A. Benejam

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Day and Night Janitorial and Maid and Other Services, Inc.

File: B-240881

Date: January 2, 1991

Norman O. Warren for the protester.
Herbert F. Kelley, Jr., Esq., and Major Jack B. Patrick, Department of the Army, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. An amendment which incorporates into an invitation for bids (IFB) for tailoring services a requirement that the contractor provide contingency plans to assure uninterrupted services in the event of natural disaster, adverse weather conditions, or labor strikes, and which adds a provision advising that the contractor might be required to support an increased workload in the event of mobilization, is not material, since it does not have more than a negligible effect on price, quantity, quality, or delivery of services, or on the relative standing of bidders, and there is no evidence that the amendment imposes significant obligations on the contractor not previously contained in the original IFB.

2. Bidder's late acknowledgment of an amendment to invitation for bids which is not material may be properly waived as a minor informality.

DECISION

Day and Night Janitorial and Maid and Other Services, Inc. protests the rejection of its low bid as nonresponsive and the award of a contract to Spector's Cleaners, Inc. under invitation for bids (IFB) No. DABT10-90-B-0123, issued by the Department of the Army, for tailoring services of Army AS344 coats at Fort Benning, Georgia. The Army rejected Day and Night's bid because it failed to acknowledge an amendment to the IFB.

We sustain the protest.

The Army issued the IFB on May 18, 1990, with an initial bid opening date of June 18. The IFB contemplated award of a requirements contract for the tailoring services from August 1, 1990, to July 31, 1991. The IFB contained a bidding schedule that required bidders to insert a unit price and an extended price for varying estimated quantities for each of seven separate line items (0001 through 0007), corresponding to seven different types of tailoring services. The schedule also required bidders to insert an estimated total amount for line items 0001 through 0007. Award was to be made to a single bidder whose aggregate price was low.

Prior to bid opening, the Army issued amendments 0001 and 0002, which extended bid opening to July 16. Amendment 0003, issued on July 11, added several provisions to the IFB, and extended bid opening to July 20.

The protester and the awardee submitted the only two bids by the extended bid opening date. Day and Night's total price ($62,883.52) was considerably below Spector's price ($90,127.25). Although Day and Night acknowledged amendments 0001 and 0002, it did not acknowledge amendment 0003 with its bid. Suspecting a mistake in Day and Night's bid, the contracting officer telephoned the protester on July 24 to advise it of the suspected mistake and of its failure to acknowledge amendment 0003. By letter dated July 24, the contracting officer requested that Day and Night verify its bid in writing, pending a determination of the effect of its failure to acknowledge amendment 0003.

On July 27, 7 days after bid opening, the contracting officer received by regular mail Day and Night's acknowledgment of amendment 0003, signed on July 17, and postmarked on July 19. On July 31, the contracting officer received a letter from Day and Night dated July 26, verifying its bid.

Having determined that amendment 0003 was material, by letter dated July 31, the contracting officer rejected Day and Night's bid as nonresponsive because it failed to acknowledge receipt of the amendment with its bid, and awarded the contract to Spector's Cleaners.1/

Day and Night argues that its failure to acknowledge amendment 0003 with its bid should be waived as a minor informality since the amendment had no effect on its bid price. Day and Night does not dispute that it mailed amendment 0003 to the agency on July 17, only 3 days before bid opening, but argues

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1/ Pursuant to Federal Acquisition Regulation (FAR) § 33.104(c)(5), the contracting officer determined not to suspend Spector's performance of the contract.

that it did not have enough time in which to acknowledge receipt of the amendment because the agency failed to mail the amendment sufficiently in advance of bid opening. The protester thus argues that it should be allowed to acknowledge the amendment after bid opening and that award should be made to Day and Night since it submitted the low price.

We need not decide whether the agency allowed sufficient time for bidders to acknowledge receipt of amendment 0003 because we conclude it was not material. Day and Night's failure to acknowledge amendment 0003 with its bid may therefore be properly waived as a minor informality.

