

DECISION

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

FILE: B-221825 **DATE:** February 24, 1986
MATTER OF: Customer Metal Fabrication, Inc.

DIGEST:

An amendment that significantly extends the period in which the government may issue delivery orders under a proposed contract is material because it changes the legal relationship between the parties by imposing an obligation on the contractor not contained in the original solicitation and therefore the protester's failure to acknowledge the amendment requires rejection of its bid as nonresponsive.

Customer Metal Fabrication, Inc. (CMF) protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DACW37-85-B-0054, issued by the Army Corps of Engineers (Corps). The solicitation contemplated the award of a contract to furnish tow haulage units (winches) for use at various canal locks operated by the Corps. CMF complains that the Corps improperly rejected its bid as nonresponsive because the firm had failed to acknowledge the sole amendment to the IFB. We deny the protest.

Background

The IFB provided that the government would issue a delivery order for a minimum of two winches and that it reserved the right to issue further delivery orders for up to seven more units. The IFB originally stated that the effective period in which the government could issue these delivery orders was from September 15, 1985 through January 1, 1986, and that the contractor would not be required to make any deliveries under these orders after April 1, 1986.

Subsequent to the issuance of the IFB, the supplier of winches to both CMF and R.A.M. Engineering, another bidder, advised the Corps that certain technical specifications of the IFB were inadequately stated and should be modified. Partly in response to this advice, the Corps then issued

Amendment 0001 to the IFB which revised certain technical specifications and also the unit/location schedule. Moreover, the amendment extended the effective period during which the government could issue delivery orders by an additional 93 days (from September 15, 1985 through January 1, 1986 to September 15, 1985 through April 4, 1986), and advanced the cut-off date after which the contractor was no longer required to make deliveries from April 1 to June 15, 1986.

R.A.M. Engineering's bid was apparently low at \$488,700, and CMF's bid was apparently second low at \$551,430. However, upon examination of CMF's bid, the Corps noticed that the firm had failed to acknowledge Amendment 0001. Accordingly, since the Corps considered the changes made by the amendment to be material, CMF's bid was rejected as nonresponsive. R.A.M. Engineering was not awarded the contract because the firm was determined to be nonresponsible for financial reasons, and the bid of the apparent third low bidder was rejected as nonresponsive because the firm had taken exception to certain specifications. The award was then made to A.C. Hoyle Co., the remaining low responsive, responsible bidder, at its bid price of \$682,789.

Following the rejection of its bid as nonresponsive, CMF filed an agency-level protest with the Corps arguing that the changes made by the amendment were not material, and that the rejection of its bid was therefore improper. The Corps denied the firm's protest, and the firm then filed this protest with our Office.^{1/}

Analysis

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. Gibraltar Industries, Inc., B-218537.3, July 3, 1985, 85-2 CPD ¶ 24. An amendment is also considered material if it changes the legal relationship between the parties. Id.; Versailles Maintenance Contractors, Inc., B-203324, Oct. 19, 1981, 81-2 CPD ¶ 314. Thus, failure to acknowledge a material amendment renders a bid nonresponsive and, in consequence, unacceptable, because, absent such an acknowledgment, the

^{1/} We are resolving the protest under the expedited procedures provided by our Bid Protest Regulations, 4 C.F.R. § 21.8 (1985), upon CMF's request and the Corps' concurrence in that request.

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. A bidder bears the risk of nonreceipt of solicitation amendments absent a deliberate attempt to exclude it from the competition. Triple A Shipyards, B-218079, Feb. 6, 1985, 85-1 CPD ¶ 149.

In the present matter, CMF states that it never received a copy of the amendment, but does not allege that this was the result of bad faith on the Corps' part. However, the firm has strenuously urged that the specification and unit/location schedule changes made by the amendment were de minimis as to price and had only a negligible impact upon either the quantity, quality or delivery of the winches. In its comments on the present protest, the Corps asserts that those issues are, in any event, academic because the amendment changed the legal relationship between the parties and was therefore material. We agree.

An amendment materially alters the legal relationship between the parties where it imposes obligations on the contractor that were not contained in the original solicitation. Reliable Building Maintenance, Inc., B-211598, Sept. 19, 1983, 83-2 CPD ¶ 344. We think it clear that Amendment 0001, by extending the effective period during which the government could issue delivery orders an additional 93 days, imposed a significantly greater obligation on CMF than originally contemplated by the firm when it submitted its bid. Thus, absent CMF's express agreement to this enhanced right on the part of the government, the firm simply would not be contractually bound to deliver any winches ordered after January 1, 1986, the last date for such orders as initially set by the IFB. (Concomitantly, the firm would not be legally obligated to make deliveries through June 15, 1986, the advanced cut-off date for required performance established by the amendment.) Moreover, because it has not agreed to this new condition, CMF has limited its exposure to the business risk of cost increases due to changed market conditions during the 93-day period, thus giving it potential unfair advantage over its competitors. In our view, this is clearly analogous to a situation where a bidder, by offering a lesser period for acceptance of its bid than called for in the IFB, does not share the same business risks that must be shared by all bidders. See Legeay, Inc., B-218307, Mar. 22, 1985, 85-1 CPD ¶ 338.

We therefore conclude that Amendment 0001 was material and that CMF's failure to acknowledge it, in consequence, was a fatal defect in its bid which could not be waived by the contracting officer. See the Federal Acquisition Regulation, § 14.405(d)(2) (FAC 84-5, Apr. 1, 1985); cf. Gibraltar Industries, Inc., B-218537.3, supra (failure to acknowledge amendment properly waived where amendment imposed no additional obligations other than those already included in the original IFB).

To the extent CMF argues that acceptance of its lower bid would be in the government's best interest, we have consistently held that a nonresponsive bid may not be accepted even though it would result in monetary savings to the government, since acceptance would compromise the integrity of the sealed bidding system. Avantek, Inc., B-219622, Aug. 8, 1985, 85-2 CPD ¶ 150.

The protest is denied.

for *Raymond E. Evers*
 Harry R. Van Cleve
 General Counsel