



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Jackson Enterprises

File: B-286688

Date: February 5, 2001

Henry Wall, Esq., Bruner, Powell, Robbins, Wall & Mullins, for the protester.
Lt. Col. Richard B. O’Keeffe, Jr., and Joseph M. Zima, Esq., Department of the Army,
for the agency.
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General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly rejected bid for failure to acknowledge amendment where amendment does not contain material information and does not alter bidders’ legal obligations.

DECISION

Jackson Enterprises protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DAKF40-00-B-0008, issued by the Department of the Army for the cleaning of grit chambers,¹ oil/water separators/interceptors, and holding tanks at various locations throughout Fort Bragg and Pope Air Force Base, North Carolina. Jackson’s bid was rejected as nonresponsive because it did not contain an acknowledgment of amendment No. 0004, which the agency considered material. The protester contends that the amendment was not in fact material, and that its failure to acknowledge it should therefore have been waived as a minor informality.

We sustain the protest.

The IFB, which was issued on May 15, 2000, contemplated the award of a requirements contract for a 12-month base period and four 12-month option periods. The IFB requested unit prices (the unit being defined as a “cleaning”) for estimated

¹ A grit chamber is an apparatus designed to remove grit from liquids, typically petrochemicals or wastewater.

quantities of cleanings for various size tanks. For example, item No. 0007 sought a unit price for an estimated 36 cleanings of 12 tanks of 50-285 gallon capacity, while item No. 0010 sought a unit price for an estimated 12 cleanings of 4 tanks of 2,500-5,000 gallon capacity. An exhibit to the IFB furnished more detailed information as to the location of the various tanks, their types (e.g., grit chamber, oil/water separator), their specific capacities, and the number of cleanings per year that each would require.

The IFB was amended four times after issuance. Amendment Nos. 0001 and 0002 answered questions posed by various prospective bidders and set dates for site visits, while amendment No. 0003 extended the bid opening date indefinitely. Amendment No. 0004 set the bid opening date as July 7 and answered additional bidder questions.

Six bids were received and opened on July 7. Gilesair was the low bidder; Jackson and Consultants Ltd. were second and third low, respectively. The contracting officer rejected Gilesair's bid because the bidder had failed to extend its bid acceptance period. She then considered Jackson's bid and determined that it should also be rejected because the bidder had failed to acknowledge amendment No. 0004.² On October 17, the contracting officer awarded a contract to Consultants as the lowest responsive, responsible bidder.

Jackson contends that the agency should have waived its failure to acknowledge amendment No. 0004 because the information contained in the amendment had no material impact on the price, quality, or competitive status of the various bidders. The agency disputes the protester's position, arguing that the amendment did contain material information and that Jackson's failure to acknowledge it thus could not be waived.

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. Federal Constr., Inc., B-279638, B-279638.2, July 2, 1998, 98-2 CPD ¶ 5 at 2. 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. Federal Acquisition Regulation (FAR) § 14.405(d)(2); Kalex Constr. & Dev., Inc., B-278076.2, Jan. 20, 1998, 98-1 CPD ¶ 25 at 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. Kalex Constr. & Dev., Inc., supra. A bidder's failure to acknowledge an amendment that is not material is

² Jackson also failed to acknowledge amendment No. 0003, but the agency concedes that it was immaterial.

waivable as a minor informality. FAR § 14.405; Overstreet Elec. Co., Inc., B-283830, B-283830.2, Dec. 30, 1999, 2000 CPD ¶ 8 at 7.

As a preliminary observation, the agency submits that any amendment responding to potential bidders' questions regarding the terms of a solicitation should be presumed to be material because "[m]ost probably the firms asking these questions needed the answers in order to develop bids that protect their business interests and profit margins." Agency Report at 10. We do not agree that all responses to bidder questions may be presumed to be material. For example, the fact that a particular bidder finds a solicitation provision to be ambiguous and thus questions it does not automatically lead to the conclusion that the provision was indeed ambiguous; it may simply mean that the bidder has not read the solicitation sufficiently thoroughly. See, e.g., Kalex Constr. & Dev., Inc., *supra*, at 3.

