



Comptroller General
of the United States

835306

Washington, D.C. 20548

Decision

Matter of: Air Quality Experts, Inc.

File: B-256444

Date: June 15, 1994

Christopher Thompson for the protester.
Linda A. Leonard, Esq., U.S. Coast Guard, for the agency.
C. Douglas McArthur, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Contracting officer properly rejected as nonresponsive a bid that failed to acknowledge an amendment resolving a discrepancy between the bid schedule and drawings.
2. Protester's nonreceipt of material solicitation amendment provides no basis to challenge rejection of the bid as nonresponsive for failure to acknowledge amendment where record shows agency followed established procedures for disseminating bid documents, and there is no evidence that agency deliberately attempted to exclude protester.

DECISION

Air Quality Experts, Inc. (AQE) protests the rejection of its bid for failure to acknowledge an amendment to invitation for bids (IFB) No. DTCGG1-94-B-3WK089, issued by the United States Coast Guard for family housing repair at Southwest Harbor, Maine. AQE argues that the amendment was not material and that the agency did not use reasonable methods to ensure that bidders received a copy of the amendment.

We deny the protest.

The agency issued the IFB on January 3, 1994, for a firm, fixed-price contract to provide labor, material, equipment, transportation, and supervision for the removal of existing roofing and windows at seven buildings; the removal of asbestos-cement siding at two; and the installation of new windows, roofing, and siding. Three pages of the solicitation--page 1, which summarized the work to be done; page 4, the bid schedule; and page 5, the statement of work--stated incorrectly that the work involved removal of

roofing and windows at six buildings; drawings attached to the solicitation showed that the correct number of buildings to be repaired was seven.

The agency soon noted this discrepancy, and on January 10, amended the solicitation to indicate on pages 1, 4, and 5 that the correct number of buildings was seven. AQE submitted the lowest of 14 bids received on February 2, a total price of \$113,680.00 versus the second-low bid of \$114,759.57, but failed to acknowledge the solicitation amendment. (According to AQE, it never received the amendment.) The agency declared the bid nonresponsive, and this protest followed.

A bidder's failure to acknowledge a material IFB amendment 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. Moon Constr. Co., B-228378, Dec. 17, 1987, 87-2 CPD ¶ 605. In this case, there is no dispute that the amendment clarifying the number of buildings at which work was to be performed was material. Rather, AQE argues that regardless of the IFB's reference to six buildings, the solicitation instructed bidders that work would be accomplished in accordance with the drawings and specifications, which clearly required that work be performed on seven buildings. AQE characterizes the solicitation's reference to six buildings as a patent ambiguity; AQE argues that the agency is protected where an ambiguity is patent because a bidder who fails to bring such an ambiguity to the agency's attention is precluded from later filing a claim. AQE contends that as a prudent bidder, it ignored the ambiguity and based its bid on the drawings, which showed seven buildings.

Contrary to AQE's argument, the Coast Guard was not required to enter into a contract with AQE which presented the potential of litigation stemming from the ambiguity in the original solicitation documents. On the contrary, given that the Coast Guard had actual knowledge of the discrepancy, it was proper to try to resolve the issue through the issuance of a clarifying amendment; such an amendment is material and must be acknowledged, or the bid must be rejected as nonresponsive. Id.

As noted above, AQE states that it did not receive the amendment, and contends that the agency failed in its duty to ensure that amendments were properly distributed to potential bidders. AQE notes that Federal Acquisition Regulation (FAR) § 14.304-1, regarding the handling of late bids, provides that an agency may consider such a bid if it is sent by registered or certified mail 5 days prior to bid

opening; AQE concludes that the FAR therefore recognizes the unreliability of first class mail. AQE also cites a Department of Veterans Affairs acquisition regulation, 48 C.F.R. § 814.208 (1992), which requires contracting officers at that agency to send amendments by certified mail, return receipt requested. AQE contends that the use of first class mail does not provide a reasonable method for distributing amendments and that the agency should have used an alternate method; for example, sending the amendment by facsimile, followed by first class mail.

A prospective bidder bears the risk of not receiving an IFB amendment unless there is evidence establishing that the agency failed to comply with the regulatory requirements for notice and distribution of amendments. Monterey Advanced Imaging Ctr., B-253152, Aug. 24, 1993, 93-2 CPD ¶ 118. The record shows that the Coast Guard has a reasonable procedure in place to ensure that all prospective bidders receive IFBs and amendments; it prepares mailing labels from the original bidders list and affixes them onto envelopes for mailing. AQE does not contend that the agency failed to mail it a copy of the amendment, and it concedes that it has had continuing problems with its local post office, to the extent that it has filed formal complaints. Neither of the regulations cited by AQE controls the instant case; AQE does not allege that the Coast Guard failed to comply with any relevant regulation. Absent evidence that the agency either deliberately tried to exclude the protester or otherwise failed to follow its procedure or to comply with regulatory requirements for notice and distribution of amendments, AQE's nonreceipt of the amendment provides no basis to question the agency's actions. Id.

The protest is denied.

/s/ Robert H. Hunter
for Robert P. Murphy
Acting General Counsel