



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Adscon, Inc.
File: B-224209
Date: December 10, 1986

DIGEST

1. Mailgram acknowledging IFB amendment was properly rejected as late where only documentary evidence as to time of receipt at government installation shows it was received after bid opening.
2. An amendment that imposes a different legal obligation on the contractor than was contained in the original solicitation is material; thus, rejection of a bid as nonresponsive for failure to include acknowledgment of the amendment is proper.

DECISION

Adscon, Inc. (Adscon) protests the rejection of its bid under invitation for bids (IFB) No. N62766-84-B-2028, issued by the Naval Facilities Engineering Command (Navy), Guam, Mariana Islands, for repair by replacement of compressed air plant equipment. The Navy rejected Adscon's low bid as nonresponsive because it failed to acknowledge amendment 3 to the IFB.

We deny the protest.

The IFB advised bidders that sealed bids should be addressed to Officer in Charge of Construction, Naval Facilities Engineering Command, Contracts, Public Works Center, Guam, Bldg. 105, FPO San Francisco 96630. Hand-carried bids were to be delivered to Bldg. 105, Ground Floor Rear, United States Navy Public Works Center, Guam, Complex. Bid opening was originally scheduled for 2:00 p.m. (Guam Time) on July 19, 1986. Amendment 1 changed the bid opening date to July 18, 1986. Amendment 2, issued July 17, 1986, extended the bid opening indefinitely "Due to potential significant change in the IFB," and provided that any sealed bids received would be held unopened until the new bid opening date. Amendment 3, issued July 24, 1986, rescheduled bid opening for August 15, 1986 at 2:00 p.m. (Guam Time), and made changes to the IFB's drawings.

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Adscon, the apparent low bidder at bid opening, failed to acknowledge amendments 2 and 3. The other four bidders acknowledged all amendments. A mailgram from Adscon dated August 12, 1986 and acknowledging amendments 2 and 3 was received by the Officer in Charge of Construction, Public Works Center, Guam on August 19, 1986, as evidenced by the installation's time/date stamp. By letter dated September 15, 1986, the Navy advised Adscon that its bid was nonresponsive and award would be made to the next apparent low bidder.

Adscon contends that it timely sent an acknowledgment of amendments 2 and 3 on August 12, 1986 by mailgram to the forwarding post office in San Francisco listed in the solicitation, and whether the mailgram was forwarded on to Guam 4 days after bid opening is irrelevant.

The Federal Acquisition Regulation (FAR) permits consideration of a bid or a bid modification not received prior to bid opening, if it was sent by mail (or telegram if authorized) and it is determined that late receipt was due solely to government mishandling after receipt at the government installation. FAR, 48 C.F.R. § 52.214-7(a)(2) (1985). Receipt by an agency's mail depot or the Postal Service does not constitute receipt at the designated contracting facility. Fisherman's Boat Shop, Inc., B-223366, Oct. 3, 1986, 86-2 C.P.D. ¶ ____; Vanish Pest Control, B-214865, Apr. 23, 1984, 84-1 C.P.D. ¶ 461. The time of receipt at the installation must be established before the question of government mishandling can be considered. H.V. Allen Co., Inc., B-215714, Dec. 3, 1984, 84-2 C.P.D. ¶ 605. The only acceptable evidence to establish the time of receipt at the government installation is the agency's time/date stamp on the bid wrapper or other documentary evidence maintained by the installation. Zinger Constr. Co., Inc.--Request for Reconsideration, B-220203.2, Jan. 8, 1986, 86-1 C.P.D. ¶ 15.

Here, the documentary evidence maintained by the installation is the time/date stamp of the office designated for bid receipt, which indicates that Adscon's mailgram acknowledging receipt of amendments 2 and 3 was received after bid opening. Since the protester has not established that its acknowledgment of amendments 2 and 3 was timely received at the Navy installation before bid opening, we need not reach the issue of whether government mishandling caused the modification to arrive late at the bid opening location. Id.

Adscon argues that, even if its acknowledgment of the amendments was untimely, its failure to acknowledge amendment 3 by bid opening should be waived as a minor informality

under FAR, 48 C.F.R. § 14.405(d)(2), since the amendment did not increase the contractor's potential liability and had no effect on price, quantity, quality, or delivery of the work. The Navy argues that amendment 3 is material because it imposes legal obligations on the prospective contractor which were not contained in the original solicitation, could cost the contractor \$100,000, and affects the quality of Adscon's bid.

A bidder's failure to acknowledge a material IFB amendment by bid opening 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. Vertiflite Air Servs., Inc., B-221668, Mar. 19, 1986, 86-1 C.P.D. ¶ 272. An amendment is material where it would have more than a trivial impact on the price, quantity, quality or delivery of the item or service bid upon, FAR, 48 C.F.R. § 14.405(d)(2), or where it imposes legal obligations on the contractor that were not contained in the original solicitation. Customer Metal Fabrication, Inc., B-221825, Feb. 24, 1986, 86-1 C.P.D. ¶ 190; Reliable Bldg. Maintenance, Inc., B-211598, Sept. 19, 1983, 83-2 C.P.D. ¶ 344. The materiality of an amendment which imposes new legal obligations on the contractor is not diminished by the fact that the amendment may have little or no effect on the bid price or the work to be performed. Reliable Bldg. Maintenance, Inc., B-211598, *supra*; Navaho Corp., B-192620, Jan. 16, 1979, 79-1 C.P.D. ¶ 24.

Here the initial IFB drawings provided that the maximum plant shutdown during removal and replacement work must not exceed 90 days, and that during the shutdown period, the contractor was to provide two temporary, diesel engine driven air compressor units at an off-site location. The two units were to be hooked in tandem with two additional off-site air compressors supplied by the Navy. Amendment 3 required the contractor to provide two temporary compressors on-site if the plant was not operating after the 90-day completion period specified in the contract.

We agree with the Navy that the amendment is material because it creates a different legal relationship between the parties than existed under the unrevised solicitation. The amendment imposes an obligation on the contractor to provide temporary air compressor units on-site after the 90-day allowance for plant shutdown should the plant not be operational within the time specified. The failure of Adscon to acknowledge such a material provision can not be waived, no matter what

the likelihood of the provision becoming operative during performance of the contract. See Cibro Petroleum, B-189330 et al., Sept. 23, 1977, 77-2 C.P.D. ¶ 221.

The protest is denied.

for Seymour Efron
Harry R. Van Cleve
General Counsel