



The Comptroller General
of the United States

Washington, D.C. 20548

Richard

Decision

Matter of: American Sein-Pro

File: B-231823

Date: August 31, 1988

DIGEST

1. Where an amendment to an invitation for bids imposes a new and more stringent obligation on prospective contractors, the amendment is material, and an agency may properly reject a bid as nonresponsive for failure to acknowledge the amendment.

2. The fact that bidder may not have received the amendment to an invitation for bids until after bid opening is irrelevant absent evidence that the failure to timely receive the amendment resulted from a deliberate attempt by the contracting agency to exclude the bidder from competition.

DECISION

American Sein-Pro protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DLA720-88-B-0290, a total small business set-aside issued by the Defense Logistics Agency, Defense Construction Supply Center (DCSC), for 461 wood doors. DCSC rejected American's low evaluated bid because the firm failed to acknowledge an amendment to the IFB. American contends that its failure to acknowledge the amendment should be waived because the amendment was not material and because the firm did not receive the amendment until after bid opening.

We deny the protest.

The IFB was issued on April 11, 1988, with a May 11 bid opening date. The IFB was amended for the first time on April 28, and bid opening was extended to May 25. On May 4, DCSC issued amendment No. 0002, which changed the packaging requirements from Packing Level "C" to Packing Level "B," to ensure that the doors would be properly packed for exporting. Specifically, Packing Level "B" requires packing in accordance with federal specification No. PPP-B-601 while Level "C" permits the contractor to use any method of packing that will provide safe delivery to

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destination. The record indicates that Packing Level "B" requires strict adherence to specific packaging requirements and standards that are not required by Level "C" packing standards. At bid opening, DCSC received six bids in response to the IFB. American's bid was rejected as nonresponsive because it failed to acknowledge amendment No. 0002. On June 10, DCSC made award to Red Hawk Industries.

American first argues that its bid should be considered responsive because the amendment was not material since the firm anticipated in its bid that Packing Level "B" was actually required, not Packing Level "C" as indicated in the IFB. In other words, American argues that its failure to receive the amendment did not affect its bid. It asserts further that even if the failure to receive the amendment had an impact, it would have had the effect of lowering its bid since it could meet the requirements of Packing Level "B" at a lower cost than it could for Level "C."

We find this argument to be without merit. 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) (FAC 84-12). 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. Data Copy Supply, Inc., B-229585, Mar. 16, 1988, 88-1 CPD ¶ 270.

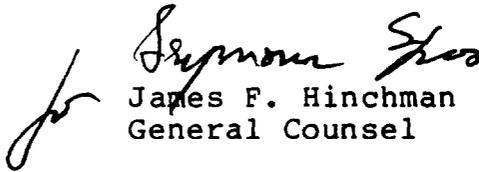
Here, amendment No. 0002 altered the Packing Level requirement from Level "C" to Level "B," thus imposing a different and more stringent obligation. As stated above, Packing Level "B" requires packing in accordance with federal specification No. PPP-B-601, as compared to Level "C" which permits the contractor to use any method of packing that will provide safe delivery to the destination. Thus, we agree that amendment No. 0002 imposed an additional obligation on prospective contractors and must be considered a material amendment. American's failure to acknowledge the amendment therefore renders its bid nonresponsive. See Data Copy Supply Inc., B-229585, supra.

American also complains that it did not receive amendment No. 0002 until May 25, the day of bid opening, after the time specified for bid opening. American asserts, without any evidentiary support, that the amendment was not mailed from DCSC until May 23.

A bidder bears the risk of not receiving IFB amendments unless it is shown that the contracting agency made a deliberate effort to exclude the bidder from competing, or unless it is shown that the agency failed to furnish the amendment inadvertently after the bidder availed itself of every reasonable opportunity to obtain the amendment. Southern Technologies, Inc., B-228516, Jan. 21, 1988, 88-1 CPD ¶ 57.

We find no evidence of an attempt by DCSC to deliberately exclude American from the competition. DCSC states that its distribution records indicate that envelopes for amendment No. 0002 were prepared on May 6 and that in the normal course of business the envelopes are mailed via regular mail by mailroom personnel on that day or the following working day. DCSC also points out that three of the six companies that submitted bids received amendment No. 0002 in sufficient time to acknowledge it before bid opening while the remaining two companies did not respond to either amendment Nos. 0001 or 0002. American, on the other hand, has presented no evidence to support its assertion that the amendment was not mailed in sufficient time to permit American to acknowledge it or that there was a conscious effort by the contracting officer to exclude it from competition.

The protest is denied.


James F. Hinchman
General Counsel