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Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: Safe-T-Play, Inc.

File: B-250682.2

Date: April 5, 1993

Robert S. Marconi, Esq., and J. Patrick Brown, Esq., Stanislaw, Ashbaugh, Riper, Peters & Beal, for the protester.
Lester Edelman, Esq., and Michael J. Adams, Esq., Department of the Army, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision., for the protestor.

DIGEST

Contracting agency properly rejected as nonresponsive a bid that failed to acknowledge an amendment correcting a prior amendment that defined worker classifications in a manner inconsistent with the Davis-Bacon Act, effectively decreasing wage rates; the correct classifications and corresponding wage rates are mandated by the Davis-Bacon Act and absent acknowledgment of the amendment stating the correct classifications, the bidder was not legally required to pay its employees the wage rates for the correct classifications.

DECISION

Safe-T-Play, Inc. (STP) protests the decision by the United States Army Corps of Engineers to terminate for convenience its contract, and make award to another firm, under invitation for bids (IFB) No. DACA67-92-B-0057, issued by the Corps's Seattle district for playground repairs and maintenance at Fort Lewis, Washington. After award, the Army concluded that STP's failure to acknowledge an amendment to the IFB prior to bid opening rendered its bid nonresponsive.

We deny the protest.

The protest revolves around the agency's attempts to clarify the IFB in response to a potential bidder's query concerning the work classifications to be used in the performance of the contract. The IFB was issued on August 14, 1992, and

instructed bidders to submit prices for one base item and nine option items; award was to be made based upon an evaluation of both the base and option items. The IFB's worklists and supplementary requirements indicated that the playground repair and maintenance included some landscaping, painting, and masonry work. Section I.26 of the IFB included Federal Acquisition Regulation (FAR) § 52.222-006, which required bidders to comply with the Davis-Bacon Act, 40 U.S.C. §§ 276a et seq. (1988). This provision mandates that all laborers and mechanics employed on the project "shall be paid not less than the appropriate wage rate and fringe benefits in the [Secretary of Labor's] wage determination for the classification of work actually performed." Accordingly, the IFB incorporated the Secretary of Labor's General Wage Decision No. WA91-1, with 15 modifications, which sets forth specific hourly rates and fringe benefits for each worker classification.

The agency states that, after the solicitation was issued, a potential bidder asked if all work under the IFB could be performed by landscape laborers. The agency determined that this would be improper,[1] and on September 22 it issued telegraphic amendment No. 0004,[2] which stated in pertinent part:

> "Work to be accomplished regarding the repair and maintenance of all playground equipment is required to be performed by General Laborers.
>
> "Work to be accomplished regarding landscaping is to be performed by Landscape Laborers."

After amendment No. 0004 was issued, the district office became concerned that it might be construed to mean that all labor other than landscaping was required to be performed by general laborers, rather than by the appropriate classification for the work, such as painter or mason.

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[1]The agency states that the district office contacted the Department of Labor (DOL) and confirmed that the labor rates incorporated in the wage determination were based on union wages. The district office then contacted the local Laborers Union representative who stated that it would not be proper for landscape laborers to perform all tasks under the IFB.

[2]Of the three amendments issued prior to amendment No. 0004, only one is relevant to the protest; amendment No. 0002 extended bid opening from September 16 to September 24.

Thus, on September 23, the agency issued telegraphic amendment No. 0005 to clarify amendment No. 0004:

> "The intent of amendment [No.] 0004 was to clarify that [the] use of Landscape Laborers is not proper for the repair and maintenance of playground equipment.
>
> "Repair and maintenance of playground equipment shall be accomplished by the appropriate classifications including General Laborers."

The protester sent its bid to the district office via Federal Express on September 22, 2 days before bid opening. STP's bid included an acknowledgment of amendment Nos. 0001 through 0004; because its bid was mailed prior to the issuance of amendment No. 0005, it did not include an acknowledgment of that amendment.[3] Upon STP's September 23 receipt of amendment No. 0005, at 1 p.m. PST, it asserts that it contacted the contracting specialist and was advised to acknowledge the amendment by telegram. STP states that on September 24, at 7:16 a.m. PST (less than 3 hours before the scheduled 10 a.m. PST bid opening), it notified Western Union to transmit its acknowledgment of amendment No. 0005 to the Corps. The record shows that Western Union attempted to transmit the telegram by telephone, but was unsuccessful; as a result, STP's acknowledgment of amendment No. 0005 was not received prior to bid opening. At bid opening time, nine bids were received. STP submitted the low bid of $786,481; The Adventure Group, Inc. (AGI) was second-low with a bid of $901,000.

