Hutchinson

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: LaCorte ECM, Inc.

File: B-231448.2

Date: August 31, 1988

DIGEST

1. Where protester's statement of facts as to the timeliness of its protest is essentially undisputed, any doubt as to the timeliness of the protest is resolved in favor of the protester.

2. Where a bidder admits receiving an IFB amendment it is not relieved of its responsibility of acknowledging receipt of the amendment even though it claims it did not receive a separate acknowledgment form which was to be used to acknowledge the amendment.

3. The failure to acknowledge receipt of an amendment increasing wage rates cannot be cured after bid opening by a bidder whose employees are not already covered by a collective bargaining agreement binding the firm to pay wages not less than those prescribed by the Secretary of Labor.

DECISION

LaCorte ECM, Inc., protests the rejection of its apparent low bid as nonresponsive under invitation for bids (IFB) No. 10564-CE issued by the General Electric Company (GE), the Department of Energy's management and operating prime contractor for the Knolls Atomic Power Laboratory. The IFB called for the supply and installation of certain electrical equipment. GE rejected LaCorte's bid because LaCorte failed to acknowledge receipt of an amendment to the IFB. LaCorte argues that its failure to acknowledge receipt of the amendment should be waived.

We deny the protest.

As the prime contractor operating the Knolls Atomic Power Laboratory for the Department of Energy (DOE), GE issued the IFB on February 22, 1988, with an April 18 bid opening date. On April 8, GE issued an amendment to the IFB deleting the

specified circuit breaker (which had gone out of production) and designating a substitute, and incorporating a new, higher wage rate determination under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1982), for three labor categories. These changes appeared on one page of the amendment. The amendment also included a second page containing blank spaces for the bidders to sign and return with their bids as acknowledgment of receipt of the amendment. Bids were opened as scheduled on April 18. Three of the five bidders, including LaCorte, failed to return the acknowledgment page of the amendment. LaCorte has protested GE's rejection of its bid as nonresponsive for failure to acknowledge receipt of the amendment.

Our Office does not review the award of subcontracts by government prime contractors except in certain limited situations. One of the exceptions to our general policy is for those awards made "by or for" the government, such as the case here. 4 C.F.R. § 21.3(m)(10) (1988). The parties do not dispute that GE is providing large-scale management services to the government, and is thus acting "for" the government. See, e.g., Union Natural Gas Co., B-224607, Jan. 9, 1987, 87-1 CPD ¶ 44. The protest therefore is one appropriate for our review.

GE argues that LaCorte's protest, filed in our Office on June 8, should be dismissed as untimely under section 21.2(a)(2) of our Bid Protest Regulations, 4 C.F.R. Part 21 (1988), which requires that a protest be filed within 10 working days after the protester knew or should have known of its basis for protest. GE states that LaCorte was present when bids were opened on April 18 and at that time was informed that its bid was "nonconforming". GE argues that this statement provided LaCorte's basis of protest and that the protest should have been filed by May 2, within 10 days of April 18.

We disagree. On April 18, after bid opening, LaCorte sent a letter to GE stating that it had not received the separate acknowledgment page along with the amendment and that its failure to acknowledge the amendment should be waived as a minor informality. There is no indication in the record that GE ever responded to this letter from LaCorte or that LaCorte ever received notification that its bid was being rejected. LaCorte states, to the contrary, that representatives of GE, after bid opening, advised LaCorte that GE was considering whether to waive acknowledgment of the amendment and award the contract to LaCorte. Further, Clifford R. Gray, Inc., the third low bidder and ultimate awardee, filed a protest on May 13 complaining that the other lower bidders, LaCorte included, who had not acknowledged the

amendment should be rejected as nonresponsive. That protest was dismissed as academic by our Office based upon a memorandum from DOE, dated June 8, stating that it intended to approve GE's ultimate recommendation to award the contract to Gray. LaCorte states that it was notified of Gray's protest on June 2 and that it then filed its own protest because it was then that it first became aware that GE would award the contract to a firm other than itself, the apparent low bidder.

It is our practice to resolve doubts about timeliness in favor of the protester. See Fairfield Machine Co., Inc., B-228015, B-228015.2, Dec. 7, 1987, 87-2 CPD ¶ 562. Here, LaCorte's letter of April 18, contending that its failure to acknowledge the amendment should be waived, went unanswered. LaCorte contends that it did not have a basis for protest until June 2 when it was notified of Gray's protest, because it was then that it became aware that LaCorte may not receive the award. GE has offered no evidence to refute this, other than to rely on the statement made to LaCorte on the day of bid opening regarding LaCorte's bid's nonconformance. Accordingly, we will consider the merits of the protest.

When we do review subcontract award protests, we do so to determine whether the procurement was consistent with and achieved the policy objectives of the "federal norm," i.e., the fundamental principles of federal procurement law as set forth in the statutes and regulations that apply to direct federal procurements. See Union Natural Gas Co., B-224607, supra, 87-1 CPD ¶ 44 at 3.

