



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Franklin Environmental Services, Inc.

File: B-240589

Date: December 4, 1990

Maury E. Lederman, Esq., for the protester.
Gregory H. Petkoff, Esq., and Larry A. Kudrle, Esq.,
Department of the Air Force, for the agency.
Sylvia Schatz, Esq., David Ashen, Esq., and John M. Melody,
Esq., Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Failure of low bidder to acknowledge receipt of an amendment should be waived where the amendment imposed no substantive or different requirement on bidders; the only reasonable interpretation of the solution prior to the amendment, when read as a whole, was that the contractor already was required to close the nine storage tanks specified by the amendment.

DECISION

Franklin Environmental Services, Inc. protests the rejection of its bid under invitation for bids (IFB) No. F30636-90-BA040, issued by the Department of the Air Force for the closure of underground storage tanks at Plattsburgh Air Force Base, New York. The Air Force rejected Franklin's low bid as nonresponsive because it failed to acknowledge amendment 0002 to the IFB.

We sustain the protest.

The protest revolves around the agency's attempts to clarify the IFB as issued, concerning the number and location of tanks to be covered by the contract. The IFB as issued indicated in section 1, paragraph 1 of the specifications (entitled "SCOPE") that 10 unspecified underground tanks were to be closed; listed in paragraph 2 (entitled "LOCATION") 10 specific tank sites by building number; and included Tables 1 and 2, listing 10 tank closure locations, also by building number. The IFB also included drawings purportedly indicating all the tank locations, but describing only seven building sites at which 10 tanks were to be closed.

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In fact, the Air Force intended under the contract, and it issued to clarify the IFB in this regard. the number of tank closures listed and included a tank at building Second, the amendment included that nine tanks were to be closed building 2624. Third, the amendment tank sites listed in paragraph discrepancies remained. No change which still required the closures. Further, while the amendment revisions closures listed in Table 1 from tank at nonexistent building 62 error, instead of building 2624 although paragraph 2 purported appeared that the numbers listed rather than eight buildings.

Subsequently, the Air Force issued the remaining discrepancies regarding of tanks to be closed. Amendment number of tank closures in paragraph the number of tank locations listed 9; and revised Table 1 to replace 2624. No changes were made to already correctly listed nine tank locations.

At bid opening, Franklin submitted \$77,771; Reidel Environmental Services second low bid of \$92,193. Franklin 0001, but failed to acknowledge and the agency therefore rejected the bid after determining that the changes to the solicitation. The contract was awarded to Reidel.

The Air Force maintains that amendment that Franklin's failure to acknowledge bid nonresponsive, because it contained amendment 0001 regarding the locations to be closed. According to the Air Force was issued, the IFB as modified was materially ambiguous because it either 8, 9 or 10 tank closures of the IFB a bidder relied upon. The Air Force believed the IFB as modified by Table 1 to which tanks were to be closed referred to a tank at building Second while Table 2 and the drawings included building 2624; the Air Force maintains that

to clarify that building 2624 was the correct reference. The Air Force concludes that, absent acknowledgment of amendment 0002, Franklin's bid did not obligate the firm to close 9 tanks as intended, including the tank at building 2624, that amendment 0002 was material, and that Franklin's bid therefore properly was rejected as nonresponsive.

The failure of a bidder to acknowledge an amendment which imposes no substantive or different requirement on the bidders as to price, quality or quantity, or which reduces the cost of performance, may be waived. Federal Acquisition Regulation (FAR) § 14.405(d)(2); Teleflex, Inc., B-220848, Feb. 5, 1986, 86-1 CPD ¶ 133; G.C. Smith Constr. Co., B-213525, July 24, 1984, 84-2 CPD ¶ 100. Here, then, amendment 0002 would be deemed material for purposes of determining the responsiveness of Franklin's bid only if the changes it made were necessary to assure that Franklin would be obligated to close all nine tanks intended to be covered by the contract, and not some lesser number. If, on the other hand, the IFB as clarified by amendment 0001 already adequately indicated at least the nine tanks the agency required to be closed, then amendment 0002 was not material and Franklin's bid would be responsive.