Amendment 0003 added paragraphs C.1.7.1 and C.1.7.2, obligating the successful bidder to provide the contracting officer with labor strike, natural disaster, and severe weather contingency plans within 10 days after contract award.2/ The agency argues that these provisions are material because the contractor would expend additional administrative effort and incur additional expense in preparing and performing in accordance with the contingency plans.

Amendment 0003 also added a provision advising that the contractor might be required to support increased requirements in the event of mobilization. The agency argues this provision is material since it would have a significant effect on the contractor's cost in view of the current situation in the Middle East which might call for mobilization during the period covered by the contract.

The amendment also replaced the IFB's original technical exhibit with "Technical Exhibit 3," an abstract depicting tailoring services actually ordered monthly from August 1, 1989, through July 31, 1990; the original exhibit showed actual orders from August 1, 1989, to February 28, 1990. The Army argues that this is also a material change to the IFB, since the new exhibit contains additional information showing

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2/ Amendment 0003 also added paragraphs C.1.5 "Reporting Accidents," and C.1.6 "Claims Liability." We note that paragraph C.1.6 is identical to the IFB's provision at H-5 with the same title. The agency does not argue that these provisions are material. In its legal memorandum to our Office, the agency mentions that the amendment also deleted a provision in the IFB that required that certain services (shortening or lengthening sleeves) be ordered only in conjunction with specific tasks (waist job, waist and hip job, lowering collar). The record does not show and the agency has not provided any evidence that this provision was material.

a substantial increase in tailoring requirements during certain months, which bidders could not accurately predict from the exhibit in the original IFB.

The agency argues that absent an acknowledgment of amendment 0003, it is uncertain that the contractor would be obligated to perform the IFB's requirements under the conditions specified in the amendment. Relying on our decision in Universal Parking Corp., 69 Comp. Gen. 31 (1989), 89-2 CPD ¶ 367, the agency concludes that the amendment is material because it imposed additional obligations on the contractor which did not exist in the original IFB, and therefore bidders were required to acknowledge its receipt with their bids.

Generally, a bid which does not include an acknowledgment of a material amendment must be rejected because absent such an acknowledgment the bidder is not obligated to comply with the terms of the amendment, and its bid is thus nonresponsive. Gulf Elec. Constr. Co., Inc., 68 Comp. Gen. 719 (1989), 89-2 CPD ¶ 272. However, an amendment is material only if it would have more than a negligible impact on price, quantity, quality, or delivery of the item bid upon, or would have an impact on the relative standing of bidders. See FAR § 14.405(d)(2); Star Brite Constr. Co. Inc., B-228522, Jan. 11, 1988, 88-1 CPD ¶ 17. A bidder's failure to acknowledge receipt of an amendment that is not material is waivable as a minor informality. See Power Serv., Inc., B-218248, Mar. 28, 1985, 85-1 CPD ¶ 374. No precise rule exists to determine whether a change required by an amendment is more than negligible; rather, that determination is based on the facts of each case. Wirco, Inc., 65 Comp. Gen. 255 (1986), 86-1 CPD ¶ 103.

Here, we find that amendment 0003 imposed no significant legal obligations different from those already imposed under the solicitation as issued. Moreover, there is no evidence that the amendment would have more than a negligible effect on price, quantity, quality, or delivery of services.

As for the amendment's contingency plans clauses, these provisions require the contractor to submit a plan that addresses adequate contract performance in the case of natural disasters, adverse weather conditions and labor strikes. In preparing its bid, Day and Night had to consider the possibility of, and include in its price, the cost of adequately performing the contract under various foreseeable situations, including the adverse conditions set out in the amendment, since contractors are generally required to

perform under adverse conditions, unless nonperformance is excusable.3/

The amendment thus merely calls for submission of a plan to carry out the contractor's existing obligation to perform under adverse conditions; except for the plan submission requirement, the amendment does not impose new performance obligations on the contractor. To the extent that the contractor would expend additional administrative effort or incur additional expense in preparing a contingency plan we fail to see, and the record does not show, how such additional efforts would have more than a negligible impact on the contractor's cost. Moreover, there is no indication in the record that the contingency plans are intended as significant quality control tools. The amendment clauses do not indicate what factors the agency considers significant or necessary for contractors to include in an effective contingency plan; nor has the agency explained in its report on the protest why the contingency plans should be regarded as having more than a negligible effect on the quality of performance. Accordingly, we find that the provisions requiring contractors to submit contingency plans within 10 days following award are not material.

