



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Overstreet Electric Company, Inc.

File: B-283830; B-283830.2

Date: December 30, 1999

Benjamin J. Overstreet for the protester.

Joan K. Fiorino, Esq., and Valinda J. Astoria, Esq., Douglas & Barnhill, for BMAR & Associates, Inc., the intervenor.

Lt. Col. Richard B. O'Keeffe, Jr., and Matthew W. Bowman, Esq., Department of the Army, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of this decision.

DIGEST

1. Amendment to invitation for bids for construction services that reduces the minimum integrated short circuit rating for the required panelboards had the effect of decreasing the performance requirements and cost, and thus is not a material amendment, such that the agency can properly waive a bidder's failure to acknowledge it as a minor informality.
2. Invitation for bids that contained general references to load centers, but did not provide detailed specifications for load centers, and contained specific specifications for panelboards, which perform the same types of functions as load centers, must reasonably be interpreted as requiring the specified panelboards.

DECISION

Overstreet Electric Company, Inc. protests the award of a contract to BMAR & Associates, Inc. under invitation for bids (IFB) No. DABT23-99-B-0039, issued by the Department of the Army for the renovation of electrical services at Van Voorhis Family Housing, Fort Knox, Kentucky. Overstreet protests that BMAR's bid should be rejected for failing to acknowledge an amendment and that a mistake in Overstreet's bid should be corrected.

We deny the protest.

The IFB, issued on August 2, 1999, contemplated the award of a fixed-price, indefinite-delivery, indefinite-quantity contract for 1 year with 4 option years. IFB at 1, B-1, L-3. The IFB bid schedule contained two contract line item numbers (CLIN), one for four-plex housing buildings and the other for eight-plex housing buildings. IFB at B-1. The estimated quantity for the first CLIN was 62 units and for the second CLIN was 119 units, and bidders were to bid unit prices and total prices for each CLIN. Id. Award was to be made to the responsible bidder with the lowest-priced responsive bid, considering the aggregate price of all items. RFP at M-2.

Section 01010 of the specifications, entitled Summary of Work, described the work to be performed, which involved the removal or demolition of the existing electric services and the installation of new services for each building and in each apartment. Agency Report, Tab F, Specifications and Drawings § 01010, ¶ 1.0. Of relevance here, this section stated:

The existing apartment service panels shall be demolished and replaced with single phase, 100 amp, 20 pole, main lug only, load centers.

Id. ¶ 1.1.3. Paragraph 2 of section 01010 includes several references to the installation of, or work on, new load centers in the apartments, including the following:

Install load center flush; the contractor shall modify wall studs as required to achieve flush mounting and shall relocate plumbing pipe and other utilities as required.

Id. ¶ 2.4.1.

Section 16470 of the specifications, entitled Panelboards, stated that the “work included” the following:

1.1.1 Lighting and appliance branch circuit panelboards.

Id. § 16470, ¶ 1.1.1.¹ This section listed acceptable manufacturers of “panelboards and load centers.” Id. ¶ 2.1, and specified the particular type of the “branch circuit panelboards” required as follows:

Lighting and Appliance Branch Circuit Panelboards: [National Electrical Manufacturers Association] NEMA PB1; circuit breaker type. [Federal Specification] FS W-P-115; Type I, Class 1.

¹ The specification also included “service panel boards,” which are to be installed outside the apartments on this project. Id. § 16470, ¶¶ 1.1.2, 2.3.

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Minimum Integrated Short Circuit Rating: 65,000 amperes rms symmetrical for 240 volt panelboards.

Id. § 16470, ¶¶ 2.2.1, 2.2.5. This section also addressed installation as follows:

Install interior panelboards plumb and flush with wall finishes, in conformance with NEMA PB 1.1. Modify wall structure, soil pipe and plumbing as required to fit panel flush into wall.

Id. § 16470, ¶ 2.4.1. The IFB also included drawings detailing various aspects of the project.