Turning then to the individual questions and answers, Question and Answer 1 were as follows:

Question 1: How is inspection to be handled under this contract? Will the contractor have to wait for a quality control person to look at each unit?

Answer 1: The method of inspection is 100 percent. The contractor [does not] have to wait for the [contracting officer's representative (COR)] to inspect each unit. The contractor's quality control should inspect prior to the Government's quality assurance inspection.

The agency argues that its response to Question 1 was material because it "expand[ed] or clarifie[d] the Army's rights with regard to inspections of completed work under the contract." Agency Report at 11. According to the agency, Answer 1 imposed two requirements not contained in the original IFB: that the contractor's quality control section inspect completed work before Army quality assurance inspection and that 100 percent of the work be inspected by the agency. The agency maintains that Jackson's failure to acknowledge amendment No. 0004 "would render doubtful the Army's ability to insist, without granting an equitable adjustment, on pre-inspection by the contractor's [quality control] personnel, and on 100% [quality assurance] inspection." *Id.*

The IFB, as originally issued, contained two provisions bearing on quality control inspections: § 1.5 Quality Control, which provided that:

[t]he contractor shall establish and maintain a complete Quality Control Plan to ensure the requirements of the contract are provided as specified. . . .

§ 1.14 Inspections, which provided that:

[a]ll deficiencies or omissions in the work inspected shall be corrected by the Contractor within (1) work day after the deficiency or omission is noted by the COR.

We do not think that Answer 1 imposed any additional legal obligations on the contractor. The statement in Answer 1 that the government would perform a “100 percent inspection” does not change or add to the contractor’s basic responsibility to perform the work in accordance with the contract requirements. On the contrary, the right to inspect the work is implicit in the government’s right to insist that the contractor perform as specified in the contract and, as provided in § 1.14, to remedy any defects in its work. With respect to “pre-inspection” by the contractor, Answer 1 states that the contractor “should” inspect its work prior to inspection by the government. Given the use of the word “should,” this statement does not clearly impose a requirement that the contractor inspect all of its work before the government inspection; rather, it simply suggests that the contractor do so. In any event, even if the statement is interpreted to mean that the agency expected the contractor to perform its own inspection prior to the government inspection, we fail to see why any such requirement is material; as with the government inspection, it has no effect on the contractor’s underlying obligation to perform in accordance with the contract requirements, or on the government’s right to insist that the contractor perform conforming work.

Next, the agency argues that its response to Question 2 was material because it corrected a potential misunderstanding. Question and Answer 2 provided as follows:

Question 2: Would the government provide the contractor a staging area for parking equipment and possibly an office trailer?

Answer 2: No, the Government will not provide a staging area.

While the Army concedes that the IFB did not provide for a government-furnished staging area, it contends that bidders may have been under the misapprehension that one was to be furnished because, during the site visits, the incumbent contractor informed other prospective bidders that his company had a staging area on the installation.³ We do not think that the information furnished by Answer 2 was material given that it merely confirmed the only reasonable reading of the IFB, i.e., that the government did not intend to furnish a staging area.

³ The agency notes that the information furnished by the incumbent was misleading in that its staging area had been provided by another contractor, not the Army.

Third, the Army argues that the answers to questions 6-8 were material because they increased the number of tanks and the number of cleanings.⁴ Questions and Answers 6-8 provided as follows:

Question 6: Line Item 0008 states there are 25 tanks while Exhibit 1 lists 27 tanks.

Answer 6: The description of CLIN 0008 and all option year CLINs is hereby changed to read "TANK 300-900 GALLON CAPACITY, (27 TANKS)."

Question 7: Line Item 0009 states there are 38 tanks while Exhibit 1 lists 35 tanks.

Answer 7: The description of CLIN 0009 and all option year CLINs is hereby changed to read "TANK 1,000-2,000 GALLON CAPACITY, (35 TANKS)."

Question 8: Line Item 0020 states there is 1 tank and a Quantity of 186 while Exhibit 1 lists 27 tanks with 198 cleanings.