Regarding "Technical Exhibit 3," and the provision advising bidders that the contractor might be required to support an

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3/ The IFB contains the standard Default clause, FAR § 52.249-8, paragraph (c) of which exempts the contractor from liability for excess costs if its failure to perform arises from causes beyond the control and without the fault or negligence of the contractor. With regard to adverse weather conditions, the contractor's nonperformance may be excused under the Default clause only if the conditions rise to the level of "unusually severe weather." See Carney General Contractors, Inc., NASA BCA Nos. 375-4, 875-7, 79-1 BCA ¶ 13,855 (weather is unusually severe where it could not have been foreseen); M.D. Willner, DOT CAB No. 72-3, 72-2 BCA ¶ 9548 (mere showing that there are weather conditions that interfere with or prevent performance is not sufficient to bring these conditions within the meaning of unusually severe weather). With regard to labor strikes, the contractor must show that the strike was beyond the control and without the fault or negligence of the contractor. See Otis Elevator Co., Material Handling Div., VACAB No.1157, 76-1 BCA ¶ 11,738 (mere assertion that failure to meet the contract delivery date was the result of a strike is insufficient to excuse contractor's default). In sum, a contractor is required to perform under adverse weather conditions or in the case of a labor strike unless nonperformance is excused under the limited circumstances contemplated by the Default clause.

increased workload during mobilization, neither provision imposed new legal obligations on the contractor not already contained in the original IFB.

The original technical exhibit in the IFB and the amendment's "Technical Exhibit 3" are both entitled "WORKLOAD ESTIMATES," and contain the following provision:

> "These workload estimates are provided for informational purposes only. The Government does not warrant, nor contend, that any information contained herein will be typical of the quantities, volume, conditions, or similar circumstances that will be encountered during the period of any contract awarded. The Government will not be responsible or liable in any way for any conclusion made by any offeror based on these estimates."

Thus, by its plain language, the exhibit is provided for informational purposes only, with a strongly worded disclaimer cautioning bidders from undue reliance on the data.

The revised exhibit set out actual workload data for an additional 5 months not included in the original exhibit (March 1990 through July 1990). The data added by the amended "Technical Exhibit 3" are not out of line with the data provided by the original exhibit for the months of August 1989 to February 1990. As a result, there is no reason to conclude that bidders' prices would be significantly affected by the information contained in "Technical Exhibit 3." To the extent that "Technical Exhibit 3" shows an increase in actual tailoring services ordered during July 1990, the original exhibit warned bidders that "services will generally be required during peak periods: Summer Surge (July-September)." Thus, bidders were on notice that workloads could increase during the months of July through September; any additional details provided in "Technical Exhibit 3" for the month of July merely confirmed information previously contained in the original exhibit. Since the revised exhibit did not change the basic contract requirement for the tailoring services contained in the original IFB, we find that this provision is not material. See Tri-S, Inc., B-226793.2, June 26, 1987, 87-1 CPD ¶ 634.

As for the clause in the amendment advising bidders that they might be required to support an increase in workload due to mobilization, the provision does not set forth the nature or quantity of the anticipated increase, nor does it require the contractor to perform additional tasks not already enumerated in the IFB. Moreover, to the extent that mobilization might result in an increased workload during performance of the

contract, the unrevised IFB obligates the contractor to support such increases.

