



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: John D. Lucas Printing Company

File: B-285730

Date: September 20, 2000

Frederic G. Antoun, Jr., Esq., for the protester.
Jennifer R. Fantuz, Esq., United States Government Printing Office, for the agency.
C. Douglas McArthur, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bidder's failure to acknowledge a material amendment to an invitation for bids, which resolved an ambiguity between the product description and the bid schedule, and which imposed an additional requirement on the contractor, 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.

DECISION

John D. Lucas Printing Company protests the award of a contract to News Printing Co., Inc., under invitation for bids (IFB) No. 466-378, issued by the United States Government Printing Office (GPO) for publications. Lucas contends that the awardee's bid was nonresponsive because News failed to acknowledge a material amendment to the solicitation.

We sustain the protest.

As originally issued, the solicitation contained specifications for publication of a pamphlet, entitled "Medicare and You," for the Health Care Financing Administration (HCFA). HCFA must, by statute, inform Medicare beneficiaries of health insurance options by October 15 of each year; HCFA issues the pamphlet to meet this statutory mandate. 42 U.S.C. § 1395w-21 (Supp. IV 1998). Some versions of the pamphlet—"items" under the bid schedule—include a mail back post card.

The solicitation contained the following specification:

PRODUCT: Six versions of estimated 76, 80 and 84 page publications with separate wraparound cover saddle-wire stitched. Two versions (Item 1 and Item 2) require bound in mail back card in only the self-mailer copies. There are two different post cards. One for Item 1 and a different card for Item 2

IFB at 2.

At the bottom of the page with the above quoted language, a chart provided information on six items; one column headed "Post Card" contained the word "YES" opposite items 1, 2, and 6. Id. The "Determination of Award" clause advised offerors which items and subitems the agency would evaluate in determining low price. Id. at 10. (There were no other specified evaluation or selection factors.) For item 6, the agency solicited a price for a "32-page section, cover with card." Id. The schedule of prices, on the same page, included the following, with blanks for inserting prices:

	Item 1	Item 2	Item 3	Item 4	Item 5	Item 6	Add'l 1,000
(1) Basic 32 page section and cover w/o card			_____	_____	_____		_____
(2) Basic 32 page section, cover with card	_____	_____				_____	_____
(3) 32 pages	_____	_____	_____	_____	_____	_____	_____
(4) 16 pages	_____	_____		_____	_____	_____	_____
(5) 8 pages			_____				_____
(6) 4 pages	_____		_____	_____			_____

Id.

This price schedule agreed with the chart on page 2 of the IFB and the "Determination of Award" clause in requiring a card for Item 6. The product specifications required a "bound in mail back card" only for Items 1 and 2.

The solicitation established a bid opening date of May 31, 2000. Id. at 1. News submitted a bid on that date. Shortly before the bid opening time on May 31, the agency issued amendment No. 1 to the IFB, which corrected the specifications to state that item 6, as well as items 1 and 2, would require the "bound in mail back card" in the self-mailer copies and which stated that there would be three different post cards, "one each for items 1, 2, and 6." Amend. No. 1, at 1. That amendment also extended, until June 6, the date on which the agency could issue the first purchase order. Id. Amendment No. 2, also issued on May 31, added some subitems to the "Determination of Award" clause. Amend. No. 2, at 1. (The schedule, supra, already contained blank lines for pricing the subitems.) On June 1, the agency issued

amendment No. 3, which extended the bid opening date to June 5 and the date on which the agency could issue the first purchase order to June 8.

The agency received seven bids, one of which it rejected as nonresponsive. In its low priced bid submitted on June 5, News acknowledged amendment No. 3, but not amendment Nos. 1 and 2. Nevertheless, the contracting officer determined that the News bid was responsive, essentially because he did not consider amendment Nos. 1 and 2 to be material. Memorandum from Contracting Officer to Contract Review Board (June 7, 2000). The contracting officer considered that amendment No. 1 merely clarified a patent ambiguity in the solicitation, and that News was bound to perform the contract in accordance with the amended terms because it had not objected to the ambiguity prior to the submission of bids. *Id.* Further, amendment No. 3 had superseded the provision of amendment No. 1 with regard to extending the initial order date. *Id.* Since the News bid contained all of the prices required by amendment No. 2, the contracting officer determined that that amendment also was not material. The agency accordingly awarded a contract to News, and this protest followed.

The protester asserts that the News bid was nonresponsive because that firm failed to acknowledge two amendments to the solicitation, in particular amendment No. 1, which clarified the requirement for a mail back card in item 6. Even assuming that News understood that item 6 required a card, the protester further argues that there is no evidence that News agreed to a separate bound in card, as opposed to using one of the cards printed for items 1 and 2, inserted loosely into the publication. We agree with the protester.