In a direct federal procurement, it is well established that a bidder's failure to acknowledge a material amendment to an IFB renders a bid nonresponsive because, 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. Canvas & Leather Bag Co., B-227100, July 24, 1987, 87-2 CPD ¶ 85. Also, a bid's responsiveness may only be determined from the material in the bid itself at the time of bid opening. Atlas Trading and Supply Co., Inc., B-227164, Aug. 10, 1987, 87-2 CPD ¶ 146. Further, a bidder bears the risk of not receiving IFB amendments unless it is shown that the contracting agency made a deliberate attempt to exclude the company from competing, TCA Reservations, Inc., B-218615, Aug. 13, 1985, 85-2 CPD ¶ 163, or the agency failed to furnish the amendment inadvertently where the bidder availed itself of every reasonable opportunity to obtain the

amendment. Catamount Construction Co., Inc., B-225448, Apr. 3, 1987, 87-1 CPD ¶ 374. These same principles apply to procurements by government prime contractors.

LaCorte has not alleged that GE made a deliberate effort to exclude the company from competing or that GE inadvertently failed to send it the amendment. In fact, LaCorte admits that it did receive the amendment prior to bid opening but claims that the separate acknowledgment page was not attached. LaCorte complains that as a result of its failure to receive the separate acknowledgment page, which it claims GE had never used before, and because GE had no consistent policy as to how amendments were to be handled, LaCorte did not know that it had an obligation to acknowledge receipt of the amendment. LaCorte alleges that it did not receive the acknowledgment page because GE failed to include it in the amendment package sent to LaCorte and to the other two bidders who also failed to acknowledge the amendment. LaCorte concludes that, in any event, it constructively acknowledged the amendment by merely submitting its bid since it would have been impossible to prepare its bid without having received and considered the technical information concerning the replacement circuit breaker which was contained in the amendment.

GE claims that it sent each bidder a complete amendment package, including the acknowledgment page, and that each amendment package was reviewed prior to issuance to ensure that all the required information was included. LaCorte has offered no evidence to substantiate its allegations that GE's method of issuing IFB amendments has been inconsistent and has never before involved use of an acknowledgment form. There also is no evidence of record to support LaCorte's assertion that two other bidders failed to acknowledge receipt of the amendment because they did not receive the second page of it. However, even if it did not receive the separate acknowledgment page, LaCorte was not relieved of its responsibility to acknowledge receipt of the amendment since it did in fact receive the amendment and was required to indicate in its bid that it agreed to be bound by the terms of the amendment or run the risk of having its bid rejected as nonresponsive. See, e.g., FAR §§ 14.404-2 and 14.405(d)(1) (FAC 84-12) (illustrating the "federal norm").

Further, we do not find that LaCorte constructively acknowledged receipt of the amendment. LaCorte cites our decision in W.A. Apple Mfg., Inc., B-183791, Sept. 23, 1975, 75-2 CPD ¶ 170, aff'd on reconsideration, Mar. 2, 1976, 76-1 CPD ¶ 143, for support of its assertion that it

constructively acknowledged the amendment by merely submitting its bid. We ruled in W.A. Apple that a bidder's failure to acknowledge a material amendment changing the packing requirement in the solicitation from a cardboard to wood container could be waived where the bidder clearly indicated in its bid that the type of shipping container to be used would be "wood." We find nothing in LaCorte's bid that indicates its agreement to be bound by the changes made by the amendment. LaCorte simply included a price in its bid without any further notations.

Further, LaCorte's failure to acknowledge the amendment cannot be waived or cured after bid opening. Failure to acknowledge an IFB amendment increasing wage rates cannot be cured after bid opening, no matter how de minimis the increase in the wage rates, unless a bidder's employees are covered by a collective bargaining agreement binding the firm to pay wages not less than those prescribed by the Secretary of Labor and reflected in the new wage determination. Fourth Corner Forestry, Inc., B-226438, Apr. 27, 1987, 87-1 CPD ¶ 439. The reason is that the prescribed wage rates are mandated by statute, so that if an agency were to give the bidder the opportunity to acknowledge the wage rate amendment after bid opening, the bidder could decide to render itself ineligible for award by choosing not to cure the defect. Because giving the bidder such control over the bid's acceptability would compromise the integrity of the competitive procurement system, the bid must be rejected as nonresponsive unless the bidder already is obligated to pay wages not less than those prescribed. Id. There is nothing in the record indicating that LaCorte's employees are covered by any binding agreement which would guarantee the wages paid its employees are not less than those required under the Davis-Bacon Act. LaCorte's failure to acknowledge the amendment increasing the wage rates therefore cannot be waived as a minor informality and its bid was properly rejected as nonresponsive on this basis.

We need not consider whether LaCorte's failure to acknowledge that portion of the amendment changing the circuit breaker required can be waived since we find that LaCorte's bid was properly rejected as nonresponsive for failure to acknowledge that portion of the amendment increasing the wage rates.

Protest denied.

James F. Hinchman
General Counsel