Answer 8: The description of CLIN 0020 and all option year CLINs is hereby changed to read "TANK 50-275 GALLON CAPACITY, (27 TANKS)." The quantity is change[d] to read 198.

The agency has furnished us with no explanation as to why, given that prices were requested on a per cleaning basis, an increase in the number of tanks to be cleaned under a particular line item would have any impact on a bidder's pricing for that line item. For example, line item 0008, both before and after issuance of amendment No. 0004, requested a price per cleaning for an estimated 84 cleanings of 300-900 gallon capacity tanks; the only thing that Answer 6 did was clarify that the number of tanks among which these cleanings were to be apportioned was 27, rather than 25. We see no reason to assume that such a change would have had a material impact on bidders' pricing, particularly given that Exhibit 1 had already identified for bidders the size and location of the individual tanks to be serviced under the line item.

Regarding the separate question of whether the increase in quantity under line item 0020 from 186 to 198 cleanings (provided for in Answer 8) would have had a material impact on either price or the contractor's performance obligations, the protester maintains as a general matter that unless the quantity varies to such an extent that an additional crew or overtime is required, the variation will have no impact on its unit

⁴ We do not discuss Questions and Answers 3-5 in this decision because the agency has not argued that they contained material information.

pricing; with regard to the specific change here, the protester asserts that the increase of 12 cleanings was de minimis. We find this argument persuasive, particularly in view of the agency's failure to offer any basis to conclude that the change, which on its face is relatively small,⁵ would have a material effect on the calculation of bid prices. Further, given that the IFB did not contain a clause limiting the contractor's obligation to furnish a quantity in excess of the estimated line item amount (see 3W American Enters., Inc., B-274410.2, Dec. 27, 1996, 96-2 CPD ¶ 242) or a clause providing for an equitable adjustment in the event that the actual number of cleanings varied from the estimated number (see J. Caldarera & Co., Inc., B-276201, May 21, 1997, 97-1 CPD ¶ 192; Harvey Honore Constr. Co., Inc., B-262071.2, Jan. 31, 1996, 96-1 CPD ¶ 30), we see no basis to conclude that the failure to acknowledge amendment No. 4 would have had an impact on Jackson's legal obligation to furnish all cleanings ordered under line item 0020 at the unit price set forth in its bid.

Finally, the Army contends that Question and Answer 9 were material in that they set the cleaning schedule for the entire contract period. Question and Answer 9 provided as follows:

Question 9: Scheduling for this contract will have to correspond with cleaning times from the present contract. The number of cleanings, as scheduled, will [a]ffect projected cash flow under the new contract. Could we bidders be given a copy of present scheduling?

Answer 9: The cleaning schedule for FY99 is attached to this amendment and has been incorporated as Technical Exhibit 2.

The agency contends that the answer "essentially agrees with the premise of the question (i.e., that cleaning under the new contract is controlled by the cleaning dates on the prior contract)." Agency Report at 13.

We disagree. Although the agency furnished the cleaning schedule for fiscal year 1999 in response to this question, it in no way indicated that it agreed with the premise of the questioner that scheduling under the contract to be awarded would need to correspond with scheduling under the existing contract. Thus, because we do not agree that Question and Answer 9 bound the contractor to a particular performance schedule, we do not think that it materially affected bidders' legal obligations.

Because we find that none of the answers set forth in amendment No. 004 contained material information, Jackson's failure to acknowledge the amendment should have

⁵ As noted above, Answer 8 added a total of 12 cleanings to the estimate for this line item. The bid abstract shows that the range of bids per cleaning for this line item was \$41.50 to \$300; the protester's unit price was \$290.

been waived. We recommend that if Jackson is determined to be otherwise eligible for award, the agency terminate the award to Consultants and make award to Jackson. We also recommend that the agency reimburse the protester for its costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1)(2000). In accordance with section 21.8 of our Regulations, Jackson's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

The protest is sustained.

Anthony H. Gamboa
Acting General Counsel