

DECISION

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

FILE: B-215397 **DATE:** December 19, 1984
MATTER OF: Kentucky Building Maintenance, Inc.

DIGEST:

Low bidder's failure to acknowledge solicitation amendment containing a number of changes, some of which had a material effect on contract performance, may not be waived as a minor informality. The bid therefore was properly rejected as nonresponsive.

Kentucky Building Maintenance, Inc. (KBM) protests the rejection of its bid as nonresponsive because of its failure to acknowledge an amendment to invitation for bids (IFB) No. DAKF06-84-B-0022, issued by the Department of the Army. The solicitation, for hospital housekeeping services at Fort Carson, Colorado, was part of a cost comparison performed to determine whether the services should be provided by a contractor or by government personnel.

KBM contends that its bid should not have been rejected because the amendment was not material in that its impact on the bid price was negligible, it neither increased nor decreased performance requirements in any material way, and it had no effect upon the quality of the performance required. We disagree, and therefore deny the protest.

KBM submitted the apparent low bid of \$1,242,000 for the 3-year contract period, while Cortez III Service Corporation submitted the second low bid of \$1,269,780. KBM, however, failed to acknowledge amendment No. 3, leading the agency to reject KBM's bid as nonresponsive. Award was made on August 3 to Cortez III after the Army determined that it would be least costly to contract out.

Amendment No. 3 made six changes to the solicitation. The first change involves the required cleaning level for rest rooms. The second change substituted pages in a 9-page performance requirement summary. The

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third, fourth and fifth changes set forth additions or revisions to the task and frequency charts. The sixth change substituted a revised quality assurance surveillance plan.

Resolution of the protest depends on whether the unacknowledged amendment made material changes to the solicitation. An amendment is material if it has more than a trivial or negligible effect on price, quantity, quality, or delivery of the item or services bid upon or on the relative standing of the bidders. See Defense Acquisition Regulation (DAR), § 2-405(iv)(B), reprinted in 32 C.F.R. pts 1-39 (1983); G.C. Smith Construction Company, B-213525, July 24, 1984, 84-2 CPD ¶ 100. An amendment also is considered material if it changes the legal relationship between the parties. Versailles Maintenance Contractors, Inc., B-203324, Oct. 19, 1981, 81-2 CPD ¶ 314.

Failure to acknowledge a material amendment renders the bid nonresponsive and thus unacceptable 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. Jose Lopez & Sons Wholesale Fumigators, Inc., B-200849, Feb. 12, 1981, 81-1 CPD ¶ 97. However, failure to acknowledge an amendment which imposes no different or additional legal obligations on the bidders from those imposed by the original solicitation may be waived. Emmett R. Woody, 63 Comp. Gen. 182 (1984), 84-1 CPD ¶ 123. The basis for this rule is that the acceptance of a bid which disregards a material provision of an invitation, as amended, would be prejudicial to other bidders. Clarification of a bid after opening would permit the bidder either to become eligible by furnishing extraneous evidence that the amendment had been considered or to avoid award by remaining silent. Mills Manufacturing Corp., B-188672, June 15, 1977, 77-1 CPD ¶ 430.

We find that in this case the first and third changes of amendment No. 3 could not be waived because they had a material effect on contract performance. It is our view that the protester's failure to acknowledge the amendment provided a proper basis for rejection of the bid.

The first change concerns the cleaning level for rest rooms. The solicitation established different required levels of cleaning for different areas of the hospital, with level I being the most stringent. Level I applied

to critical areas such as isolation, emergency room, and intensive care; level II covered subcritical areas such as clinics and wards; and level III applied to non-critical areas, specifically "rest rooms, Occupational Health, Preventive Medicine and Nursing Service." Amendment No. 3 deleted rest rooms from the level III cleaning description.

The Army maintains that this deletion was necessary to correct an ambiguity and thus had a material impact on the IFB, because it increased the rest room cleaning requirements in areas designated as levels I and II. Without the amendment, the Army contends, a successful contractor would have been obligated only to clean rest rooms at the lower level III, regardless of where they were located. The agency also maintains that the deletion had a material effect on price, estimating the cost impact of the additional cleaning requirements at \$18,780 a year or \$56,340 for the 3-year contract period.

KBM, on the other hand, argues that the deletion merely clarified the agency's clear intent not to permit level III cleaning in other than level III areas. The protester states that it read the IFB as requiring rest room cleaning that would be consistent with the areas in which the rest rooms were located and that it formulated its bid price accordingly.

While the protester may have read the IFB in such a manner, the IFB provisions, prior to the amendment, did not explicitly indicate that rest room cleaning would be consistent with the areas in which the rest rooms were located. Thus, any resultant contract with KBM might not have bound it to provide the level of cleaning services agreed to by those bidders acknowledging the amendment and required by the Army. Therefore, we think KBM's failure to acknowledge the amendment had a material impact with respect to both price and the quality of the services that would be provided. Dover Elevator Co., B-194679, Nov. 8, 1979, 79-2 CPD ¶ 339.

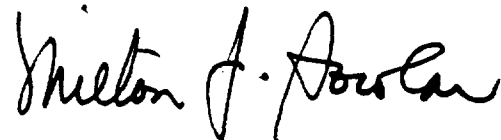
The third change added the "cleaning metal surfaces" (paragraph 5.3.8 of the performance work statement) to the walls task on the task and frequency charts included in the IFB. The agency maintains that this increased performance requirements because, although the task description included wall mounted fixtures, it did not include polishing of metal surfaces as required by

paragraph 5.3.8. By not acknowledging the amendment, the agency contends, the successful contractor would not be obligated to polish the metal surfaces of walls with any minimum acceptable frequency. The protester contends this change was not actually an addition, since the task was already included in the performance work statement prior to amendment No. 3.

We agree with the agency that the third change increased the requirement for polishing metal surfaces on walls from zero to specified minimum frequencies. This too would have a material impact on the quality of performance, although we recognize that the relative impact on price of this change might not be significant.

Nonetheless, where, as here, the effect of an amendment is to add requirements to contract performance, a bidder's failure to acknowledge the amendment may not be waived as a minor informality. Doyon Construction Co., Inc., 63 Comp. Gen. 214 (1984), 84-1 CPD ¶ 194; McKenzie Road Service, Inc., B-192327, Oct. 31, 1978, 78-2 CPD ¶ 310. Since the Army's requirements, prior to issuance of amendment No. 3, were at least arguably ambiguous, and KBM might not have been legally obligated to meet them, we believe the bid properly was rejected as nonresponsive.

The protest is denied.

for 
Comptroller General
of the United States