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

(Corrected Copy)

Decision

Matter of: Adrian Supply Company

File: B-251886.2

Date: June 7, 1993

Bob Stormberg for the protester.
Timothy A. Beyland, Maj. John J. Karns, and Lt. Col.
Martha E. Fred, Department of the Air Force, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Contracting agency properly rejected as nonresponsive a bid that failed to acknowledge material solicitation amendment which specified type and increased rating of required transformer arrestors; amendment had a significant impact on the contractor's obligations under the solicitation and bidder who failed to acknowledge amendment is not obligated to furnish solicited items in accordance with the government's exact specifications in the amendment.

DECISION

Adrian Supply Company, the apparent low bidder under invitation for bids (IFB) No. F64133-91-BA053, issued by the Air Force for the purchase of transformers, essentially protests the agency's rejection of its bid as nonresponsive for failure to acknowledge amendment No. 3 to the IFB.

We deny the protest.

The IFB, issued on March 23, 1992, initially scheduled bid opening for May 8. The IFB was amended three times prior to bid opening. Amendment No. 1 was issued on April 20 and extended the bid opening date indefinitely. Amendment No. 2, issued on August 1, revised the bid schedule, changed the performance period, and set the bid opening date for August 26. Adrian submitted its bid, in which it

acknowledged receipt of amendment Nos. 1 and 2, by the amended closing date of August 26. Amendment No. 3 was issued on August 25 and sent to all prospective bidders on August 26. Amendment No. 3 changed the specifications for the transformers by increasing the required rating of the arrestors, requiring that the arrestors had to be of a plug-in type, and stating that a specific drying process, which was previously required, was now only recommended. Amendment No. 3 extended the bid opening date until September 9. Due to mail delays apparently caused by recent typhoons in Guam, the location of the contracting activity, Adrian did not receive its copy of amendment No. 3 until September 10 after bid opening. Adrian contacted the agency upon its late receipt of amendment No. 3 to explain its failure to acknowledge the amendment by bid opening. The protester alleges it was told by agency personnel that Adrian was the apparent third low bidder at bid opening, that many of the bidders failed to receive amendment No. 3 prior to the September 9 bid opening, and that the protester's late acknowledgment of the amendment would be accepted. Adrian thereafter provided its acknowledgment of its receipt of the amendment to the agency.

Eight bids were received in response to the solicitation; six of those bids, including Adrian's bid, were rejected for failure to acknowledge material solicitation amendments. The contract was awarded to the apparent low bidder, Lypco International, on December 22. On January 4, 1993, Adrian filed a protest with our Office against the award. On February 8, the Air Force advised our Office that its review of the procurement showed that both the apparent low and apparent second low bidders at bid opening took exception to material terms of the IFB. The agency reported that due to inadequate or ambiguous specifications in the IFB, the Air Force was going to terminate for the convenience of the government the contract awarded to Lypco, revise the specifications, and resolicit the requirement. Since the agency's corrective actions rendered the protest academic, we dismissed Adrian's protest on February 9.

Adrian filed its current protest with our Office on February 9 against the agency's determination to resolicit the requirement. The protester states that resolicitation is not warranted and that the protester should receive the award under the IFB. As the threshold issue to its protest, Adrian essentially contends that the changes made by amendment No. 3 were not material to its bid or the

competition, and that its failure to acknowledge receipt of the amendment prior to bid opening did not require the rejection of its bid, because the changes made by that amendment were incorporated into the price of Adrian's timely submitted bid.

The Air Force reports that it properly rejected Adrian's bid for failing to acknowledge its receipt of amendment No. 3 prior to bid opening. The agency states that the changes made by that amendment were material to the specifications since they affected the contractor's obligations regarding product quality and price. The agency reports that Adrian's bid prices were furnished on the IFB's bid schedule, without modification to the schedule to indicate increased prices to reflect or otherwise incorporate the changes of amendment No. 3. Thus, there was no way for the agency to determine at bid opening that Adrian's bid conformed to the changed specifications or included prices, as the protester contends, which incorporated the requirements of amendment No. 3.