Bid opening was originally scheduled for August 31. IFB at 1. On August 31, prior to the scheduled bid opening, the agency received a message from a potential bidder requesting clarification and postponement of bid opening because:

[t]he contract requires bidders to furnish 65k rating on all panels. This is non-typical on residential facilities and involves a \$300.00 per panel adder for each which makes it several hundred thousand dollars higher than it should be. A 65k rating is typical for a commercial application, not residential loadcenters.

Agency Report, Tab D, Fax Message, Aug. 30, 1999. The agency then issued an amendment extending bid opening to September 13 and amending the specifications as follows:

In Section 16470, page 16470-2, Paragraph 2.2.5. Change “65,000 amperes” to “22000 amperes.”

RFP amend. 0001.

Prior to the issuance of the amendment, Overstreet had submitted its bid. This bid reflected a \$4,574 unit price and a \$283,588 extended price on CLIN 0001, and a \$9,050 unit price and a \$1,076,950 extended price on CLIN 0002, for a total bid of \$1,360,538. Agency Report, Tab G, Abstract of Bids, at 1; Tab K, Overstreet’s Initial Bid, at B-1. BMAR also submitted a bid prior to the issuance of the amendment totaling \$1,146,284. Agency Report, Tab I, BMAR’s Bid, at B-1.

Following the amendment of the IFB, Overstreet submitted a letter with the following instruction concerning its bid for this IFB:

Please amend our bid as follows:

Item 0001 Four Plex (To Include Cost of Bond) 62 Ea \$500 EA \$31,000

Item 0002 Eight Plex (To Include Cost of Bond) 119 Ea \$1,000 EA 119,000

Note: We hereby acknowledge Amendment No. 0001, Dated 8/31/99 and Addendums No. One thru Three.

Agency Report, Tab L, Letter from Overstreet to Directorate of Contracting (Sept. 9, 1999).

On September 13, the agency received another letter from Overstreet dated September 10. Agency Report at 6. The letter stated the following:

Reference is being made to panelboards/loadcenters required for this project.

Your attention is directed to Specification Section 01010, entitled Summary of Work. This section of the specification clearly indicate that the "Branch Circuit Panels" being installed in the interior of the apartments be new loadcenters. This information can be found in paragraphs 1.1.3, 1.1.4, 2.4, 2.4.1, 2.4.2, and 2.5.1.

Specification Section 16470, entitled Panelboards, clearly identifies the "Branch Circuit Panels" as new panelboards. This information can be referenced in paragraphs 2.2 thru 2.2.6. However in paragraph 2.1 of Section 16470 the word panelboards and loadcenters are referenced.

Our question is simply, are the "Branch Circuit Panels" required to be panelboards or loadcenters? Panelboards are generally used in commercial type installations, [whereas] loadcenters are used in residential type installations. If for some unknown reason, the intent is for the "Branch Circuit Panels" to be panelboards, we would like to point out that a panelboard will not fit in the wall of the apartment units. The size of the interior panelboards for this project would be approximately 48"H x 20"W x 5.75"D.

While we realize that this letter comes to you at such a late time, we would like point out that if some clarification isn't made, the confusion regarding this matter would certainly cause a number of protests amongst the perspective prime bidders.

Agency Report, Tab AC, Letter from Overstreet to Directorate of Contracting (Sept. 10, 1999). The agency provided the following response to Overstreet prior to bid opening:

Per . . . the project manager, the branch circuit panels are to be panelboards as specified in Section 16470, Paragraph 1.2.4 NEMA PB1-Panelboards. Incidentally, the NEC [National Electrical Code] definition of panelboard includes load centers.

Agency Report, Tab AD, Letter from Contracting Officer to Overstreet (Sept. 13, 1999).

The agency received nine bids by the 2 p.m., September 13 bid opening. Agency Report at 8. Overstreet's amended bid was low at a total price of \$150,000.² BMAR's bid was second low at \$1,146,284. The third low bid was \$1,545,720 and the government estimate was \$2,209,600. Agency Report, Tab G, Abstract of Bids.

