

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: DBI Waste Systems, Inc.

File: B-400687; B-400687.2

Date: January 12, 2009

John M. Curran, Esq., and Michael S. Robertson, Esq., Corwin & Corwin LLP, for the protester.

Edward B. Carney, Department of Veterans Affairs, for the agency.

Frank Maguire, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency's publishing of notice of solicitation on government-wide point of entry was inadequate because protester lacks internet access is denied; potential offerors are on constructive notice of solicitation notice published on GPE.
 2. Protest that awardee's proposal was ineligible for award because it did not acknowledge solicitation amendment is denied where record establishes that amendment was immaterial; failure to acknowledge immaterial amendment was properly waived by agency.
-

DECISION

DBI Waste Systems, Inc. (DBI), of Everett, Massachusetts, protests the award of a contract to Waste Management, Inc. (WMI) under request for proposals (RFP) No. VA-241-08-0589, issued by the Department of Veterans Affairs (VA) for refuse removal services at Boston-area VA medical facilities. DBI contends that the agency failed to provide adequate notice of the RFP and failed to acknowledge a material amendment to the RFP.

We deny the protest.

The solicitation, which was for refuse removal at three Boston-area VA facilities, including VA's Jamaica Plain campus, Brockton campus, and West Roxbury campus, was issued on Tuesday, September 23, 2008, and publicized on the government-wide point of entry (GPE), FedBizOpps, at approximately 3 p.m. on that day. AR, exh. 1, Contracting Officer's Statement (COS), at 2. Proposals were due by 10 a.m., Monday,

September 29. AR exh. 6. On Friday, September 26, VA amended the solicitation, changing the requirement for a 4 cubic yard compactor under contract line item (CLIN) 09 (Brockton campus), to one for a 4 cubic yard container. AR exh. 4. Three proposals were received. AR exh. 5. Although DBI was the incumbent for the Jamaica Plain campus, it did not submit a proposal. A contract was awarded to WMI for all three sites. Id.

SOLICITATION NOTICE

DBI asserts that the agency should have provided it with individual notice of the RFP, in addition to the notice on FedBizOpps, based on its status as an incumbent and the agency's course of dealing with it in this and in prior acquisitions in which DBI asserts it was orally notified of the solicitation.

This argument is without merit. FedBizOpps has been designated as the GPE, "the single point where Government business opportunities greater than \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public." Federal Acquisition Regulation (FAR) § 2.101. Protesters are charged with constructive notice of the contents of procurement actions published on the GPE. Herndon & Thompson, B-240748, Oct. 24, 1990, 90-2 CPD ¶ 327 at 3. The doctrine of constructive knowledge imputes knowledge to a party without regard to the party's actual knowledge of the matter at issue. WorldWide Language Resources, Inc.; SOS Int'l Ltd., B-296984 et al., Nov. 14, 2005, 2005 CPD ¶ 206 at 9. Accordingly, the notice of the RFP published on FedBizOpps was legally sufficient, and the fact that DBI may not have had actual knowledge of the RFP is not determinative here. See, e.g., Specialty Marine, Inc., B-292053, May 19, 2003, 2003 CPD ¶ 106 at 2 (prospective contractor on constructive notice of the contents of procurement announcement even when it did not see the announcement).

DBI's status as an incumbent contractor did not operate to impose some greater notice obligation on the agency. At one time—but no longer—the FAR required that "bids shall be solicited from . . . the previously successful bidder" or offeror for the requirement. See (superseded) FAR §§ 14.205-4 and 15.403. However, the current FAR does not require such notice to incumbent contractors; thus, VA's failure to provide actual notice to DBI provides no valid basis for protest. See PR Newswire Ass'n, LLC, B-400430, Sept. 26, 2008, 2008 CPD ¶ 178 at 2 n.1. Nor did the agency's prior practice of providing oral notice require the agency to provide DBI with actual notice of the RFP here. Shirlington Limousine & Transp., Inc., B-299241.2, Mar. 30, 2007, 2007 CPD ¶ 68 at 3.

