Gary

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Data Copy Supply, Inc.

File: B-229585

Date: March 16, 1988

DIGEST

1. Where an amendment to an invitation for bids specifies requirements in addition to those contained in previous versions of the solicitation, and where those requirements entail the imposition of new legal obligations on prospective contractors, the amendment is material, and an agency may properly reject a bid as nonresponsive for failure to acknowledge the amendment.

2. Failure to acknowledge a material amendment prior to bid opening may not be cured by acknowledgment subsequent to bid opening.

DECISION

Data Copy Supply, Inc. protests the rejection of its bid as nonresponsive under Department of the Air Force invitation for bids (IFB) No. F05604-87-B-A070. The IFB, issued to obtain copier services for Peterson Air Force Base and the 2163d Communications Squadron in Colorado, was amended three times. According to the Air Force, Data's failure to acknowledge the third amendment to the IFB, which modified several IFB terms, rendered the firm's bid nonresponsive and therefore ineligible for consideration.

In its protest, Data (which submitted the lowest of eight bids received on the Peterson requirement and the second low bid on the other), argues that the subject amendment contained only clarifications and made no material changes to the IFB, and that any failure to acknowledge the amendment thus was merely a minor informality that should have been waived by the agency. In the alternative, the firm states that its acknowledgment of the amendment subsequent to bid opening was an acceptable correction of any prior failure to acknowledge the amendment.

We deny the protest.

Under the Federal Acquisition Regulation (FAR), contracting agencies may waive a failure to acknowledge receipt of an amendment to an IFB if the 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 solicited. FAR § 14.405(d)(2). In applying this provision, we have held that an amendment is material where, among other things, it would have an impact on the relative standing of bidders, or would impose legal obligations on a prospective contractor that were not contained in the original solicitation. We have made clear, moreover, that the materiality of an amendment that imposes new legal obligations on the contractor is not diminished by the circumstance that the amendment may have little or no effect on the bid price or the work to be performed. See, e.g., Vertiflite Air Services, Inc., B-221668, Mar. 19, 1986, 86-1 CPD ¶ 272.

We find that at least two of the changes in amendment no. 3 were material. One modification added by the amendment (applicable to the 2163d Squadron portion of the IFB) was a requirement that copiers have the capacity for automatic duplexing, that is, two-sided copying. Prior to the amendment, the IFB merely called for "duplicating" capability. The amendment also added a requirement (to the Peterson portion of the IFB) that machines capable of sorting or collating have a 10-bin capacity; prior to the amendment there was no reference to a specific bin capacity. These changes clearly affected the types of machines that would be acceptable under the solicitation, and altered the type of copy services (i.e., two-sided instead of one-sided copying) to be furnished. As a result, not only is the contractor's legal obligation different under the amended solicitation, but the competitive standing of bidders could have been affected; Data's $1,020,300 bid on the Peterson requirement was only $6,726 under the second low bid.

Data does not argue that the duplexing requirement is not material but, rather, attempts to dismiss the significance of the added requirement by arguing that the only other firm that bid on this part of the IFB, International Business Machines, was not affected by the change. This argument misses the point. The significance of the added requirement is that the only way the agency could be assured that a bidder would be obligated to provide the increased level of performance represented by the duplexing requirement was to obtain acknowledgment of the changed obligation prior to bid

opening. See C Construction Co., Inc., B-228038, Dec. 2, 1987, 67 Comp. Gen. ___, 87-2 CPD ¶ 534.

As for the other change, Data maintains it was superfluous because no bidder could have offered a copy machine that had less than a 10-bin capacity and also met the specifications as they existed prior to issuance of amendment no. 3. Data states that an employee of the firm gleaned this information from a publication that contained facts on all copy machines available on the market. However, while Data cites the March 1987 publication, it has not furnished a copy of the relevant portions and has not addressed the possibility that new products were introduced on the market between March and October 1987. Under these circumstances, Data has not adequately supported its assertions.

Data also argues that since its bid price was not affected by the amendment, its acknowledgment of the amendment on October 20, subsequent to bid opening, was sufficient to render its bid responsive. It is well-settled, however, that a failure to acknowledge a material amendment cannot be cured after bid opening; to provide a nonresponsive bidder an opportunity to correct its bid would provide it the competitive advantage of being able to accept or reject the contract after bids have been publicly exposed simply by deciding whether to make the bid responsive. See Fast Electrical Contractors, Inc., B-223823, Dec. 2, 1986, 86-2 CPD ¶ 627.

Finally, in its comments on the Air Force's administrative report on the protest, Data argues for the first time that language in the amendment requiring that it be acknowledged was ambiguous, and that this alleged ambiguity provides yet another reason why acknowledgment was not necessary and should have been waived. This assertion is untimely. The firm concedes that it received the amendment prior to bid opening; our Bid Protest Regulations require that such a protest of an alleged defect in a solicitation be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1987).

The protest is denied.

for James F. Hinchman
General Counsel