



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Kalex Construction & Development, Inc.

File: B-278076.2

Date: January 20, 1998

Edward J. Kinberg, Esq., for the protester.

Thomas W. Burt, Esq., and Larry E. Beall, Esq., Department of the Army, for the agency.

Linda C. Glass, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Amendment is not material where it does no more than restate information already contained in the solicitation regarding the scope and quality of certain work.
 2. Contracting officer properly accepted bid that failed to acknowledge a solicitation amendment that was not material.
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DECISION

Kalex Construction & Development, Inc. protests the proposed award of a contract to ABC Landclearing/Tri-State Design (ABC), under invitation for bids (IFB) No. DACA01-97-B-0082, issued by the United States Army Corp of Engineers for basewide landscaping and signage at Homestead Air Reserve Base, Florida. Kalex contends that ABC's bid should have been rejected as nonresponsive because it failed to acknowledge an amendment to the IFB.

We deny the protest.

The IFB, issued on August 5, 1997, stated that the work consisted of landscaping buffers, streetscaping, pedestrian spine with landscaping, security lighting and signs for buildings and roadway intersections. The IFB required offerors to perform all work and furnish all plant, labor, equipment, and materials required by the specifications and the drawings. With respect to the sodding requirement, the IFB provided that the work would consist of solid sodding with St. Augustine "Floritam" or Bahia "Pensacola," as indicated on the contract drawings. The limits of sodding were also stated to be as required on the contract drawings. With respect to the lighting system, the IFB required that the lighting system be configured as specified by the drawings and that the system included all fixtures, hardware, poles, cables, connectors, adapters, and appurtenances needed to provide a fully functional lighting system. Amendment 0001, issued on August 25, revised the bid schedule

and the explanation of bid items. Amendment 0002, issued on August 29, was entitled "Bid Clarification" and provided the following:

Several contractors have inquired about the extent of sodding required. This clarification is being issued to ensure that all contractors understand the government's intent. This solicitation requires sodding in all areas designated to receive sodding as shown on the plan sheets (L-1 thru L-32) AND ADJACENT TO THE PEDESTRIAN SPINE as shown on detail sheet L-33; Typical Sod Installation for the Pedestrian Spine. The cost for this work shall be included in Bid Item No. 1. Likewise, all contractors shall bid on the electrical work as shown in the plans and specifications. Reuse of any existing fixtures shall not be permitted.

Ten bids were received by the September 5 bid opening date. ABC submitted the lowest bid of \$1,462,300 but failed to acknowledge amendment No. 0002. Kalex submitted the second low bid of \$1,521,405. On September 26, Kalex filed an agency-level protest challenging the potential award to ABC on the grounds that ABC's bid should have been rejected as nonresponsive because it failed to acknowledge the amendment. On September 30, the agency denied the protest on the basis that the amendment was not material and that ABC's failure to acknowledge was properly waived as a minor informality. On October 9, Kalex filed this protest with our Office.

Kalex contends that amendment No. 0002 was material because it clarified two patent ambiguities in the solicitation. Specifically, Kalex maintains that the scope of work for Bahia grass sod at the pedestrian spine was not indicated in the unamended solicitation and that the amendment defined the ability of the contractor to reuse existing light poles.

Generally, 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. Pittman Mechanical Contractors, Inc., B-225486, Feb. 25, 1987, 87-1 CPD ¶ 218 at 3. An amendment is material, however, only if it would have more than a trivial impact on the price, quantity, quality, delivery, or the relative standing of the bidders. Id.; Federal Acquisition Regulation (FAR) § 14.405(d)(2). An amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation; that is, for example, where it merely clarifies an existing requirement or is a matter of form. In that case, the failure to acknowledge the amendment may be waived and the bid may be accepted. Star Brite Constr., Co., Inc., B-228522, Jan. 11, 1988, 88-1 CPD ¶ 17 at 3.

Here, because of the solicitation provisions already in the IFB, amendment No. 0002 did not impose any additional obligations on the bidder. The bidder was already obligated to provide sodding in accordance with the drawings provided and to install a lighting system that included hardware, poles, cables, connectors, adapters, and appurtenances. Moreover, the IFB invited contractors to inspect the site and acquaint themselves with the site conditions and any problems incident to the execution of the work.

With respect to the sodding requirement, the amendment merely stated that the solicitation required sodding in all areas designated to receive sodding as shown on plan sheets L-1 to L-32 and adjacent to the pedestrian spine as shown on detail sheet L-33. This amendment only reiterated what was already required by the IFB and did not impose any additional obligations on bidders. The protester argues that, without the amendment, a bidder would not know if and what type of sodding was to be used for the pedestrian spine; in particular, Kalex argues that, prior to the amendment, the drawings were ambiguous concerning whether the pedestrian spine was to be sodded with Bahia grass or St Augustine grass. However, if this were a legitimate concern, the amendment would not have resolved it, since the amendment merely stated that sodding was to be done in accordance with the plans. In fact, reading all the drawings and plan sheets, with which bidders were required to comply, clearly shows that the pedestrian spine was to be sodded with Bahia grass. A solicitation must be read as a whole and in a manner that gives effect to all of its provisions. Hines/Mortenson, B-256543.4, Aug. 10, 1994, 94-2 CPD ¶ 67 at 4. Reading the plans in conjunction with the IFB instructions, the sodding requirement for the pedestrian spine was already clear before amendment No. 0002 was issued.

Likewise, with respect to the light fixtures, the amendment stated that all contractors shall bid on the electrical work as shown in the plans and specifications, adding simply that reuse of any existing fixtures was not permitted. However, the IFB already provided that the lighting system to be replaced consisted of all fixtures, hardware, poles, cables, connectors, adapters, and appurtenances. The IFB also contained detailed drawings for the installation of the poles and the assembly of the light fixture. Further, the IFB contained FAR § 52-236-5 prescribing materials and workmanship, which requires the use of all new equipment, material, and articles incorporated into the work required by the solicitation, and the IFB did not provide for any government-furnished equipment.

The protester maintains that the original IFB requirement to install new light poles in the same approximate location as existing poles without specifically requiring the demolition and removal of existing poles created an ambiguity. According to the protester, the amendment made it clear that reuse of the existing light fixtures was not permitted. However, the amendment merely stated that contractors should bid as required by the solicitation. The solicitation provided plans for the installation of poles that were of a different size and location than the existing poles and also

included detailed plans for the installation of a different light assembly. Contrary to the protester's argument, the amendment does not indicate what is to be done with the existing poles, but merely reiterates that the electrical work should be performed as required by the already extant plans and specifications. Consequently, because the amendment did not place any new obligations on bidders, ABC's failure to acknowledge properly was waived as a minor informality.

The protest is denied.

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