After bid opening, at 3:55 p.m. on September 13, the agency received a telegram from Overstreet stating the following:

We hereby modify our bid as follows:

Item 0001 Four Plex Add \$4,308.00 EA x 62 \$267,096.00

Item 0002 Eight Plex Add \$8,586.00 EA x 119 \$1,021,734.00

Agency Report at 9, Tab M, Telegram from Overstreet to Directorate of Contracting.³ By phone conversation on September 14, the contracting officer informed Overstreet that its telegram had arrived late and was not considered, and that its bid was recorded as \$150,000 per Overstreet's letter of September 9. Agency Report at 9. By letter to the agency dated that same day, Overstreet acknowledged the recording of its bid as \$150,000 and stated the following:

It is our intent to both allege and fully justify that we made a mistake in our bid. It is our intent to show that that the total of our bid was intended to be \$1,438,800.00.

Agency Report, Tab AE, Letter from Overstreet to Directorate of Contracting (Sept. 14, 1999) (emphasis deleted).

By letter of September 20, Overstreet requested correction of the mistake in its bid and submitted evidence of its intended bid. Agency Report, Tab V, Letter from Overstreet to Directorate of Contracting (Sept. 20, 1999). The letter explained the basis for amending its initial bid as follows:

Up until we received [amendment 0001], we had assumed Paragraph [2.2.5 of section 16470 of the IFB specifications] to have been included because it was in the "Guide Specification" but it did not apply to this

² The agency first opened and recorded Overstreet's initial bid of \$1,360,538, and then revised Overstreet's bid to \$150,000 per Overstreet's letter of September 9. Agency Report at 8-9.

³ If effective, this would have increased Overstreet's amended total bid price of \$150,000 to a total bid price of \$1,438,830.

project. The fact that the Government was changing this paragraph alerted us to the fact that, most likely, the Government was assuming the 1200 interior electrical panels to be distribution centers and not load centers. Distribution centers are significantly more expensive than are load centers.

Id. at 2.

This letter went on to explain that, in its letter dated September 9, Overstreet had intended to increase its initial bid of \$1,360,538 by \$150,000, to a total of \$1,510,538, to account for its new understanding of the IFB requirement for the electric panels to be installed in the apartments. Id. at 2. Overstreet explained that it subsequently realized that the wording in the letter could be interpreted (as it was) as a total bid of \$150,000, and had since received firm quotations for the panelboards specified in section 16470 that allowed it to update its bid. Overstreet thus sent the telegram of September 13 to the agency to increase its amended bid price from \$150,000, by \$1,288,830 for both CLINs, to a total of \$1,438,830. Id. at 3.

The contracting officer determined that Overstreet's bid modification was late and could not be considered, that Overstreet's bid of \$150,000 was unreasonably low and must be rejected, and that Overstreet's request for bid correction would not be considered because the corrected bid would no longer be low. Agency Report, Tab X, Contracting Officer's Determination, Sept. 23, 1999, at 3.

The amount of BMAR's bid dated August 27 was not changed after amendment 0001 was issued. The agency did not receive an acknowledgment of amendment 0001 in the name of BMAR; rather, the chief executive officer (CEO) of BMAR, the same individual who signed BMAR's bid, submitted a Standard Form 30 acknowledging the amendment in the name of another firm, Republic General Contractor LLC. Agency Report at 11; Tab I, BMAR's Bid, at 2; Tab J, Acknowledgment of Amend.

Upon investigation, the agency determined that the CEO for BMAR is also the CEO for Republic. Agency Report at 11; Tab Q, Memorandum for Record of Contracting Officer's Conversation with BMAR, Sept. 16, 1999; Tab R, BMAR's Bid Verification Letter, Sept. 17, 1999. BMAR explained that the CEO requested solicitation packages for both BMAR and Republic, although only BMAR submitted a bid. Agency Report, Tab Q, Memorandum for Record of Contracting Officer's Conversation with BMAR. In response to the agency's inquiry after bid opening, the CEO stated that he inadvertently had signed and submitted the acknowledgment form that the agency had sent to it pre-printed with Republic's name, rather than an acknowledgment in BMAR's name. Id.

