

DECISION



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

FILE: B-220412; B-220412.2 **DATE:** March 10, 1986

MATTER OF: Ohmeda; LSL Industries, Inc.

DIGEST:

1. Protest of agency's rejection of bid for failure to acknowledge receipt of IFB amendment is dismissed as academic where agency determines that amendment was not material and waives protester's failure to acknowledge receipt of it.
2. Agency properly waived bidder's failure to acknowledge receipt of IFB amendment because amendment--which relaxed a portion of the agency's requirements by providing alternative specifications and clarified the original solicitation by providing information that was incorporated by reference in the solicitation as issued--was not material.
3. Amendment to IFB which added entire specification for one item was material, and bidder's failure to acknowledge the amendment rendered its bid nonresponsive as to that item.

Ohmeda, a division of the BOC Group, Inc., protests the rejection of its bid under invitation for bids (IFB) No. DLA120-85-B2786 issued by the Defense Logistics Agency (DLA) for Macintosh and Wisconsin laryngoscope kits. Ohmeda's ostensibly low bid was rejected as nonresponsive for failure to acknowledge receipt of an amendment. Subsequent to the filing of Ohmeda's protest, the agency determined that with respect to item 1 of the solicitation--the requirement for the Macintosh laryngoscope kits--the amendment was not material; it therefore waived as a minor informality Ohmeda's failure to acknowledge the amendment as to item 1. Ohmeda's failure to acknowledge the amendment as to item 2, however, was not waived because the amendment was determined to be material as to that item. LSL Industries, Inc., the second low bidder on item 1, protests the agency's action waiving Ohmeda's failure to acknowledge the amendment as to item 1.

Ohmeda's protest is dismissed in part and denied in part; LSL's protest is denied.

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With reference to item 1, the amendment provided for an alternative type of battery handle and surface finish, as well as an alternative identification marking for the Macintosh laryngoscope, and added for informational purposes the Defense Personnel Support Center (DPSC) drawings numbers and their revision dates.^{1/} With reference to item 2, the amendment added the entire specification.^{2/}

Ohmeda's Protest

Ohmeda protests that it did not receive a copy of the amendment and, for that reason, its bid on the two items should not be found nonresponsive for failure to acknowledge receipt of the amendment. Ohmeda states that because of its "previous bid activity" with the DPSC, it has on file "all relevant specifications" for the items being procured under the subject solicitation. Ohmeda further states that since the amendment only cited specifications already incorporated by reference in the solicitation and postponed the bid opening date by 1 day, its bid price would not have been affected by the amendment.

The agency explains that Ohmeda was not sent a copy of the amendment due to a computer program malfunction and a clerical error, which together resulted in the omission of Ohmeda's name from the solicitation mailing list (SML).^{3/} With respect to Ohmeda's contention that since it never received the amendment, it should not be deemed

^{1/} The drawings numbers are listed in military specification MIL-L-36628B, specified for compliance in the solicitation as originally issued.

^{2/} The specification data provided by the amendment was inadvertently omitted from the IFB, apparently due to a computer malfunction.

^{3/} The agency advises that to correct this situation, the DPSC Medical Directorate has directed all appropriate procurement personnel to add Ohmeda to their SML and that the Procurement Operations Support Office will monitor the SML to ensure that in the future, Ohmeda is on the list for requested items.

nonresponsive for not acknowledging it, DLA argues that where, due to clerical error, an agency fails to provide a bidder with a copy of a material solicitation amendment, the bidder's failure to acknowledge that amendment renders its bid nonresponsive, and that the agency may make award under the IFB absent a showing by the bidder of a deliberate agency attempt to preclude it from bidding and provided that adequate competition and reasonable prices were obtained. In support of this position, the agency cites our decision, Triple A Shipyards, B-218079, Feb. 6, 1985, 85-1 C.P.D ¶ 149.

