



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

Decision

Matter of: Cedar Electric, Inc.

File: B-402284.2

Date: March 19, 2010

Timothy J. Woolford, Esq., Woolford Law, PC, for the protester.
Kelly DiGrado, Esq., Antonio R. Franco, Esq., PilieroMazza PLLC, for the intervenor.
Kate Gorney, Esq., Department of Veterans Affairs, for the agency.
Paula J. Haurilesko, Esq., Jonathan L. Kang, Esq., and Guy R. Pietrovito, Esq., Office
of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of agency's waiver of the awardee's failure to acknowledge an amendment is denied where the amendment was not material because it did not impose new legal obligations on the bidders.

DECISION

Cedar Electric, Inc., of Lititz, Pennsylvania, protests the award of a contract to Seawolf Construction Corp., of Parsippany, New Jersey, by the Department of Veterans Affairs (VA) under invitation for bids (IFB) No. VA-244-09-IB-0315, for renovation and new construction at the Lebanon VA Medical Center, in Lebanon, Pennsylvania. Cedar Electric contends that the VA improperly waived Seawolf's failure to acknowledge amendments to the IFB.

We deny the protest.

The IFB, issued on August 31, 2009, provided for the award of a construction contract. Drawings, specifications, and project design information for performance of the construction services were provided. The IFB was amended eight times. Bidders were required to acknowledge each amendment when submitting a bid, and were advised that, "[f]ailure to acknowledge an amendment may result in your proposal being considered non-responsive." IFB at 7.

Amendment 1 replaced the IFB in its entirety and included associated drawings and two volumes of specifications. As relevant here, this amendment included a section

on Wall and Door Protection, which specifically discussed “corner guards.” IFB amend. 1, Project Manual, Vol. 2, § 10 26 00.

Amendment 5 included a list of the specifications and also amended some of the specifications and drawings. The amendment listed as an attachment the “Schedule for Finishes,” which specifies interior and exterior materials, sizes, colors, patterns, textures, and finishes for the project. IFB amend. 5, at 2. The Schedule for Finishes was referred to throughout the specifications provided by Amendment 5.¹ For example, the section on Shop Drawings, Product Data, and Samples requires the contractor to submit all samples required by the Schedule for Finishes in quadruplicate for approval. *Id.*, Project Manual, Vol. 1, § 01 33 23, at 2. The specification for Resilient Sheet Flooring identifies the Schedule for Finishes as the source for color, pattern, and texture. *Id.*, § 09 65 16, at 1. However, the agency did not attach the Schedule for Finishes to Amendment 5. Contracting Officer’s (CO) Statement ¶ 5.

Amendment 8 provided a copy of the Schedule for Finishes and responded to contractor questions. In response to a question about wall and door protection, the agency stated that corner guards should be 42” high, made of stainless steel, and should be assumed for all outside corners of corridors. IFB amend. 8.

VA received six bids, including that of Cedar Electric and Seawolf. Seawolf submitted the apparent low bid of \$3,695,000 and acknowledged amendments 1 through 6, but failed to acknowledge amendments 7 and 8 prior to bid opening.² Cedar Electric submitted the next apparent low bid of \$3,760,000 and acknowledged all eight amendments. CO Statement ¶ 2. The CO waived Seawolf’s failure to acknowledge amendments 7 and 8, citing Federal Acquisition Regulation (FAR) § 14.405, and awarded the contract to Seawolf.³ CO Statement ¶¶ 3-4.

Cedar Electric protested to the agency, and following the VA’s denial of the protest, protested to our Office. Cedar Electric primarily argues that Amendment 8 is a material amendment that cannot be waived, and that Seawolf’s bid should have been

¹ The specifications provided in Amendment 1 also contained references to the Schedule for Finishes.

² Seawolf acknowledged Amendments 7 and 8 after bid opening; however, a bidder’s intent to be bound must be evident from the bidding documents themselves, so that post-bid-opening submissions or explanations cannot be used to make a non-responsive bid responsive. *Johnson Moving & Storage Co.*, B-221826, Mar. 19, 1986, 86-1 CPD ¶ 273 at 3.

³ FAR § 14.405 permits the waiver of minor informalities and irregularities in bids.

rejected.⁴ In particular, Cedar Electric contends that the Schedule for Finishes constitutes a significant design change that imposes new legal obligations and increases the cost of performance. The agency responds that Amendment 8 is not material because the Schedule for Finishes was referenced in Amendment 5, which Seawolf acknowledged. In the alternative, the agency argues that the price impact of Amendment 8 is not significant in relation to the value of the total project and therefore is not material.