The IFB contained the standard "Requirements" clause, FAR § 52.216-21, paragraph (c) of which specifically states that the quantities stated in the bidding schedule are estimates only, and provides that ". . . the Government shall order from the Contractor all of [its] requirements for supplies specified in the Schedule that exceed the quantities that the activity may itself furnish." When entering into a requirements contract, bidders accept the risk that heavy demands could strain their ability to perform. See Allied Paint Mfg. Co., Inc. v. United States, 470 F.2d 556 (Ct.Cl. 1972). It is therefore unreasonable for the agency to argue that the estimates in the bidding schedule, provided solely for guidance to bidders, state maximum quantities beyond which the contractor is not bound absent the amendment. Notwithstanding its obligation, however, the Army is not entitled to place unlimited orders under a requirements contract; orders must be reasonable in relation to the estimates in "Technical Exhibit 3." Id. To the extent that the Army suggests that the mobilization provision supplements the estimates in the exhibit by expanding the upper limits of services that may be ordered under the contract, the clause fails to do so, since the provision does not adequately inform bidders of the scope of the anticipated increase.4/ Since the mobilization clause does not impose new obligations on the contractor that are not already contained in the IFB, we find that it is not material.

Since we find that amendment 0003 imposes no significant legal obligations not already contained in the IFB, the agency's reliance on our decision in Universal Parking Corp., 69 Comp. Gen. 31, supra, to argue that Day and Night's failure to acknowledge amendment 0003 is not waivable as a minor informality is misplaced. That case turned on a finding that an amendment to an IFB that imposed a legal obligation5/ on the contractor not contained in the original IFB was material. Thus, failure of the bidder to acknowledge it with its bid rendered the bid nonresponsive. Here, since we find that

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4/ See Chemical Technology Inc. v. United States, 645 F.2d 934 (Ct.Cl. 1981); Womack v. United States, 389 F.2d 793 (Ct.Cl. 1968) (the government is obligated to base estimates on all relevant information that is reasonably available to it).

5/ The IFB in Universal Parking Corp., 69 Comp. Gen. 31 supra, was for the lease of parking space. The only amendment to the solicitation incorporated into the IFB the minimum hours for operating the parking lot, not previously included in the IFB.

amendment 0003 imposed no significant obligations on the contractor not already contained in the original IFB, the amendment is not material. Day and Night's failure to acknowledge it at bid opening, therefore, may properly be waived as a minor informality. See, e.g., DeRalco, Inc., 68 Comp. Gen. 349 (1989), 89-1 CPD ¶ 327.

The agency further argues that Day and Night's failure to acknowledge amendment 0003 should not be waived as a minor informality since, in its July 26 letter verifying its bid, the protester requested that it be allowed to modify its bid as a result of the amendment. Implicit in the agency's argument is that since the protester considers amendment 0003 to be material, its failure to acknowledge it at bid opening cannot be waived. The protester's July 26 letter, received by the agency on July 31, states in relevant part:

> "Day and Night received amendment No. 3 on July [16], 1990, which would have a considerable impact on the total bid even though our original bid was made without mistake in the absence of amendment No. 3. This amendment would have an impact on the submitted bid and the fact [that] we did not receive amendment No. 3 should justify modification or rebidding of the contract. We expect to be the successful bidder and believe that our company should be allowed to adjust our bid in view of amendment No. 3."

The protester's argument in response to a request to verify its bid that it "should be allowed" to increase the bid because of amendment 0003 is confusing, since it had already acknowledged the amendment without changing its bid. As stated previously, the acknowledgement was signed on July 17 and postmarked July 19, while bid opening took place on July 20.

Day and Night's evident desire to talk the agency into a price increase through the July 26 letter does not establish the materiality of the amendment. It contains essentially self-serving generalities concerning the impact of the amendment on Day and Night's bid. The bidder provided no reason or details explaining how the amendment would "impact" its bid, and made no suggestion as to what "modifications" or "adjustments" it would make as a result of the amendment. The lack of a rationale is not surprising in light of the fact that the protester's actual acknowledgment of the amendment was not accompanied by any bid price revisions nor any expression of concern that sufficient time had not been allowed for responding to the amendment. It is also significant that in its July 26 letter, Day and Night did not decline to perform at its bid price--it only argued that it

"should" be allowed a price adjustment. Thus, we do not find persuasive evidence in the July 26 letter that amendment 0003 materially changed the performance required by the solicitation.

We recommend that the Army terminate for convenience the award to Spector's Cleaners and award the contract to Day and Night. We also find the protester to be entitled to the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d)(1) (1990). Day and Night should submit its claim directly to the agency.

The protest is sustained.

Milton J. Socolar

for Comptroller General
of the United States