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. Specialty Contractors, Inc., B-258451, Jan. 24, 1995, 95-1 CPD ¶ 38 at 2. GPO Printing Procurement Regulation (GPOPPR) XII §4.1(d) requires a contracting officer to waive or to give a bidder the opportunity to cure any deficiency resulting from a minor informality or irregularity, including the failure to acknowledge receipt of an amendment if the amendment involves only a matter of form or is one that has no more than a trivial effect on price, quantity, quality, or delivery.¹ Where an amendment would have more than a trivial impact on price, quantity, quality, or delivery, or imposes legal obligations not contained in the original solicitation, it is generally material. Star Brite Constr. Co., Inc., B-238428, Apr. 5, 1990, 90-1 CPD ¶ 373 at 2.

¹ GPO, as a legislative branch agency, is not subject to the Federal Acquisition Regulation (FAR), although the FAR and the GPOPPR, in this instance, contain similar guidance. See News Printing, Inc., B-274773.2, Feb. 11, 1997, 97-1 CPD ¶ 68 at 2; FAR § 14.405.

Here, even the agency acknowledges that the unamended IFB contained a patent ambiguity concerning whether a card was required for item 6. What is also clear is that, in addition to this ambiguity, the unamended IFB contained no requirement obligating the contractor to furnish a bound in card for item 6, which represented the agency's need. Thus, amendment No. 1 imposed an additional material requirement on the contractor for a bound in card for item 6, that was clearly not contained in the original solicitation.² We conclude that amendment No. 1 was material and that the agency could not waive the failure of News to acknowledge this amendment without prejudice to the other bidders.

The agency argues that by acknowledging amendment No. 3, News constructively acknowledged the prior amendments and committed itself to comply with them. Letter from Agency to GAO 7 n.7 (July 26, 2000). Acknowledgment of a later amendment to a solicitation, however, does not constitute acknowledgment of prior amendments; a bidder must acknowledge all material amendments. Simco, Inc., B-222294, Apr. 16, 1986, 86-1 CPD ¶ 376 at 2. The agency also argues that since the conflict between the specification and other portions of the solicitation represented a patent ambiguity in the original solicitation, regardless of the bidder's interpretation, News was on notice of the conflict. Letter from Agency to GAO 6 (July 26, 2000). The agency asserts that News later cannot claim to have been misled by the ambiguity, concluding that the awardee has waived any right to have the solicitation interpreted in a manner inconsistent with the agency's actual requirement that the contractor provide a card for item 6. Id. For that reason, the agency argues the amendment had no effect on price, quantity, quality, or delivery, and the amendment imposed no additional legal obligations on News. Id.

As discussed above, regardless of whether the awardee is committed to providing a card for item 6, there is nothing to commit News to providing a bound in card, as opposed to one inserted loosely into the publication. Presuming that the agency

² The protester explains that the requirement for a bound in card affects both the method of performance and cost. More specifically, the protester states:

To supply the postcard as called for in the original specs, the only charge, in addition to printing, would be the cost of shrinkwrapping, which was included in the bid price, as there is no line item price for packaging. However, Amendment [No. 1] required the contractor to bind the same 662,000 cards into Item 6. This operation requires the mechanical insertion of a heavy weight card into the text pages after the text is printed, but before saddle stitch binding. This is an extra "off-line" step that adds substantial cost at John D. Lucas or any printing company.

Letter from Protester to GAO 1 (Aug. 17, 2000).

could successfully defend a claim for the additional cost of providing a card for item 6 on the basis of a patent ambiguity, until amendment No. 1, there is nothing in the IFB that would require a bidder to bind the card into the pamphlet. As noted above, the protester reports, and the agency does not dispute, that this additional “off-line” step adds substantial cost to the project and alters the normal printing and binding process. Letter from Protester to GAO 1-2 (Aug. 17, 2000). We also note that when an agency attempts to resolve an ambiguity in a bid through the issuance of a qualifying amendment in order to avoid potential litigation, that amendment is material, and the bidder must acknowledge that amendment, or the agency must reject the bid as nonresponsive. ACC Constr. Co., Inc., B-277554, Sept. 22, 1997, 97-2 CPD ¶ 84 at 4; Air Quality Experts, Inc., B-256444, June 15, 1994, 94-1 CPD ¶ 374 at 2. For that reason as well, amendment No. 1 was material.

The protest is sustained. We recommend that GPO terminate the contract awarded to News, if feasible, and make award to Lucas, if otherwise appropriate. If termination is not feasible, we recommend that Lucas be reimbursed its bid preparation costs. We also recommend that Lucas be reimbursed for the cost of filing and pursuing its protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d)(1) (2000). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving the decision.

Anthony H. Gamboa
Acting General Counsel