effect on price and that therefore the failure to acknowledge the amendment could not be waived under Defense Acquisition Regulation (DAR) § 2-405(iv)(B) (1976 ed.) which provides that a bidder's failure to acknowledge an amendment can be waived only if the effect of the amendment on price was trivial or negligible.

TSARCOM has cited several of our decisions in support of its rejection of Navaho's bid, including AFB Contractors, Inc., B-181801, December 12, 1974, 74-2 CPD 329, and 53 Comp. Gen. 64 (1973). In AFB Contractors we held that an amendment was not trivial or negligible with respect to price where the estimated

increase in bid price was only .874 percent of the low bid but which was approximately 14.8 percent of the difference between the two low bids. Likewise, in 53 Comp. Gen. 64 we held that an estimated increase in bid price was not trivial or negligible where the increase was .434 percent of the actual bid but was 20.9 percent of the difference between the two low bids.

Navaho, on the other hand, has not cited any of our decisions in support of its position but in essence maintains that an estimated increase of .25 percent resulting from an amendment can only be considered trivial. Navaho also states that it acknowledged amendments 0004, 0005 and 0006 pursuant to a telephone conversation with the contracting officer after bid opening and subsequently confirmed the acknowledgment in writing. Navaho asserts that its acknowledgment of the amendments was orally accepted by the contracting officer and as evidence of that fact points out that on June 17, 1978, almost seven weeks after bid opening, TSARCOM requested that Navaho extend the period for acceptance of its bid. Finally, Navaho asserts that its bid included an amount attributable to the durability testing requirement imposed by amendment 0004, since it viewed the amendment 0004 requirement as a part of quality control and functional test responsibility.

TSARCOM specifically denies that it accepted Navaho's acknowledgment of amendments 0004, 0005, and 0006 by telephone. TSARCOM states that it merely informed Navaho's president that TSARCOM was not in the position of preventing Navaho from acknowledging the amendments. Whether the contracting officer in fact accepted Navaho's acknowledgment after bid opening is irrelevant since to be effective an acknowledgment must be submitted prior to bid opening. Ira Gelber Food Services, Inc., 55 Comp. Gen. 599, 601 (1975), 75-2 CPD 415. Furthermore, although Navaho asserts that its bid includes an appropriate amount for the durability testing requirement, that fact is not evident from the bid in the absence of an acknowledgment of amendment 0004, and the bid therefore does not represent a legally binding commitment

to comply with that requirement. Thus, Navaho's bid can be accepted only if the amendment can be viewed as having a trivial or negligible effect on price, or is not otherwise material.

No precise standard can be employed in determining whether a change effected by an amendment is trivial or negligible in terms of price and consequently a determination must be based on the particular facts of each case. However, in determining whether the value of an amendment is trivial or negligible our Office looks at the amendments estimated impact on bid prices and the relationship of that impact to the difference between the two low bids. 52 Comp. Gen. 544 (1973). As noted by TSARCOM, in 53 Comp. Gen. 64 we held an amendment was not trivial or negligible in terms of price where the increase in bid price was only .434 percent of the low bid but was 20.9 percent of the difference between the two low bids. Similarly, we believe that the amendment in the instant case can not be viewed as being trivial or negligible with respect to price. Although the estimated increase is only .25 percent of Navaho's actual bid price as evaluated, it constitutes 13.34 percent of the difference between Navaho's and B.F. Goodrich's bids.

Furthermore, although TSARCOM has not argued it, it appears that the amendment imposing the durability testing requirement must be viewed as material regardless of the dollar value attached to it by TSARCOM. In this regard, we have recognized that there are many solicitation provisions with which compliance may not be waived because that waiver would result in different legal obligations than those contemplated by the solicitation. See 38 Comp. Gen. 131, 133 (1958). For example, we have held that a bid which reserved to the bidder the right to negotiate the terms of a warranty was not responsive to a solicitation providing for a specific warranty, since "the terms of a warranty may unquestionably be material." 42 Comp. Gen. 96, 97 (1962). We have reached similar conclusions with respect to provisions dealing with such things as progress payments and cost and pricing data. See Thomas Construction Company, Inc., B-184810, October 21, 1975, 75-2 CPD 248 and cases cited therein.

Here, the testing requirement clearly relates to the quality assurance needs of TSARCOM, and is, in our opinion, reasonably analogous to a warranty provision. In other words, Navaho's bid would not bind it to provide a shelter capable of withstanding a durability test of 1440 hours prior to TSARCOM's accepting delivery of the shelters, and thus TSARCOM would bear the increased risk that a shelter furnished by Navaho would not meet its minimum durability needs.

Protest denied.



Deputy Comptroller General
of the United States