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 ¶ 65 at 2. An amendment is material if it would have more than a negligible impact on price, quantity, quality, or delivery. FAR § 14.405(d)(2). Moreover, our Office has held that an amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation—for example, where it merely clarifies an existing requirement or is a matter of form—or has a negligible impact on the relative standing of the bidders. Kalex Constr. & Dev., Inc., B-278076.2, Jan. 20, 1998, 98-1 CPD ¶ 25 at 2. A bidder's failure to acknowledge an amendment that is not material is 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. No precise rule exists to determine whether a change required by an amendment is more than negligible; that determination is based on the facts of each case. K Services, B-238744, June 13, 1990, 90-1 CPD ¶ 556 at 2, citing DeRalco, Inc., B-233996, Mar. 29, 1989, 89-1 CPD ¶ 327.

We find that Amendment 8 is not a material amendment because the inclusion of the Schedule for Finishes in Amendment 8 does not constitute a change in the legal obligations of the bidders to meet the government's requirements. The references to the Schedule for Finishes in Amendment 5 put bidders on notice that the Schedule for Finishes existed as a contract requirement which they were obligated to fulfill. The Schedule for Finishes was included in the list of attachments to Amendment 5, even though the agency neglected to provide the actual schedule at that time. Amendment 5 required the contractor to submit for approval all samples required by the Schedule for Finishes in quadruplicate. Moreover, several of the specifications attached to Amendment 5 specifically stated that "color, pattern, and texture" performance requirements were specified in the Schedule for Finishes. All of these references, combined, clearly indicate that Amendment 5 created a legal obligation

⁴ Cedar Electric also argued in its protest that Seawolf's failure to acknowledge amendment 7 was not waivable. However, Cedar Electric did not address the agency's response to this argument in its comments on the agency report. We therefore deem this basis for protest to have been abandoned. Citrus College; KEI Pearson, Inc., B-293543 et al., Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4.

for contractors to perform in accordance with the Schedule for Finishes, even though the schedule was not attached to the amendment.⁵ See B-173563, Nov. 12, 1971, 51 Comp. Gen. 293 (1971). Because Amendment 8 was not a material amendment, VA acted appropriately in waiving Seawolf's failure to acknowledge the amendment.

Cedar Electric also objects that the amendment's requirement to provide 42" stainless steel corner guards constitutes a new material requirement. This allegation is untimely, however.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2)(2009). Moreover, where a protester initially files a timely protest, and later supplements it with independent grounds of protest, the later-raised allegations must independently satisfy the timeliness requirements, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. L-3 Sys. Co. Wescam Sonoma, Inc., B-297323, Dec. 3, 2005, 2005 CPD ¶ 219 at 4.

Here, Cedar Electric first raised the issue of the corner guards in its response to the agency report. However, Cedar Electric was aware of the requirement for corner guards at the time of its original protest, and therefore should have raised the issue at that time. Hence, the argument with regard to corner guards is untimely.⁶

⁵ In this regard, boards of contract appeals have found that contractors are bound to perform, at no additional cost to the government, provisions of which the contractor had knowledge, or should have requested clarification. Murson Constructors, Inc., 88-3 BCA ¶ 20992, June 29, 1988, aff'd, 878 F.2d 1446 (Fed. Cir. 1989); George E. Newsom, 80-2 BCA ¶ 14490, June 30, 1980, aff'd, George E. Newsom v. United States, 230 Ct.Cl. 301, 676 F.2d 647 (1982).

⁶ In any event, it appears that the requirement for corner guards is negligible. The agency estimates the cost of the corner guards as \$6,550, which is less than 0.2 percent of both Cedar Electric's and Seawolf's bids and is 10 percent of the difference between the two bids. CO Statement ¶ 3. Our Office has found that a change that represented 0.1 percent of the lowest bid price and 6.6 percent of the difference between the low bid and the second lowest bid to be negligible. See K Services, supra; cf. M. C. Hodom Constr. Co., Inc., B-209241, Apr. 22, 1983, 83-1 CPD ¶ 440 (an 11.25 percent difference in bid prices is not negligible).

In sum, we think that Amendment 8 was not a material amendment. It did not impose legal obligations upon the bidders that were not already incorporated through prior amendments. Therefore, the agency reasonably waived Seawolf's failure to acknowledge Amendment 8 as a minor informality.

The protest is denied.

Lynn H. Gibson
Acting General Counsel