While the solicitation as modified by amendment 0001 arguably was unclear as to whether the contract covered 9 or 10 tanks,^{1/} we do not believe it was reasonably susceptible of the interpretation that only 8 tank closures were required. The Air Force's interpretation to the contrary is based on paragraph 2, entitled "LOCATIONS," which after amendment 0001, listed eight numbers--supposedly building numbers--at which tank closure work was to be performed. The list included one building number twice, however, once as 2555A and once as 2555B; and also included letter designations after two other building numbers, indicating that the paragraph probably was referring to specific tanks, with more than one tank in some buildings. The Air Force argues that some bidders thus may have been misled by paragraph 2 into reading the IFB as covering only eight tanks rather than all nine intended. We do not agree.

A solicitation is ambiguous only where, when read as a whole, it is susceptible of more than one reasonable interpretation.

^{1/} Further, even if the solicitation as modified by amendment 0001 were interpreted as requiring the closure of 10 tanks, rather than the 9 tanks specified by amendment 0002, Franklin's failure to acknowledge amendment 0002 should be waived since the failure of a bidder to acknowledge an amendment that decreases the cost of performance does not prejudice other bidders. Teleflex, Inc., B-220848, supra.

Tri-Cities Tool, Inc., B-238377, Apr. 8, 1990, 90-1 CPD ¶ 401. While we certainly agree with the Air Force that the IFB was not as clear as it should have been, we find that the solicitation as changed by amendment 0001, when read as a whole, could not reasonably be read as indicating that only eight tanks were to be closed. All of the more specific listings and detailed descriptions of the tanks in the IFB indicated that nine tanks were intended. Table 1 included the eight tanks listed in paragraph 2 plus (although erroneously) a tank at building 624, for a total of 9 tanks. Likewise, the specific listing and detailed description of the tanks in Table 2 and in the detailed drawings both described the eight tanks listed in paragraph 2, plus a tank at building 2624, for a total of 9 tanks. The only other post-amendment 0001 IFB reference to the number of tanks was in paragraph 1, which incorrectly advised that a greater number of tanks--a total of 10--were to be closed. Thus, every reference in the solicitation other than that in paragraph 2 to the tanks to be closed, including all of the more specific references in the tables and drawings, indicated that more than eight tanks were to be closed.

In these circumstances, the only reasonable interpretation of the solicitation as modified by amendment 0001 was that the Air Force intended that nine tanks be closed, and that the listing of eight tanks in paragraph 2 reflected an error by the agency rather than an intention to reduce the number of tanks so clearly set forth in the rest of the IFB. Accordingly, by acknowledging amendment 0001, Franklin obligated itself to close at least 9 tanks, the number specified by amendment 0002.

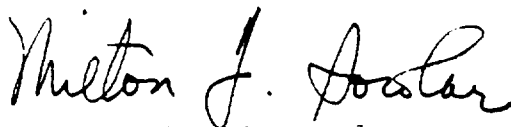
The Air Force also maintains that because amendment 0001 mistakenly referenced a tank at building 624 in Table 1 when a tank at building 2624 was intended, Franklin thus was not bound by its acknowledgment of amendment 0001 to close tank 2624. Again, however, we do not believe this interpretation is supported by the IFB read as a whole. The mistaken reference to the nonexistent building was included only in Table 1, while a correct reference to a tank at building 2624 was included in Table 2, and the drawings included a building 2624. We think a bidder reasonably should have deduced that the reference to tank 624 simply resulted from an accidental dropping of the number "2" from the building designation.

We conclude that, by acknowledging amendment 0001, Franklin obligated itself to close the nine tanks listed in amendment 0002 at its low bid price, and that this amendment therefore imposed no substantively different requirements on Franklin than amendment 0001. The protester's failure to

acknowledge amendment 0002 accordingly should be waived. See G.C. Smith Constr. Co., B-213525, supra.2/

By letter of today to the Secretary of the Air Force, we are recommending that, if Franklin is found to be otherwise eligible for award, Reidel's contract should be terminated for the convenience of the government and award made to Franklin. In any case, we find that Franklin is entitled to be reimbursed its protest costs. 4 C.F.R. § 21.6(d)(1) (1990); see Falcon Carriers, Inc., 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96.

The protest is sustained.

for 
Comptroller General
of the United States

2/ We need not decide whether Franklin's notation of the extended bid opening date from amendment 0002 on the bid envelope represented a constructive acknowledgment in view of our conclusion that the amendment imposed no substantively different requirements on Franklin than amendment 0001. See C Construction Co., Inc., 67 Comp. Gen. 107 (1987), 87-2 CPD ¶ 534.