On September 25, the contracting officer determined that amendment No. 0005 was immaterial and that, as a result, STP's failure to acknowledge it could be waived as a minor informality; the Seattle district's Office of General Counsel concurred. On September 29, AGI filed an agency-level protest against award to STP, arguing that amendment No. 0005 was material. On September 30, the division's Chief Counsel denied AGI's protest and held that amendment Nos. 0004 and 0005 were not material; award was made to STP that same day. On October 1, AGI protested to our Office. Prior to our rendering a decision on the protest, the division's Chief Counsel reversed his denial of AGI's protest and determined that amendment Nos. 0004 and 0005 were material, and that STP's failure to acknowledge

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[3]Since Federal Express guaranteed only a 10:30 a.m. delivery, and the bid opening time was 10 a.m. Pacific Standard Time (PST), STP, based in North Carolina, sent its bid 2 days prior to bid opening to ensure its timely arrival to the Seattle district.

amendment No. 0005 rendered its bid nonresponsive; he recommended that STP's contract be terminated for convenience. We dismissed AGI's protest as academic on November 16; this protest followed.

STP argues that its failure to acknowledge amendment No. 0005 should be waived as a minor informality because neither amendment No. 0005 nor amendment No. 0004 is material. STP first asserts that neither amendment imposes any additional legal obligations on prospective bidders; amendment No. 0005 simply restates the requirements of the Davis-Bacon Act already present in the original solicitation, and amendment No. 0004 cannot affect those requirements because the agency does not have the authority to waive or modify the Davis-Bacon Act. STP also contends that neither amendment affects the price in more than a negligible manner.

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, 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 where it imposes legal obligations on a prospective bidder that were not contained in the original solicitation, Weatherwax Elec., Inc., B-249609, Oct. 26, 1992, 92-2 CPD ¶ 281, or if it would have more than a negligible impact on price, quantity, quality, or delivery, or the relative standing of the bidders. FAR § 14.405(d)(2); Star Brite Constr. Co., Inc., B-238428, Apr. 5, 1990, 90-1 CPD ¶ 373.

Both the protester and the agency agree that amendment No. 0005 simply restated the requirements of the Davis-Bacon Act as incorporated in the original solicitation. Since amendment No. 0005 alone did not impose additional legal obligations on a prospective bidder, it would be deemed material for purposes of determining the responsiveness of STP's bid only if the clarification of amendment No. 0004 it made was necessary to assure that STP would be obligated to pay its workers in accordance with the proper work classifications as required by the Davis-Bacon Act clause included in the original solicitation. As a result, the materiality of amendment No. 0004 is at issue as well.

The Army maintains that the language of amendment No. 0004 requires all playground repair and maintenance work, including specialized work like painting and masonry, to be performed by general laborers. As a result, before

amendment No. 0005 was issued, the IFB as modified by amendment No. 0004 was ambiguous because it could be read as either requiring all playground repair and maintenance work to be performed by general laborers, or as requiring the work to be done by general laborers as well as by other appropriate classifications, depending on which portion of the IFB a bidder relied upon. The Army concludes that amendment No. 0004 is material because a bidder's reliance upon its incorrect work classifications would have been reasonable and would have resulted in a change in the bidder's legal obligations. Likewise, the agency concludes that amendment No. 0005 is material because it corrected the Seattle district's misstatement in amendment No. 0004, resulting in a change in the bidder's legal obligations.

A solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. Herman Miller, Inc., 70 Comp. Gen. 287 (1991), 91-1 CPD ¶ 184. To be reasonable, an interpretation must be consistent with the solicitation read as a whole and in a manner that gives effect to all its provisions. Id.