DBI asserts that, on several occasions, its president met with two VA employees, who "indicated that they were not sure exactly what was happening," but that "VA would let [DBI] know the particulars of the bid once the details were put in place." Comments at 3. However, even as recalled by the protester's president, these vague assurances did not include any specific promise to provide a solicitation other than

through legally required means, i.e., FedBizOpps, and, further, the agency advises that the employees in question worked in the agency's Environmental Management Service, not the contracting office. ASR exh. 1. We conclude that these conversations did not establish a commitment on the agency's part to provide DBI with actual notice of the RFP.

FAILURE TO PUBLICIZE FOR 30 DAYS

DBI asserts that the agency improperly failed to publicize the solicitation for 30 days, as it claims is required under the FAR. Under our Bid Protest Regulations, protests of alleged RFP improprieties must be filed no later than the closing time for initial proposals. 4 C.F.R. § 21.2(a)(1) (2008). Here, the RFP as published on FedBizOpps specifically provided that proposals were due by September 29. Thus, any argument that this due date was inconsistent with the 30-day requirement had to be raised prior to that date. DBI's protest was not filed in our Office until after award; accordingly, it is untimely and will not be considered. We point out that, while, as already discussed, DBI allegedly did not view the RFP prior to the closing time, this fact has no bearing on our conclusion; again, DBI was on constructive notice of the RFP and its contents by virtue of its posting on FedBizOpps.

AWARDEE'S FAILURE TO ACKNOWLEDGE AMENDMENT

As indicated above, on September 26, VA amended CLIN 09 of the RFP, changing the phrase "4 CU YD compactor" to "4 CY CONTAINER." AR exh. 2 at 1. DBI maintains that the record shows that WMI did not acknowledge the amendment, that its offer thus should have been rejected, and that the requirement should be resolicited.¹ VA advises that the contracting officer determined that the amendment was not material, and therefore waived the failure to acknowledge the amendment as a "minor informality." Id. The protester does not agree that the amendment was immaterial.

We find the waiver unobjectionable. In determining whether an amendment is material, we look at the facts of each case. While no precise rule exists as to whether a change required by an amendment is more than negligible, such that failure to acknowledge the amendment renders the proposal unacceptable, an amendment is material where it imposes legal obligations on a party that are different from those contained in the original solicitation, or if it would have more than a negligible impact on price, quantity, quality, or delivery. See Skyline ULTD, Inc., B-297800.3, Aug. 22, 2006, 2006 CPD ¶ 128 at 3. The mere fact that requirements have been changed by an amendment, however, does not render the amendment material. Doty Bros. Equip. Co., B-274634, Dec. 19, 1996, 96-2 CPD ¶ 234 at 3-5.

¹ The agency advises that none of the offerors acknowledged the amendment. ASR exh. 1.

DBI asserts that the amendment was material because “a compactor, including its wiring and installation, is far more expensive than a mere container.” Comments at 12. However, it appears from the record that there is no effective price difference between the two items. VA reports that all of the offerors submitted the same price for the compactor and the container CLINs, ASR exh. 1, and also has furnished an invoice indicating that DBI charges an identical rate for compactors and containers under its current contract. ASR exh. 3. We also note that the unacknowledged amendment related to only 1 of 35 CLINs. These considerations indicate that the change was not significant, and DBI has presented no evidence showing otherwise. Under these circumstances, we conclude that the amendment was not material and that the agency properly waived WMI’s failure to acknowledge it. See, e.g., Lumus Constr., Inc., B-287480, June 25, 2001, 2001 CPD ¶108 at 3 (even where amendment arguably introduced new obligations in solicitation, any price difference attributable to amendment was negligible and amendment was not material); Microform, Inc.; Gov’t Printing Office--Recon., B-231411.2, B-231411.3, Dec. 13, 1988, 88-2 CPD ¶ 587 at 2 (amendment decreasing estimated quantity not material where no evidence that change would have had more than trivial effect on prices).

The protest is denied.

Gary L. Kepplinger
General Counsel