As previously stated, the agency waived Ohmeda's failure to acknowledge the amendment as to item 1 on the basis that the amendment was not material to that item because it only added alternative specifications and information that was incorporated by reference in the solicitation as it was originally issued. Since Ohmeda expressed its intention to be bound by the requirements of the specification for item 1 by referencing in its bid the specification that was incorporated by reference, the agency determined it to be the low, responsive bidder for that item.

As to item 2, however, the agency determined that the amendment was material because the specification for that item, which was totally omitted in the original solicitation, was added by the amendment. Thus, it is the agency's position that Ohmeda's bid must be considered nonresponsive with respect to item 2 because Ohmeda did not acknowledge receipt of the amendment or allege a deliberate effort on the agency's part to exclude it from competing, and the two remaining responsive offers for that item provide adequate competition.

LSL's Protest

LSL protests the agency's action in finding Ohmeda the low, responsive bidder on item 1, arguing that the amendment is material with respect to item 1, as well as item 2. LSL maintains, therefore, that because Ohmeda did not acknowledge the amendment, its bid is nonresponsive. We note, however, that, in essence, LSL simply asserts that the amendment was material as to item 1, but offers no analysis of the effect of the amendment or legal support for its contention.

Discussion

A bidder's failure to acknowledge receipt of a material amendment to an IFB renders its bid unacceptable because, absent such an acknowledgment, the bidder is not legally obligated to comply with the terms of the amendment, and its bid is, therefore, nonresponsive. Power Service, Inc., B-218248, Mar. 28, 1985, 85-1 C.P.D. ¶ 374. An amendment is material if it affects the bidder's price or the quantity, quality, delivery, or the relative standing of the bidders. Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.405 (1984). An amendment that merely clarifies an existing solicitation requirement is not material; thus, a bidder's failure to acknowledge receipt of such an amendment may be waived as a minor informality. Uffner Textile Corp., B-215991, Nov. 30, 1984, 84-2 C.P.D. ¶ 591; see also Gibraltar Industries, Inc., B-218537.3, July 1, 1985, 85-2 C.P.D. ¶ 24.

Item 1

As originally issued, the IFB set forth the specification for item 1 as follows:

"Item Description

"Laryngoscope Infant-Child-Adult, Macintosh shall be in accordance with military specification MIL-L-36628B dated August 4, 1978, with the following exceptions:

"PAR 3.3.2 Battery Handle, in Last Sentence"

The remainder of the item description was inadvertently omitted from the IFB. The referenced military specification states in the last sentence of paragraph 3.3.2:

". . . Style, design and dimensions of the handle shall be in strict accordance with DPSC Drawing 24276, for Type I or Type II design."

With respect to that paragraph, the amendment added:

"Delete 'design' and substitute 'or Type III design.'"

It is evident that this change only provided a third design alternative to those already stated in the specification.

The amendment also provided an alternative to the requirements in the military specification for the finish of the laryngoscope blade assemblies. The military specification requires in the first sentence of paragraph 3.4:

". . . Finish of the laryngoscope blade assemblies shall be mirror and satin as designated on DPSC Drawing 20473."

With reference to this specification, the amendment adds after the word "satin" in that sentence, "or entirely satin."

The military specification also requires in paragraph 3.5:

". . . Laryngoscope blades manufactured from class 3 material shall also be marked 'stainless.'"

Under the amendment, the blades are required to be marked "stainless" or "S.S."

It is readily apparent that these changes only provided alternatives to the requirements already stated in the military specification. As to item 1, the amendment also listed the revision dates of the applicable drawings referenced in the military specification for the laryngoscope battery handle, blade finish, and blade lamp. Since each of the drawings bears its own latest revision date and since the military specification states that copies of the drawings "should be obtained from the procuring activity or as directed by the contracting officer," the listing of the drawing numbers and their latest revision dates in the amendment was apparently provided for informational purposes only, because incorporation of the military specification by reference, in any event, would bind the bidder to compliance with its requirements. See Uffner Textile Corp., B-215991, supra, 84-2 C.P.D. ¶ 591 at 3.

