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DECISION



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

FILE: B-220327 **DATE:** January 29, 1986
MATTER OF: Wirco, Inc.

DIGEST:

1. A bidder's failure to acknowledge an amendment that adds two containers to each of five previously-scheduled deliveries of containers is not a material deviation requiring rejection of the bid as nonresponsive. Rather, it may be treated as a minor informality that may be cured after bid opening when the bidder has submitted a price for and is obligated to provide the correct total number of containers and the effect on price, if any, of the change made by the amendment is negligible.
2. Failure of the low bidder to bid on an option item added by amendment is not a material deviation requiring rejection of the bid as nonresponsive when the option price is not evaluated.

Wirco, Inc. protests the rejection of its low bid as nonresponsive to invitation for bids (IFB) No. N00024-85-B-6270, issued on June 28, 1985 by the Naval Sea Systems Command (NAVSEA). The solicitation was for a first article and various production quantities of torpedo shipping containers.

We sustain the protest.

The bid schedule included 16 different line items, some with subitems, covering base and option quantities of the containers, as well as progress reports, data, and warranties. Except for the first article, the Shipping

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Instruction Data Form (Attachment A) required all to be delivered at specified times to TRW in Cleveland, Ohio. Shipping, the IFB specifically stated, would be at government expense, normally on a government bill of lading.

At issue here is line item No. 0003AA, for which bidders were to submit unit and extended prices for 35 containers on an f.o.b. origin basis. However, the delivery schedule for this item called only for 5 shipments of 5 containers each, for a total of 25 containers. Amendment No. 0001, dated July 22, among other things corrected this discrepancy and increased the quantity for each shipment of this item to 7, for a total of 35.

NAVSEA rejected Wirco's low bid for failure to acknowledge receipt of the above-discussed amendment or to submit a delivery schedule. The agency awarded a contract to Yanke Container Corporation on September 10.

Wirco contends that its failure to acknowledge the amendment should not render its bid nonresponsive because the amendment was not material, but merely corrected an "obvious typographical error." The protester further contends that its omission of the delivery schedule should not render its bid nonresponsive because in signing Standard Form 33, Wirco agreed to provide the items at the prices set forth in its bid within the times specified in the delivery schedule.

NAVSEA maintains that, contrary to the protester's argument, correction of the delivery information was a material change that could have affected price. According to the agency, Wirco had no basis for assuming that the correct schedule was 5 deliveries of 7 containers each, since the 10 containers omitted from the original delivery schedule could have been required to be shipped either sooner or later and in various other combinations. The agency concludes that it therefore properly rejected Wirco's bid.

Generally, a bidder's failure to acknowledge the receipt of an amendment or to demonstrate clearly an obligation to perform the amendment's requirements renders

the bid nonresponsive. Lear Siegler, Inc., B-212465, Oct. 19, 1983, 83-2 CPD 465.^{1/} However, the failure of a bidder to acknowledge receipt of an amendment may be waived or allowed to be cured where the amendment has either no effect or merely a negligible effect on price, quantity, quality, or delivery. Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.405 (1984); Gentex Corp., B-216724, Feb. 25, 1985, 85-1 CPD ¶ 231. No precise standard can be employed in determining whether a change required by an amendment is more than negligible, and the determination must be based on the facts of each case.

Although an amendment is material where it imposes legal obligations on the contractor that were not contained in the original solicitation, see Reliable Building Maintenance, Inc., B-211598, Sept. 19, 1983, 83-2 CPD ¶ 344, here Wirco bid on and was legally bound to provide the correct total number of containers, 35. While the NAVSEA theoretically could have required delivery either sooner or later and in various other combinations, thus arguably affecting price, here it did not do so. The amendment merely added 2 containers to each of the previously scheduled 5 deliveries to TRW. We are not convinced that such an addition would have more than a negligible effect on price,^{2/} and we agree with Wirco that the change was more in the nature of a typographical correction.

^{1/} We note that Wirco correctly states that the failure to return part of the bid package, such as the delivery schedule, does not automatically render a bid nonresponsive where the omitted portion of the bid is incorporated into the bid by reference. See Werres Corp., B-211870, Aug. 23, 1983, 83-2 CPD ¶ 243. Under those circumstances, the submittal is in a form such that acceptance would create a valid and binding contract, requiring the bidder to perform in accord with all material terms and conditions of the IFB. Id. However, the rule is not applicable here because the amendment revised the delivery schedule.

^{2/} We note that the addition had no effect on transportation costs, because the bid terms were f.o.b. origin and the solicitation did not specify that these costs would be evaluated (although such evaluation is provided for in FAR, 48 C.F.R. § 47.305-3(f)(2)). Even if transportation costs had been evaluated, presumably those from Wirco's plant in Indiana to the Cleveland delivery point would be less than those from Yanke's plant in Idaho to the same delivery point.

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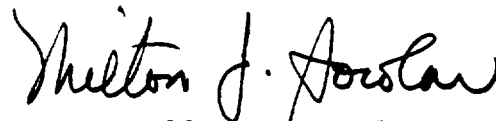
Thus, we find the facts here do not support rejection of Wirco's bid as nonresponsive, since Wirco committed itself to the total number of containers required. Rather, we believe Wirco should have been given the opportunity to cure the deficiency. Given the \$41,631 difference between Wirco's and Yanke's bids (Wirco at \$1,096,577 and Yanke at \$1,138,208), a cure would not have been prejudicial to other bidders.

Remaining for resolution is whether Wirco's failure to bid on the line item added by the amendment rendered its bid nonresponsive. The agency has not questioned the acceptability of the bid on this basis. We note, however, that the item in question, No. 0016AE, is a warranty provision applicable to item No. 0007, which in turn is an option item. Neither Wirco nor Yanke bid on the warranty provision.

We have held that where option prices are not included in the evaluation and where it is not specified that they may not exceed a particular ceiling, a bidder's failure to quote option prices is not a material deviation, and a bid should not be rejected as nonresponsive on this basis. 51 Comp. Gen. 528 (1972); AMS Mfg., Inc., B-203589, Sept. 2, 1981, 81-2 CPD ¶ 195, aff'd on reconsideration, B-203589.2, Nov. 2, 1981, 81-2 CPD ¶ 371. Here, the solicitation did not provide for the evaluation of options or include a ceiling on option prices. Moreover, in determining the low and second-low bidder, NAVSEA considered only prices for base quantities. Wirco's failure to bid on the warranty provision is therefore not a material deviation that requires bid rejection. See 52 Comp. Gen. 614 (1973).

Performance has been delayed pending our decision. By letter of today to the Secretary of the Navy, we are therefore recommending that if Wirco is determined to be responsible and cures its failure to acknowledge the amendment, award should be made to it and the contract awarded to Yanke be terminated for the convenience of the government.

The protest is sustained.



Acting Comptroller General
of the United States