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 legally obligated to comply with the terms of the amendment, and its bid is thus nonresponsive. Hospitality Inn-Downtown, B-248750.3, Oct. 28, 1992, 92-2 CPD ¶ 291; Recreonics Corp., B-246339, Mar. 2, 1992, 92-1 CPD ¶ 249. Even where an amendment may not have a clear effect on price, quantity, or quality, it still is considered material where it changes the legal relationship between the parties, for example, if the amendment increases or changes the contractor's obligations or responsibilities. Firetech Automatic Sprinklers, Inc., B-248452, Aug. 12, 1992, 92-2 CPD ¶ 100. The materiality of an amendment which imposes new legal obligations on the contractor is not diminished by the fact that the amendment may have little or no effect on the bid price or the work to be performed. Id. A bid's responsiveness must be determined from the bid itself. For example, an amendment may be constructively acknowledged where the bid itself includes one of the essential items appearing only in the amendment, thus evidencing the receipt of, and intent to be bound by, the amendment. Martech USA, Inc., B-245957; B-245957.2, Feb. 11, 1992, 92-1 CPD ¶ 173.

Amendment No. 3 changed a previous mandatory requirement of amendment No. 2 for a particular drying process to a permissive recommendation. Adrian believes this change in

terminology alone will not affect bid prices. The protester concedes, however, that other changes made by amendment No. 3 to "significant specifications" of the IFB were material since they affect product quality and price. Amendment No. 2 had required the contractor to "[p]rovide 3 each, 10 KV Metal Oxide Variator (MOV) Type arrestors for loop feed dead front transformer." Amendment No. 3 changed this provision to read as follows:

"[p]rovide 3 each, 15 KV [MOV] Type arrestors for loop feed dead front transformer. (External Plug-In Type Surge Arrestor.)"

The protester estimates that the amendment No. 3 changes to the arrestor type and rating "would add approximately \$100 per arrestor to a bidder's cost or \$7,200 total."

Adrian contends, however, that it discussed arrestor rating with agency personnel prior to the submission of its bid (during which conversation Adrian allegedly pointed out that, based upon Adrian's anticipation of the agency's maintenance requirements, plug-in arrestors would be necessary and that the correct arrestor rating for the specified primary voltage is 15 KV). Adrian asserts that it thus incorporated these product characteristics into its price as submitted by bid opening prior to its receipt of amendment No. 3. Adrian therefore contends it should receive award under the IFB, despite its failure to timely acknowledge amendment No. 3, since its bid, as submitted, purportedly complies with the amendment's changes.

Amendment No. 3 placed additional obligations on the bidder. It provided the government's exact specifications for the transformers, including the required arrestor rating and type. Thus, the amendment was material. Absent an acknowledgment of the amendment, Adrian did not obligate itself to furnish the transformers as required under amendment No. 3. The IFB bid schedule does not identify the transformer arrestor by rating or type, as depicted in amendment No. 3, as a separate line item. Adrian's bid schedule merely provides prices for the requested items as described in the IFB and does not confirm Adrian's contentions that its price at bid opening incorporated the changes of amendment No. 3. Since the bid does not otherwise show the firm would be legally obligated to comply

with that amendment's additional requirements,¹ the agency properly rejected Adrian's bid as nonresponsive.² Firetech Automatic Sprinklers, Inc., supra.

Adrian specifically argues that amendment No. 3 was the result of its discussions with agency personnel and thus its bid price reflects the change in arrestors. As stated above, there is no way to tell this from Adrian's bid. Further, since the change was material, consistent with Federal Acquisition Regulation (FAR) requirements, all competitors were entitled to an equal opportunity to receive notice of, and bid on, the revision. See FAR § 14.404-1(c)(1).

Since the firm's bid was properly rejected for failing to acknowledge a material amendment, Adrian is not an interested party to protest the determination of the agency to resolicit the requirement. 4 C.F.R. § 21.0(a) (1993). Adrian would not be eligible for award if its protests of

¹Adrian contends that the agency's contracting personnel advised the protester that its late acknowledgment of amendment No. 3 would nevertheless be accepted by the agency. However, a bidder may not rely on oral advice of contracting personnel which is inconsistent with the solicitation and procurement regulations. See *Recreonics Corp., supra.*

²Adrian also contends the agency should have realized that the mail containing amendment No. 3 would be delayed due to recent typhoons in the area and thus should have delayed bid opening until the agency was assured the bidders received the amendment. Although a contracting officer may delay bid opening where he has reason to believe that the bids of an important segment of bidders have been delayed in the mails for causes beyond the bidders' control and without their fault or negligence, the FAR does not require such a delay. FAR § 14.402-3(a)(1). Even assuming Adrian was correct, this defect now can only be remedied by resolicitation. In this regard, the contracting officer offers the additional reason for resoliciting these requirements of obtaining the competition that was lost due to the agency's failure to recognize that several bidders had not received amendment No. 3.

these issues were sustained. ECS Composites, Inc.,
B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. These matters
therefore will not be considered further.

The protest is denied.


for James F. Hinchman
General Counsel