We agree with the Army that a bidder could reasonably interpret amendment No. 0004 to be a predetermination by the agency that a bidder need only use general laborers for the playground repair and maintenance and pay them accordingly. First, the language of amendment No. 0004 is quite clear: "[w]ork to be accomplished regarding the repair and maintenance of all playground equipment is required to be performed by General Laborers." Second, while the solicitation's Davis-Bacon Act clause states that workers "shall be paid no less than the appropriate wage rate(s) . . . for the classification of work actually performed," the agency is charged with the responsibility to assure compliance with that clause, 29 C.F.R. § 5.6(a)(3) (1992), and its attempt to clarify that clause by issuing amendment No. 0004 was in keeping with that responsibility. The protester argues that no bidder could have relied upon such an erroneous worker classification as the one amendment No. 0004 suggests, because the agency does not have the authority to modify or waive the Davis-Bacon Act or the wage determination. However, while the ultimate decision as to which worker classifications and corresponding wage rates apply to a given construction project rests with the Department of Labor (DOL), the contracting agency does have limited authority, subject to review by DOL, to classify workers, 29 C.F.R. § 5.5(1)(ii). Further, differences of opinion between contracting officers and contractors concerning misclassification of workers are generally settled administratively by the contracting agency, subject to review by DOL. FAR § 22.406-10. In light of these provisions, we conclude that it would not have been unreasonable for a bidder to rely on amendment No. 0004 as an indication of the

agency's interpretation of the Davis-Bacon Act's application to the solicitation. Amendment No. 0004 thus, at a minimum, made the bidders' legal obligations under the Davis-Bacon Act ambiguous.

An amendment that purports to predetermine worker classifications, as here, is similar to an amendment that modifies a wage determination. Both amendments change the amount a contractor must pay its employees; one changes the wage rates, and the other changes the appropriate classifications of workers. Just as an amendment modifying a wage determination is material because the payment of prescribed wage rates is mandated by the Davis-Bacon Act, we conclude that an amendment classifying workers is material because the payment of the prescribed wage rates to the appropriately classified workers is also mandated by that Act. If a bidder were given the opportunity to acknowledge an amendment that corrects an amendment that misclassified workers after bid opening, regardless of how de minimis, the bidder could decide to render itself ineligible for award by choosing not to cure the defect; the bidder would not be legally obligated to pay the specified wage rates to its employees. See Grade-Way Constr. v. United States, 7 Ct. Cl. 263 (1985); ABC Paving Co., 66 Comp. Gen. 47 (1986), 86-2 CPD ¶ 436; Weatherwax Elec., Inc., supra. As a result, amendment No. 0004 is material, and STP's failure to acknowledge amendment No. 0005, which corrected amendment No. 004, rendered its bid nonresponsive.[1]

In its comments on the agency report, STP argues for the first time that the agency's late receipt of its acknowledgment of amendment No. 0005 was due to government mishandling. Specifically, STP contends that the fact that no agency employee was manning the point-of-contact telephone prior to bid opening prevented Western Union from telephonically transmitting STP's acknowledgment of amendment No. 0005.

Under our Bid Protest Regulations, a protest must be filed within 10 working days of the time the basis of the protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1992). Where a protester initially files a timely protest and later supplements it with additional arguments in its

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[1]The protester argues that any price change resulting from a bidder's reliance on amendment No. 0004 would be no more than negligible. However, as with amendments modifying wage rates, an amendment predetermining worker classifications, which affects the applicable wage rates, is material regardless of how negligible the effect is on price. See Grade-Way Constr. v. United States, supra; Weatherwax Elec., Inc., supra.

comments to the agency report, the later raised arguments must independently satisfy the timeliness requirements of our Regulations. San Antonio Floor Finishers, Inc., B-241386, Feb. 4, 1991, 91-1 CPD ¶ 112. Here, the record shows that on October 12, Western Union notified STP that it attempted to telephonically transmit the acknowledgment but was unable to do so because no one answered the telephone. As a result, when STP filed its initial protest on November 27 it was clearly on notice of this basis of protest, yet failed to raise it at that time. The argument is thus untimely.[5]

The protest is denied.

James F. Hinchman
General Counsel

[5]STP also argues that providing bidders less than 24 hours to acknowledge amendment No. 0005 was insufficient time for bidders to consider and acknowledgment the amendment. This argument is also untimely under our Bid Protest Regulations, since it involves an alleged solicitation impropriety in a solicitation which was not protested prior to bid opening. 4 C.F.R. § 21.2(a)(1); there is no evidence that STP asked for an extension of the bid opening date. See Vector Telecom, Inc., B-216008, Oct. 23, 1984, 84-2 CPD ¶ 452.