DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-213525 DATE: July 24, 1984

MATTER OF: G. C. Smith Construction Company

DIGEST:

Contracting officer should not have rejected bid that failed to acknowledge a solicitation amendment which made changes having only a minimal impact on cost, relaxed a portion of the agency's requirements and reiterated a provision giving the contracting officer control over the amount of extra material removed during excavation. Such an amendment was not material and therefore the protester's failure to acknowledge the amendment should have been waived as a minor informality.

G. C. Smith Construction Company protests the rejection of its bid as nonresponsive because of its failure to acknowledge an amendment to invitation for bids (IFB) No. F05604-83-B-0048 issued by Peterson Air Force Base, Colorado. Smith contends that the amendment did not impose any additional requirements on the contractor and only had a minimal impact on price, and thus the contracting officer should have waived the protester's failure to acknowledge the amendment as a minor informality. We sustain the protest.

The Air Force issued the solicitation on August 13, 1983 for the replacement of a reserve aircraft parking apron. The solicitation required the successful contractor to excavate and remove the existing aircraft parking apron, prepare the subgrade and install a granular filter course, subbase and new aircraft parking apron with static ground tie down rods and pavement markings. It also included scale drawings that showed the contract work was to be performed in two areas, "AREA A BASIC" and "AREA B ADDITIVE," and provided for a single lump sum price for the project.

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As originally issued, the solicitation provided at paragraph 4a of section 2B of the technical provisions that the government would make an equitable adjustment in the contract price to compensate the contractor for the removal of any unsuitable subgrade material in excess of that required by the specifications. By amendment 0001, the agency, among other things, deleted Area B Additive from the contract work and included a provision stating that the contractor would be paid $5.00 per cubic yard (cu. yd.) for actual quantities of excess unsuitable subgrade material removed.

Subsequently, the agency issued amendment 0002 deleting the $5.00 per cu. yd. payment provision and substituting a bid schedule that, in addition to requiring bidders to submit a lump sum price for the project, included a separate item for the removal of the excess unsuitable material. That item listed an estimated quantity of 1,000 cu. yds. and a predetermined price of $10.00 per cu. yd. The amendment also provided that the quantity of excess unsuitable material to be removed would be determined by the government and that payment would be based upon the actual quantities removed. Amendment 0002 further deleted a detail on the drawings and changed the required length of the tie down anchors from 6 to 8 feet.

At bid opening, Smith submitted the apparent low bid of $908,874 while Pete Sprouse Construction, Inc. submitted the second low bid of $957,428. Smith, however, failed to acknowledge amendment 0002. After finding that this amendment made material changes to the solicitation, the agency rejected the bid as nonresponsive. The agency awarded a contract to Sprouse but has withheld issuing a notice to proceed pending the resolution of this protest.

After taking the position that the amendment had a significant cost impact, the agency now states that the amendment's cost impact is minimal. It maintains, however, that the amendment is material because it affected the legal relationship between the parties. The agency points to the provision added by amendment 0002 which states that the quantity of excess material to be removed is to be determined by the government and that "the contractor

will be notified pursuant to General Provision 4"[1], and argues that absent this provision the solicitation as modified by amendment 0001 would give the government no control over the amount of material the contractor might remove. Thus, the agency maintains, this provision eliminates the risk that it might be forced to litigate a claim for removing the material.

A bid that does not include an acknowledgment of a material amendment must be rejected because absent such an acknowledgment the bidder is not obligated to comply with the terms of the amendment and its bid is thus nonresponsive. Emmett R. Woody, B-213201, Jan. 26, 1984, 84-1 CPD ¶ 123. An amendment is material, however, only if it has more than a trivial or negligible effect on price, quantity, quality or delivery of the item or services bid upon, see Defense Acquisition Regulation (DAR), § 2-405(iv)(b); Owl Resources Company, B-210094, April 29, 1983, 83-1 CPD ¶ 461, or if the amendment changes the legal relationship between the parties. Versailles Maintenance Contractors, Inc., B-203324, Oct. 19, 1981, 81-2 CPD ¶ 314. Generally, the failure to acknowledge an amendment which imposes no substantive or different requirement on the bidders or reduces the cost of bidders' performance may be waived. See Emmett R. Woody, supra.