The contracting officer "determined that Amendment 0001 [was] immaterial in that it lessens the Government's requirements and would have a trivial (negative) impact on price." Agency Report, Tab X, Contracting Officer's Determination, Sept. 23, 1999, at 3. The contracting officer further determined that Republic's name on the

acknowledgment signed by BMAR's CEO was a minor informality and, since the amendment was not material, BMAR's failure to properly acknowledge the amendment could be corrected as a minor informality under Federal Acquisition Regulation (FAR) § 14.405. Id.

The agency awarded the contract to BMAR on September 27, 1999. Agency Report, Tab I, BMAR's Bid, at 3. Overstreet's protest followed.

Overstreet essentially alleges that its amended bid of \$150,000 contained an obvious error, that it had presented clear and convincing evidence of the intended bid amount, and that its bid should be corrected to either \$1,510,538 or \$1,438,830, which would make it the second low bid. Protest at 8; Amended Protest and Comments at 24. Overstreet protests that it should receive award at a corrected price because BMAR's bid was nonresponsive inasmuch as it did not acknowledge amendment 0001, which Overstreet asserts is material. Protest at 8; Protester's Response to Request for Summary Dismissal at 1, 3-5; Amended Protest and Comments at 1, 8-10, 17-18, 26.

A bidder's failure to acknowledge a material amendment of an IFB renders the bid nonresponsive since, absent such 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. Precise Constr. Management, B-278144.2, Feb. 24, 1998, 98-1 CPD ¶ 63 at 3. On the other hand, a bidder's failure to acknowledge an amendment that is not material is waivable as a minor informality. Id.; FAR § 14.405. An amendment is material where it imposes legal obligations on the prospective bidder that were not contained in the original solicitation, or if it would have more than a negligible impact on price, quantity, quality, or delivery. FAR § 14.405(d)(2). An amendment is generally not material under this regulation where it has the effect of decreasing the price, quantity, quality, delivery, or the bidder's legal obligations, without materially increasing any of these matters. See Schuster Eng'g. Inc., B-275044, Jan. 17, 1997, 97-1 CPD ¶ 29 at 2, 4; Doty Bros. Equip. Co., B-274634, Dec. 19, 1996, 96-2 CPD ¶ 234 at 4-5; Conrad Indus., Inc., B-213974.2, Aug. 7, 1984, 84-2 CPD ¶ 156 at 3; MBAssocs., B-197566, June 4, 1980, 80-1 CPD ¶ 383 at 2.

On its face, amendment 0001 merely reduced the minimum integrated short circuit rating for the branch circuit panelboards required by the IFB under specification section 16470, paragraph 2.2.5, from 65,000 amperes to 22,000 amperes. This change reduces the performance requirement for branch circuit panelboards from that initially required. Indeed, a bid that binds the bidder to provide branch circuit panelboards with the original higher minimum integrated short circuit rating would exceed the agency's amended minimum requirement. Agency Report at 17. It is also undisputed that the effect on price of reducing the minimum short circuit rating of the specified panelboards would be to reduce price. Thus, on its face, the amendment is immaterial. See Schuster Eng'g. Inc., supra, at 4.

