

DECISION

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

31611

FILE: B-218537.3 **DATE:** July 3, 1985
MATTER OF: Gibraltar Industries, Inc.

DIGEST:

Low bidder's failure to acknowledge amendment to IFB reducing quantity of items required may be waived as minor informality under Federal Acquisition Regulation, since amendment is not material because it did not impose on the bidder any greater legal obligation than that already required by original solicitation.

Gibraltar Industries, Inc. (Gibraltar), protests the Defense Logistics Agency's (DLA) failure to reject as nonresponsive the low bid submitted by Jay-Dee Sportswear, Inc. (J-D), for fragmentation vests (vests) under invitation for bids (IFB) No. DLA100-85-B-0429, a total small business set-aside, issued by DLA's Defense Personnel Support Center. Gibraltar contends that J-D's bid is nonresponsive because J-D failed to acknowledge an allegedly material amendment (Amendment 001) reducing: (1) the maximum quantity of vests to be procured from 270,000 to 100,000; and (2) correspondingly the number of vests required for each of the IFB's numerous scheduled deliveries.

We deny the protest because in our view Amendment 001 was not a material amendment.

As initially issued, the IFB set out four separate quantities of vests which in all totaled 270,000. The vests were to be shipped to four separate destinations in various quantities at numerous different times. Bidders were not required to bid on the entire 270,000 vest requirement, but could instead, under the "Offeror's Minimum/Maximum Quantity Limitations" clause, bid any quantity or range of quantities up to 270,000 vests. Bidders were warned that the government reserved the right to award a different (presumably lesser) quantity than that advertised or than that bid, in which event pro rata delivery based on the delivery schedule would be required. Bidders were put on notice of both the existence of open options under an earlier procurement for

032481

approximately 200,000 vests and of the prices at which the options could be exercised by the government. Finally, bidders could, if they desired, grant the government an option to increase the quantity awarded by up to 50 percent. In effect, the IFB required bidders in the calculation of their prices to include the cost associated with the risk of being contractually bound to produce any particular quantity of vests within the minimum/maximum range of their respective bids.

J-D specifically bid to a minimum of 33,000 vests and the maximum of 270,000 vests. J-D further agreed to permit DLA to exercise up to a 50-percent option on the quantity initially awarded.

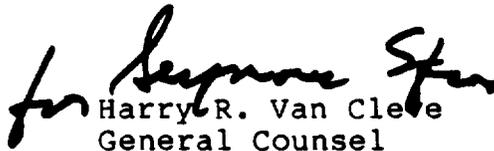
Gibraltar argues that J-D's failure to acknowledge Amendment 001 was material because it affected quantity, delivery and price. However, its contention is essentially based on Gibraltar's speculation concerning the manner in which J-D arrived at its bid prices. Gibraltar assumes that J-D "based its price upon the expectation that 270,000 units would be awarded under the solicitation, and that potentially it could receive award for that entire quantity." Gibraltar argues that neither DLA or J-D rebuts Gibraltar's contentions. In this connection, Gibraltar points to the theory of "economies of scale" (manufacturing costs per unit decline as the number of units manufactured increases) and concludes that J-D would have bid a higher price had it known of the reduction in quantity to 100,000 vests in order to compensate for the higher per unit costs of a shorter production run. Gibraltar contends that this amendment was material and the failure to acknowledge it cannot be waived as a minor informality under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.405 (1984), which permits waiver where an amendment involves only a matter of form or has either no effect or merely a negligible effect on price, quantity, quality, or delivery of the item bid upon.

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 48 C.F.R. § 14.405; G.C. Smith Construction Co., B-213525, July 24, 1984, 84-2 C.P.D. ¶ 100. An amendment also is considered material if it

changes the legal relationship between the parties. Kentucky Building Maintenance, Inc., B-215397, Dec. 14, 1984, 84-2 C.P.D. ¶ 583; Versailles Maintenance Contractors, Inc., B-203324, Oct. 19, 1981, 81-2 C.P.D. ¶ 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 C.P.D. ¶ 97.

Here, the amendment imposed no additional obligations on J-D other than those already included in the original IFB. By the terms of the IFB as originally issued, J-D was already bound to provide lesser quantities of vests and to make reduced deliveries of vests proportionate to the number actually ordered. Also, as provided for in the original IFB, J-D bid a minimum quantity at which it would offer the price bid, and this minimum quantity reasonably should reflect J-D's consideration of the "economies of scale." Thus, there is no showing that the issuance of the amendment affects materially the legal relationship between the parties. See Mills Manufacturing Corp., B-188672, June 15, 1977, 77-1 C.P.D. ¶ 430.

Accordingly, the agency could properly waive J-D's failure to acknowledge Amendment 001, and the protest is denied.


Harry R. Van Cleve
General Counsel