Of the changes made by amendment 0002, only the increase in length of the tie down anchors is likely to increase contractor costs. All of the other changes will result in decreased costs. The agency considered the net effect of these changes in finding that the amendment's cost impact was minimal. In order, however, to determine the materiality of an amendment that both increases and decreases costs it is necessary to consider the increasing portions separately. Northwestern Construction, Inc., B-186191, Nov. 23, 1976, 76-2 CPD ¶ 442. Here, the agency states that the change in the length of the tie down anchors will increase contractor costs by approximately $2,390 ($1,890 for labor and materials, plus 15 percent for

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[1]/"General Provision 4" refers to the Differing Site Conditions clause incorporated into the solicitation as originally issued.

overhead and 10 percent for profit). This is .262 percent of Smith's bid and 4.92 percent of the difference between the two low bids. We think this amount would have only a trivial impact on overall contract cost and clearly would not affect the competitive standing of the bidders. Also there is nothing in the record indicating that increasing the length of the down anchors would have a material impact on the quality of the project. Thus, we believe that the amendment's impact was de minimus and subject to waiver.

Further, the agency maintains that amendment 0002 was material because it changed the government's requirements by deleting the requirement for dowels in construction joint detail 2/1/1 in the solicitation drawings. Where, as here, a bidder fails to acknowledge an amendment that relaxes the agency's requirements and thus offers to supply more than that which is required under the solicitation, its bid may properly be accepted as responsive. Charles V. Clark Company, Inc., 59 Comp. Gen. 296 (1980), 80-1 CPD ¶ 194; Abhe & Svoboda, Inc., B-202493, July 27, 1981, 81-2 CPD ¶ 63.

Finally, we do not agree with the agency's position that the language concerning removal of excess unsuitable material contained in amendment 0002 altered the legal relationship[2/] between the parties. Rather, we believe that the solicitation as modified by amendment 0001 gave the contracting officer the authority to direct the removal of any excess unsuitable subgrade material.

Paragraph 4a of section 2B of the solicitation's technical provisions stated in part as follows:

> "The excavation shall conform to the dimensions and elevations indicated except as specified hereinafter.

[2/]The increase in the amount to be paid the contractor from $5.00 per cu. yd. in amendment 0001 to $10.00 per cu. yd. in amendment 0002 would decrease the contractor's cost of performance.

. . . . .

> In cases where overexcavation is ordered to remove unsuitable material, an equitable adjustment in contract price will be made to cover the additional cost of performing the overexcavation . . . . Material removed below the depths indicated without specific direction of the contracting officer shall be replaced, at no additional cost to the government, to the indicated excavation grade with suitable materials . . . ."

This provision, along with the Differing Site Conditions clause[3]/ incorporated into the original solicitation, indicates that the contractor will be paid for additional excavation only if it is ordered by the agency. (Amendment 0001 changed the formula under which the contractor would be paid from an equitable adjustment in contract price to the predetermined $5 per cu. yd., but it left unchanged the other provisions in this section.) Contrary to the agency's position, it appears that should the contractor remove any excess material without receiving "specific direction" from the contracting officer, it does so at its own risk and the government would not be obligated to pay for this work. We fail to see how the language of amendment 0002 adds to the contracting officer's right to specifically direct the removal of any excess material. Rather, that language merely reiterates that which was already provided for in the solicitation as amended. Thus, the agency's position

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[3]/The Differing Site Conditions clause set forth at DAR § 7-602.4, and cited in amendment 0002 as "General Provision 4", provides that no claim of a contractor based on subsurface or latent physical conditions at the site differing from those indicated in the contract shall be allowed unless the contractor notifies the agency of the conditions.

in this regard does not provide a sufficient basis to reject Smith's bid. See Abhe & Svoboda, Inc., supra.

The protest is sustained. We recommend that if Smith is determined to be responsible, the Air Force terminate the contract with Sprouse for the convenience of the government and make award to Smith.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations, and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendation.

for Milton J. Socolar
Comptroller General
of the United States