Nevertheless, Overstreet alleges that the amendment was material because, prior to its issuance, the IFB, as Overstreet interpreted it, did not require branch circuit panelboards to be installed in the apartments, but required the installation of only load centers. Overstreet points to the repeated references of the requirement for load centers in section 01010 of the specifications and the absence of any reference to panelboards in this section, and contends that it reasonably concluded that the requirement for branch circuit panelboards at section 16470 of the IFB specifications was not applicable, but rather that section was a guide specification that inadvertently had been included in the IFB. Overstreet explains that load centers and panelboards are different items in that load centers ordinarily would be installed in residences, whereas panelboards ordinarily would be used in commercial applications. Overstreet claims that there is a significant difference in cost between panelboards and the relatively inexpensive load centers. Overstreet also contends that unlike load centers, which could be installed in the apartments without modifying the walls, the installation of the larger-sized panelboards specified in section 16470 would require modification of the walls, which was not adequately provided for in the IFB. Overstreet contends that it was only after receiving the amendment modifying the requirements pertaining to branch circuit panelboards at section 16470 that it determined that it had reached an incorrect, although reasonable, conclusion as to how the IFB should be interpreted and realized that the specification for branch circuit panelboards was applicable. Overstreet alleges that, since its initial interpretation of the IFB requirements was reasonable, and since the changes to Overstreet's bid spurred by the issuance of the amendment were material as to performance and bid price, the amendment must be considered material. Protest at 4-9; Protester's Response to Request for Summary Dismissal at 3-4; Amended Protest and Comments at 2-6, 10-18, 20, 25; Protester's Submission, Dec. 6, 1999, at 2-3; Protester's Submission, Dec. 14, 1999, at 4-5.

The agency's position is that the term "load center" as used in the IFB encompassed the panelboards specified in section 16470 of the specifications, so there should have been no reasonable confusion about whether the agency intended section 16470 to be applicable. See Agency Report, Tab AD, Letter from Contracting Officer to Overstreet (Sept. 13, 1999).

Where, as here, a dispute exists as to the meaning of a solicitation provision, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. Zeta Constr. Co., Inc., B-244672, Nov. 5, 1991, 91-2 CPD ¶ 428 at 4. We find little merit to Overstreet's arguments as to why this amendment assertedly caused the meaning of the IFB to be changed. Indeed, the only reasonable interpretation of the terms of the IFB, as initially issued, as well as after amendment 0001 was issued, required the use of branch circuit panelboards.

The term "load center" is not defined in the IFB, nor does the IFB contain any detailed specification requirements for load centers, as it does for panelboards. We recognize that Overstreet has produced evidence that indicates that the term "load centers" generally refers to items that would not meet the section 16470

requirements. Amended Protest and Comments, exh. A, Excerpts from Product Catalog; Protester's Submission, Dec. 6, 1999, attach., Product Descriptions and Specifications; Protester's Submission, Dec. 8, 1999, exh. A, Excerpts from Product Catalog, exh. B, Product Descriptions and Specifications, exh. C, Letter from Product Vendor to Overstreet (Dec. 8, 1999). Here, however, the record shows that load centers perform essentially the same type of functions as panelboards. Indeed, as noted by the agency and conceded by Overstreet, the NEC definition of panelboards is sufficiently broad to include the load centers on which Overstreet stated it based its original bid.⁴ Agency Report, Tab AD, Letter from Contracting Officer to Overstreet (Sept. 13, 1999); Protester's Submission, Dec. 6, 1999, at 1. Moreover, both NEMA and FS W-P-115C (Mar. 14, 1990) classify "panelboards" as including "load centers," Agency's Submission, Dec. 6, 1999, attach., Excerpt from NEMA Website; Agency's Submission, Dec. 14, 1999, attach., Excerpt of Federal Specification W-P-115C,⁵ although these load centers are not the type of NEMA PB1 panelboards that are required by section 16470. Protester's Submission, Dec. 6, 1999, at 2-3; Protester's Submission, Dec. 8, 1999, at 2-3; Protester's Submission, Dec. 14, 1999, at 2.

