**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Innovative Refrigeration Concepts

File: B-271072

Date: June 12, 1996

Sam Zalman Gdanski, Esq., for the protester.
David H. Brujes, Esq., Department of the Treasury, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly rejected low bid for 600-ton chillers as nonresponsive for failing to acknowledge an amendment that corrected an obvious error in the entry water temperature parameter under which the chillers would be operated; the amendment was not material because it did not affect the protester's obligation to supply 600-ton chillers in accordance with the solicitation's requirements.

DECISION

Innovative Refrigeration Concepts (IRC) protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. FTC-96-11, issued by the Department of the Treasury, Federal Law Enforcement Training Center (FLETC), Glynco, Georgia, for two 600-ton chillers. The agency rejected the bid because IRC failed to acknowledge amendment Nos. 0002 and 0003. IRC contends that the amendments were not material.

We sustain the protest.

The IFB schedule required a bid for two 600-ton chillers and one 1,300-ton cooling tower.[1] Amendment No. 0001 was issued to incorporate certain drawings and technical specifications omitted from the original IFB package. Among other things, the information sheet in the amendment included operating parameters for the evaporators on the 600-ton chillers. The stated operating parameters were entry water temperature of 57 degrees Fahrenheit (F), leaving water temperature of 42 degrees F, and flow rate of 1,150 gallons per minute (GPM). Amendment No. 0002 was subsequently issued, and contained the following question and answer:

[1]The agency did not award the item for the 1,300-ton cooling tower.

"QUESTION: Chiller capacity - The flow rate and water temperature difference for the evaporator do not equate to the scheduled tonnage (600T).

"ANSWER: The entering water temperature as shown on the chart in Amendment 0001 was incorrect. The correct chiller entering water temperature should be 54.5 [degrees] F instead of 57 [degrees] F."

Six bids were received by bid opening on December 20. IRC submitted the low bid at $185,976 for the two 600-ton chillers. While IRC's bid acknowledged amendment No. 1, it failed to acknowledge amendment Nos. 0002 and 0003.[2] FLETC rejected IRC's bid as nonresponsive on the basis that amendment No. 0002 was material in light of the change in the entry water temperature parameter.[3] FLETC made award to the next low bidder, Carrier Corporation, at $186,646 on February 9, 1996. IRC protested on that same date. The agency determined that the need for the chillers was urgent and authorized contract performance, notwithstanding the protest. We have been advised that the chillers have been delivered.

A bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive, since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Central Atlantic Contractors, Inc., B-243663, Aug. 14, 1991, 91-2 CPD ¶ 146. On the other hand, a bidders failure to acknowledge an amendment that is not material is waivable as a minor informality. Federal Acquisition Regulation (FAR) § 14.405. An amendment is material only if it would have more than a trivial impact on price, quantity, quality, or delivery of the item bid upon, or the relative standing of the bidders. Id.; FAR § 14.405(d)(2). An amendment is not material, however, where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation or previous and acknowledged amendments. Angus Fire Armour Corp., B-237211.2, Jan. 18, 1990, 90-1 CPD ¶ 68. No precise rule exist to determine whether a change is more than negligible, but an amendment that merely clarifies an existing requirement is not material and the failure to acknowledge it may be waived. Id.

Here, the agency asserts that amendment No. 0002 was material because it corrected a mistake in one of the operating parameters, entry water temperature, that rendered the specifications in the IFB, as amended by amendment No. 0001,

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[2]IRC failed to timely acknowledge amendment Nos. 0002 and 0003 because its agent delivered them to the wrong address.

[3]There is no contention, nor do we have any basis to find, that amendment No. 0003, or any other parts of amendment No. 0002, are material.

impossible to meet. The agency explains that it would take a 718-ton chiller to cool water in accordance with the parameters stated in amendment No. 0001,[4] and has provided the formula and mathematical calculations, in which each of the parameters as well as the chiller capacity are factors, to support its position in this regard.

The protester argues that the IFB unambiguously required 600-ton chillers, as stated on the IFB schedule completed by IRC, and that while it was apparent that one of the parameters in amendment No. 1 was in error, it was otherwise clear that the IFB required 600-ton chillers and that the operating parameters specified were not material. IRC explains in this regard that the specified chiller capacity is "a single, vital engineering parameter, which summarizes the size, flow, operation temperatures, etc. of the [chiller]." The protester also notes that the fact that the agency was also soliciting bids for a 1,300-ton cooling tower demonstrated that 600-ton chillers were required, inasmuch as a 1,300-ton tower could not accommodate two 700-ton chillers.

Based on our review of the record,[5] we find that the amendment correcting the entry water temperature parameter was not material and that there was no reasonable doubt that IRC's bid commited that firm to supply 600-ton chillers that would comply with the IFB requirements. First, we note that the operating parameters for the 600-ton chillers are within the control of the agency; the agency determines the temperature level at which the water enters the chillers and the flow rate, and thereby decides the desired leaving water temperature from the chiller. As noted, there is an algebraic formula, which was used by the FLETC engineer and is commonly known in the industry, in which each of the parameters and the chiller tonnage are variables, to determine the operating parameters and/or chiller size (tonnage). As in any algebraic formula, it can be used to determine the value of an unknown or erroneous variable where the other variables are predetermined or known. In this case, any bidder offering to supply 600-ton chillers could and should have readily discerned that one of the operating parameters was in error since these parameters cannot be satisfied by a 600-ton chiller. The record shows (and the agency concedes) that 600-ton chillers that otherwise satisfy the IFB requirements are designed to accommodate variations of the operating parameters specified; for example, the flow rate could be lowered to allow the chiller to process 57 degree F water to 42 degree F water or, as here, the entry temperature of the water could be lowered. Moreover, the agency does not dispute that the requirement for a 1,300-ton cooling tower indicates that 600-ton chillers, rather than 718-ton units,

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[4]The agency reports that chillers larger than 600 tons would not fit in the limited physical space available.

[5]This information includes that gathered during a telephonic hearing.

were required. Finally, the bid schedule completed by IRC clearly stated that 600-ton chillers were required; under the Order of Precedence--Sealed Bidding clause set forth at Federal Acquisition Regulation § 52.214-29 and incorporated in the IFB, any inconsistency in the IFB would be resolved by giving precedence to the schedule (excluding the specifications) over the specifications.

As noted by the agency, we have observed that an agency should not be required to enter into a contract that presents the potential of litigation stemming from ambiguity in the original documents, that an agency with actual knowledge of such ambiguities should try to resolve them in an amendment, and that such amendments are generally material. See Air Quality Experts, Inc., B-256444, June 15, 1994, 94-1 CPD ¶ 374; Moon Constr. Co., B-228378, Dec. 17, 1987, 87-2 CPD ¶ 605. However, for the reasons set out above, we think there is no reasonable possibility that a bidder would not be bound to supply 600-ton chillers or could decline to perform the contract because the specified operating parameters that contained an obvious error could not be met with a 600-ton chiller. Thus, amendment No. 0002 was not material; it merely corrected one clearly erroneous operating parameter (not within the control of the contractor) of the clearly required 600-ton chillers. Therefore, the failure to IRC to acknowledge the amendment was not a proper basis for rejecting IRC's bid as nonresponsive. See Franklin Envtl. Servs., Inc., B-240589, Dec. 4, 1990, 90-2 CPD ¶ 454.

Since the chillers have been delivered, we cannot recommend corrective action. We recommend that IRC be reimbursed its costs of bid preparation, and of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8 (d)(1996). The protester must file its certified claim for cost with the contracting agency 90 days after receipt of our decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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