In view of the incorporation of military specification MIL-L-36628B in the solicitation as originally issued and the fact that the amendment otherwise relaxed the specifications for item 1 in that it simply permitted additional design alternatives, we find that the amendment imposed no

additional obligations on the bidder. Gibraltar Industries, Inc., B-218537.3, supra, 85-2 C.P.D. ¶ 24 at 3. Because Ohmeda's bid incorporated the military specification, it was legally bound to comply with its terms. We conclude, therefore, that the agency could properly waive Ohmeda's failure to acknowledge receipt of the amendment as to item 1. Since the agency has so determined, Ohmeda's protest of the rejection of its bid as to item 1 is now academic and, accordingly, is dismissed. See IBI Security Service Inc., B-217444, Aug. 19, 1985, 85-2 C.P.D. ¶ 189. LSL's protest of the agency's action in this regard is denied. Gibraltar Industries, Inc., B-218537.3, supra, 85-2 C.P.D. ¶ 24 at 3.

Item 2

Ohmeda contends that the amendment was not material as to item 2 as the agency maintains but, as in the case of item 1, was only informational and, therefore, its failure to acknowledge receipt of the amendment with respect to item 2 should also be waived as an informality. As a basis for this argument, the protester maintains that even though the original solicitation omitted the specifications for item 2, it was aware of the specifications for that item because it has bid before to DLA on the laryngoscope required by that item and because the solicitation listed the item's national stock number (NSN). Thus, Ohmeda contends that the amendment would not have affected its bid. Ohmeda further contends that the next low bid on item 2 was 46 percent higher than its bid and, therefore, reasonable prices were not obtained.

The sole description of item 2 in the IFB as originally issued was in the Schedule where prices were to be entered. Item 2 was referred to there as "NSN: 6515-00-346-0480 Laryngoscope, Child-Adult, Wisconsin." In section "C" of the IFB, "Description/Specification," the specifications for item 2 were totally omitted through error.

The agency states that the NSN consists of "descriptive nomenclature" which identifies the supply class of the item, but the government's specifications are not inherent in that number. The agency further maintains that the government's specific needs for item 2 were accurately and fully described only in military specification MIL-L-36696A and the changes to it made by the amendment. Therefore, the bidder's reference to the NSN would not legally bind the bidder to meet the government's requirements.

The protester has provided no information which would tend to support its contention that the specifications were inherent in, or were incorporated by reference in, the NSN. Unlike item 1 where the specification was incorporated by reference in the original solicitation, there was nothing in the original solicitation to inform the bidder of the government's specific requirements with respect to item 2. In this regard, we note that Ohmeda's bid on item 2 mentions only the NSN; it makes no reference to the military specification applicable to that item.

A contract based on Ohmeda's bid on item 2 would not create a clear, legal obligation to meet the government's needs as identified by the amended IFB. See Belfort Instruments, Co., B-218561, Aug. 6, 1985, 85-2 C.P.D. ¶ 135. Since the amendment stating the government's specific needs changed the requirements for item 2 in a way that affects the quality as well as the relative standing of the bidders, it was material and Ohmeda's failure to acknowledge receipt of the amendment as to item 2 rendered its bid nonresponsive. See Doyon Construction Co., Inc., B-212940, Feb. 14, 1984, 84-1 C.P.D. ¶ 194. The fact that the next low bid was higher than Ohmeda's bid does not alter the consequences here since Ohmeda was not bound to the same requirements as were the other bidders who acknowledged the amendment. Moreover, the integrity of the competitive bidding process outweighs any monetary savings that might accrue to the government as a consequence of waiving a material deficiency in any particular bid. See Rozier, Sidbury & Co., Inc., B-216741, Jan. 18, 1985, 85-1 C.P.D. ¶ 58.

Ohmeda's protest of the rejection of its bid with respect to item 2 is denied.

for *Seymour E. Elias*
Harry R. Van Cleve
General Counsel