Under the circumstances, given that load centers are devices akin to panelboards, and that the IFB had detailed specifications for panelboards and none for load centers, it should have been apparent from the unamended IFB that the term "load center" as used in section 01010 was intended to reference the panelboards specified in section 16470. In this regard, we note that the IFB used various general terms interchangeably to refer to the new electric panels to be installed in the apartments. Not only was the undefined term "load center" used only in a general context in section 01010 of the specifications, but it was used interchangeably with the term "branch panel" on the same page of one of the drawings to identify the new apartment electric panels. Agency Report, Tab F, Specifications and Drawings, at Drawing Sheet 2.

⁴ The NEC Handbook definition of Panelboard is:

A single panel or group of panel units designed for assembly in the form of a single panel; including buses, automatic overcurrent devices, and equipped with or without switches for the control of light, heat, or power circuits, designed to be placed in a cabinet or cutout box placed in or against a wall or partition and accessible only from the front.

Agency's Submission, Dec. 3, 1999, attach., Definition from NEC Handbook.

⁵ Various NEMA standards, including NEMA PB1, and FS W-P-115 were referenced in section 16470 ¶¶ 1.2.2, 1.2.3, 1.2.4, 1.2.5, 2.2.1.

Thus, given the lack of a specific specification for load centers in the IFB, Overstreet could not reasonably ignore the “guide specification” for panelboards included in the IFB, which sets out a specific and clear product specification that, as Overstreet concedes, excludes load centers as Overstreet defines them. Amended Protest and Comments at 20; Protester’s Submission, Dec. 6, 1999, at 2. Overstreet’s interpretation does not consider the IFB as a whole so as to give effect to all provisions and does not give effect to all terms of the solicitation. See Algernon Blair, Inc., ASBCA No. 28619, Aug. 6, 1984, 84-3 BCA ¶ 17567 (guide specifications, though inadvertently included in contract, are relevant to interpreting terms of a contract); A. A. Beiro Constr. Co., Inc., ASBCA No. 16171, Apr. 27, 1972, 72-1 BCA ¶ 9447 (interpretation of contract terms must give meaning to guide specification included in a contract where that specification can apply to work to be performed).

Moreover, contrary to Overstreet’s interpretation, the IFB contemplates modification of the existing walls to accommodate the requirement for flush mounting of the circuit breaker enclosure. Agency Report, Tab F, Specifications and Drawings, compare § 01010 ¶ 2.4.1 (“the contractor shall modify wall studs as required to achieve flush mounting”) with § 16470 ¶ 2.4.1 (“Install interior panelboards plumb and flush with wall finishes, in conformance with NEMA PB 1.1. Modify wall structure, soil pipe and plumbing as required to fit panel flush into wall”). Thus, there is no support for Overstreet’s conclusion that since walls would have to be modified to accommodate flush mounting of branch circuit panelboards, the IFB as initially issued did not contemplate installation of branch circuit panelboards.

Since Overstreet’s initial interpretation of the IFB was not reasonable, there is no basis to support its allegation that the amendment is material, and thus whether or not BMAR properly acknowledged this amendment, such failure can be properly cured or waived under FAR § 14.405 because the amendment was immaterial.⁶ Since

⁶ Overstreet claims, based upon its review of documentation submitted by BMAR during the course of this protest, that BMAR’s bid was premised on supplying load centers, rather than the required panelboards, and that it should therefore be rejected as nonresponsive. Not only does our review of the documentation referenced by Overstreet not support this contention, but since BMAR’s bid did not take exception to the specifications, BMAR is bound to perform in accordance with those specifications. Thompson Power, B-244894, July 31, 1991, 91-2 CPD ¶ 118 (bidder is bound to comply with requirement where bid does not take exception to requirement and actual compliance with requirement is a matter of contract administration not for consideration by our Office).

Overstreet's bid of \$150,000 was properly rejected, see Zeta Constr. Co., Inc., supra, at 6 (bid cannot be accepted where it is apparent that it is based upon a mistake), and the bid prices to which Overstreet seeks to have its bid corrected would not entitle it to award ahead of BMAR, Overstreet's protest provides no basis to disturb the award.

The protest is denied.

Comptroller General
of the United States