



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Martech USA, Inc.
File: B-245957; B-245957.2
Date: February 11, 1992

John P. Meade, Esq., and Andrew L. Erhlich, Esq., O'Connor & Hannan, for the protester.
John D. Sherwood, Esq., Wildcat Construction Co., Inc., an interested party.
John Pettit, Esq., and W.W. Pishnotte, Esq., Department of the Air Force, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Amendment, which added inadvertently omitted specifications that contained the government's precise requirements for sump pumps to be replaced under solicitation for construction work, was material and therefore procuring agency properly rejected the protester's bid, which failed to expressly acknowledge the amendment, in the absence of any evidence that the amendment was constructively acknowledged.

DECISION

Martech USA, Inc. protests the rejection of its low bid under invitation for bids (IFB) No. F14614-91-B-0007, issued by McConnell Air Force Base, Kansas, to replace certain oil/water separators. The Air Force determined Martech's bid was nonresponsive for failing to acknowledge a material amendment to the IFB. Martech contends that the Air Force was required to waive its failure to acknowledge the amendment as a minor informality, since it constructively acknowledged the amendment and since the amendment was not material.

We deny the protests.

On September 12, 1991, the Air Force issued amendment No. 0001, which modified the specifications and drawings, replaced the bid schedule and extended the bid opening date to September 23. On September 18, the Air Force issued amendment No. 0002 adding pages 11310-01 and 11310-02, which contained specifications on two sump pumps to be furnished

under the contract and extended bid opening to September 25. These pages had been inadvertently omitted from the IFB package as issued.

The Air Force received three bids in response to the IFB. Martech was the apparent low bidder at \$1,669,345; however, Martech's bid lacked acknowledgement of amendment No. 0002. On September 29, the Air Force rejected Martech's bid as nonresponsive because of this failure. On September 30, the Air Force made award to the second low bidder, Wildcat Construction Co., Inc., at a price of \$1,715,000. Martech filed this protest on the same date and the Air Force has withheld performance under the contract pending our decision.

As a general rule, a bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive, since absent such an acknowledgement the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Central Atl. Contractors, Inc., B-243663, Aug. 14, 1991, 91-2 CPD ¶ 146. Although an amendment may be constructively acknowledged where the bid itself includes one of the essential items appearing only in the amendment, thus evidencing the bidder's receipt of, and intent to be bound by, the amendment, the submission of the bid on the extended bid opening date, without more, is insufficient to show that the bidder agreed to comply with the terms of the amendment. See Professional Aviation Maint. & Mgmt. Servs., Inc., B-232078, Oct. 13, 1988, 88-2 CPD 350.

Martech argues that, despite failing to acknowledge amendment No. 0002, the bid clearly indicates that Martech received the amendment and considered its contents, since the bid bond showed a bid opening date of September 25 and the bid itself was delivered on the correct date. This is insufficient to show that Martech considered amendment No. 0002 in its bid; all bidders, including Martech, were verbally informed of the ensuing amendment No. 0002 and the September 25 revised bid opening date. Further, since the IFB bidding format only required individual pricing for general categories, and the amendment did not require any specific line item pricing, there is nothing in the bidding schedule format from which to infer constructive acknowledgment of the amendment. Since Martech's bid does not indicate the amendment was considered in its bid, there is no basis to conclude that Martech constructively acknowledged the amendment.

Martech also contends that the Air Force was required to waive its failure to acknowledge amendment No. 0002 as a minor informality because the amendment allegedly only clarified the original IFB and did not place any additional

obligations on bidders. As issued, the IFB included the engineering drawings of the two sump pumps that were required to be provided under the contract. Martech maintains that these drawings provided sufficient information for any competent engineer to determine the Air Force's requirements for the sump pumps and obligated bidders to provide the required pump without the addition of the omitted specifications contained in amendment No. 0002.

A bidder's failure to acknowledge an amendment that is not material is waivable as a minor informality. Federal Acquisition Regulation (FAR) § 14.405. An amendment is material only if it would have more than a trivial impact on price, quality, quantity or delivery of the item bid upon. 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. Central Atl. Contractors, Inc., supra.

The Air Force reports that amendment No. 0002 was material because it provided the government's exact specifications for sump pump capacity, motor size, electrical power requirements, operation in hazardous materials, and procedures necessary for installation of the pumps. As issued, the IFB was missing the pages that contained the specifications regarding the pump requirements, which the drawings specifically directed bidders to utilize in determining the detailed requirements of the pumps.

In support of the claim that amendment No. 0002 was not material, Martech has submitted an affidavit of the Martech official that prepared the bid. According to that official, the requirements in amendment No. 0002 were discernable from all of the available information provided in the once amended IFB and engineering drawings. This official specifically identifies several areas which it argues would have led any skilled contractor to propose pumps meeting the requirements contained in the amendment. For example, he states that the location of the pumps on the drawings indicated that the pump should have been a submersible pump with a 2-inch solid handling capability.

We find plausible Martech's assertion that the drawings suggested the requirements cited by the Martech official. However, the specification sheet in amendment No. 0002 contained other specific requirements pertaining to the sump pumps and their installation that may not necessarily follow from the drawings. For example, under the pump product requirement the amendment expressly required that one unit

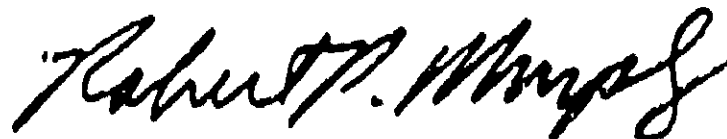
¹The record indicates that the installation of the sump pumps was a material part of the IFB.

with a capacity of 150 grams per minute (gpm) be suitable for installation in a sump having a depth of 13 feet and maximum volute diameter of 18 inches; while, the other unit was required to have a capacity of 50 gpm at a total head of 25 feet (including friction in discharge piping and velocity head). It is not clear how these and other requirements necessarily would be deduced from the drawings or be necessarily legally enforceable on a bidder who has not specially bound itself to them. In this regard, Martech has not detailed how every specification requirement on the missing pages was deducible from the drawings. Martech recognizes that technical drawings "are general" and the requirements on the missing pages are "necessary technical requirements."

Martech maintains that the IFB as issued would have obligated Martech to the missing specifications based upon clause 84 of the IFB. This clause provides that omissions from the specifications that are manifestly necessary to complete the work require the contractor to perform the contract as if correctly described in the drawings and specifications. See Department of Defense FAR Supplement § 252.236-7001. While this provision is applicable in contract administration where the parties are unaware of missing specifications when the contract is formed, see generally 48 Comp. Gen. 90 (1968), the government is not required to enter into a contract where recourse to such a clause is necessary because the contractor failed to bind itself to the detailed specifications. See Moon Constr. Co., B-228378, Dec. 17, 1987, 87-2 CPD ¶ 605.

Since amendment No. 0002 legally obligated bidder's to meet the government's specific detailed requirements with regard to the sump pumps, the amendment was material. See Ohmeda; LSL Indus., Inc., B-220412; B-220412.2, Mar. 10, 1986, 86-1 CPD ¶ 233. Therefore, we find the Air Force properly rejected Martech's bid as nonresponsive.

The protests are denied.



for James F. Hinchman
General Counsel