



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Central Atlantic Contractors, Inc.

File: B-243663

Date: August 14, 1991

Anthony J. DiPaula, Esq., Covahey & Boozer, P.A., for the protester.

Bruce L. Robertson, Action Enterprises Inc., an interested party.

Herbert F. Kelley, Jr., Esq., Department of the Army, for the agency.

Jeanne White Isrin, Esq. and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency properly accepted low bid despite absence of acknowledgment of solicitation amendment, where amendment merely clarified or restated requirements already contained in the solicitation, made insubstantial changes, and had a negligible impact on cost.

DECISION

Central Atlantic Contractors, Inc. protests the proposed award of a contract to Action Enterprises, Inc. under invitation for bids (IFB) No. DAHA09-91-B-0004, issued by the U.S. Property and Fiscal Officer for Georgia, National Guard Bureau, to repair the ramp, taxiway, and runway used by the Air National Guard at the Savannah International Airport, Savannah, Georgia. Central Atlantic claims that Action's bid should have been rejected as nonresponsive for failure to acknowledge an amendment.

We deny the protest.

The IFB contemplated award of a firm-fixed-price contract. The agency mailed a copy of the IFB to Action at the firm's request, but Action was not then placed on the bidders mailing list for the solicitation, as normally is done. Subsequently, therefore, when amendment 0001 was issued on March 21 and sent to all contractors on the bidders mailing list, Action did not receive a copy. Nine bids were received by the April 4 bid

opening, ranging from Action's low bid of \$481,936.01 to \$831,275. The protester's bid of \$546,967.25 was second low. Action's low bid did not include an acknowledgment of amendment 0001, but the contracting officer waived this failure after determining that the amendment had no material effect on the IFB. See Federal Acquisition Regulation (FAR) § 14.405. On April 16, Central Atlantic filed this protest challenging any award to Action.

The protester asserts generally that the amendment was in fact material, and that Action's failure to acknowledge it should not have been waived, because it had a "widespread effect on various parts of the . . . solicitation," and an effect on the bid prices of the seven contractors who acknowledged it that ranged from \$394 to \$5,378.67.

A bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive, since 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. Head Inc., 68 Comp. Gen. 198 (1989), 89-1 CPD ¶ 82, aff'd, Head Inc.--Recon., B-233066.2, May 16, 1989, 89-1 CPD ¶ 461. On the other hand, a bidder's failure to acknowledge an amendment that is not material is waivable as a minor informality. FAR § 14.405; DeRalco, Inc., 68 Comp. Gen. 349 (1989), 89-1 CPD ¶ 327. An amendment is material only if it would have more than a trivial impact on price, quantity, quality, or delivery of the item bid upon, or would have an impact on the relative standing of the bidders. Id.; FAR § 14.405(d)(2). 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. Id.

In its report on the protest, the agency specifically addressed each of the changes made by amendment 0001 and concluded that they were not material. In its comments on the report, Central Atlantic generally disagrees with the agency, but does not attempt to rebut the facts and rationale on which the agency's position is based. In light of this absence of any specific rebuttal, and based on our own review of the amendment, we agree with the Guard that the changes were not material. The amendment addressed eight areas, but its overall effect was insignificant, merely further describing and clarifying already existing requirements; restating work already required; correcting the bid schedule to reflect quantities already required by the drawings; breaking out unit prices for work already required; and making other similarly minor changes. We discuss some of the changes below.

The amendment altered the wording under the demolition and concrete work (paragraph 1.03c(2)), which required the

existing joint sealer material in the joints to be completely removed, to specify that metal filler (where present) was to be removed. Since under the original specification the existing joint was to be cleaned out and sealer material removed, specifying that any metal filler in the joint was also to be removed in no way changed the required work and is not material. Similarly, on the "Typical Grate Inlet Replacement Detail" of drawing 14, the amendment specified the depth of the grate inlet replacement as "varies from 3' to 8'," instead of merely "varies," as the drawing had stated. Again, this only added further detail to the drawing, without changing the bidder's obligation. See Angus Fire Armour Corp., B-237211.2, Jan. 18, 1990, 90-1 CPD ¶ 68; Head Inc., 68 Comp. Gen. 198, supra.

The amendment changed the quantities under two line items on the bid schedule: line item 0001PP, grate inlet replacement, was reduced from five to four, and line item 0001RR, new steel grate and frame, was increased from one to two. These quantity changes not only were immaterial in relation to the project as a whole, but also merely reflected the quantities already indicated in the drawings.

The amendment substituted the current Department of Labor wage determination for a superseded one contained in the solicitation. As there was no change in any of the terms of the wage determinations, this change was immaterial. See LaCorte ECM, Inc., B-231448.2, Aug. 31, 1988, 88-2 CPD ¶ 195.

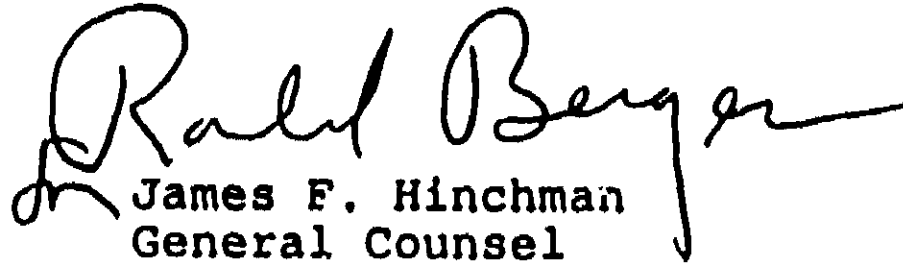
The amendment also called for broken out prices for certain work that already was required. In this regard, line item 0001SS was added to the bid schedule to require a separate price for the removal or cutoff of 44 ground rods, and line item 0001TT was added to require separate pricing for one manhole cover with frame. It is clear from the drawings that a total of 44 ground rods already were required to be removed, and that a new manhole cover and frame already was required (drawing 5). Thus, the amendment did not add any work requirements in this regard and from this record it is not apparent why this change should be viewed as material.

Notwithstanding the protester's assertion that the amendment resulted in some price changes among the bidders, the agency takes the position that the changes should not have increased bidders' costs. It is not possible to determine from the record precisely how bidders would have bid without the changes, but we agree with the agency that since none of the changes increased the work or materials required, there is no basis for finding that the amendment had any significant effect on the bid prices. While the protester has indicated specific amounts by which it believes the bids varied based on the amendment, it appears that its conclusion is based on the

amounts under the additional line items setting forth the broken out prices for work already called for by the IFB (see discussion above). As such, these amounts, do not evidence materiality of the amendment.

In its comments on the agency report, the protester argues that the agency's failure to furnish the bidders mailing list with the report casts doubt on the agency's explanation that Action failed to receive the amendment due to its omission from the list, and evidences agency bad faith. Upon request, the agency provided us a copy of the bidders mailing list; it does not contain Action's name, supporting the agency's assertion. In any case, the reason a bidder failed to acknowledge an immaterial amendment has no bearing on the propriety of the waiver. See FAR § 14.405.

The protest is denied.


James F. Hinchman
General Counsel