



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

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Decision

Matter of: G. R. Sponaugle & Sons, Inc.

File: B-257784

Date: November 7, 1994

Diane M. Tokarsky, Esq., McNees, Wallace & Nurick, for the protester.
Theodore A. Adler, Esq., Reager & Adler, P.C., for Eichelberger Construction, Inc., an interested party.
Vera Meza, Esq., and Melinda N. Finucane, Esq., Department of the Army, for the agency.
Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bidder's failure to acknowledge an amendment to an invitation for bids, which limited the hours during which certain construction work could be performed after regular work hours, renders its bid nonresponsive.

DECISION

G. R. Sponaugle & Sons, Inc. protests the rejection of its low bid under invitation for bids (IFB) No. DAAC67-94-B-0031, issued by the Letterkenny Army Depot, for the construction of a computer room. Sponaugle's bid was rejected as nonresponsive because it failed to timely acknowledge receipt of a material IFB amendment. The protester argues that its failure to acknowledge the amendment should have been waived as a minor informality because the amendment was not material.

We deny the protest.

Note 1 on drawing PE-2437, sheet 1 of 17 (key plan and location map) in the IFB, as issued, states:

"All work within [the specified area] shall be performed after 4 p.m. All furniture shall be covered with plastic before the start of any work in this area. At the end of each work shift all ceiling tiles shall be reinstalled, all plastic shall be removed, all dust shall be cleaned from

the furniture and the floor shall be vacuumed or wet mopped to remove all dust and debris."

Amendment No. 2 required the contractor to establish a standard 8-hour shift starting no earlier than 4 p.m. for all work to be performed in the area covered by Note 1.

The low bid submitted by Sponaugle did not acknowledge receipt of amendment No. 2. Soon after bid opening, Sponaugle confirmed that it failed to acknowledge the amendment, but stated that it had received a copy and had accounted for associated costs in its bid price. Because the Army considered the amendment a material change to the IFB, it rejected Sponaugle's bid as nonresponsive and made award to Eichelberger Construction, Inc., the second low bidder.

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. Safe-T-Play, Inc., B-250682.2, Apr. 5, 1993, 93-1 CPD ¶ 292. On the other hand, a bidder's failure to acknowledge an amendment that is not material is waivable as a minor informality. Federal Acquisition Regulation (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. FAR § 14.405(d)(2); Star Brite Constr. Co., Inc., B-238428, Apr. 5, 1990, 90-1 CPD ¶ 373.

Sponaugle argues that amendment No. 2 did not constitute a material change because it did not increase the number of hours to be worked or otherwise change the time when the hours were to be worked, inasmuch as Note 1 had always advised prospective bidders that work had to be performed in the specified area after 4 p.m. Sponaugle contends that the amendment's clarification as to the working hours had no affect on its price because it had always intended to work an 8-hour shift and that extended hours would have increased its expenses and bid price.

An amendment delineating hours to be worked or specifying hours of operation different from those imposed by the IFB is generally considered to be a material change. Universal Parking Corp., 69 Comp. Gen. 31 (1989), 89-2 CPD ¶ 367. Amendment No. 2 expressly limited work time in the specified

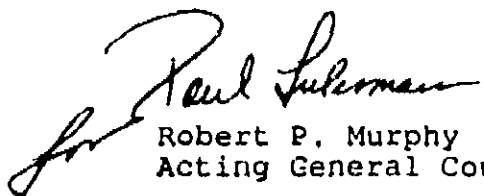
area to one 8-hour period. This restriction was not present in the initial IFB, therefore, the amendment's hour restriction materially affected the IFB requirements. Specifically, amendment No. 2 was issued in response to questions posed by prospective bidders at on-site inspections conducted after the IFB was issued. Bidders wanted to know whether they could work in the specified area from 4 p.m., the earliest the site was available, to 7:30 a.m., the time the site had to be ready for the regular daytime occupants of the space. This time frame would have allowed a contractor to work a total of 15.5 hours straight each day in the specified area. The Army estimated that the time required to restore and clean the area each day before the regular daytime occupants of the site arrived was between 1 to 1.5 hours, regardless of whether the contractor worked 8 hours or more. Thus, before amendment No. 2 was issued, it may have been advantageous for the contractor to work more than 8 hours each day in the designated area.

The fact that bidders asked about the amount of time available also indicates that the number of available work hours was a factor in formulating their bids and suggests that other bidders were considering working longer than 8-hour shifts. For example, Eichelberger pointed out that prior to amendment No. 2, it planned to work two shifts back-to-back, which would have allowed it to reduce the number of times it had to protect existing furnishings; remove the ceiling; reinstall the ceiling; and clean the area each day. According to Eichelberger, amendment No. 2's limitation of the work hours essentially extended the overall length of this aspect of the project and therefore materially increased Eichelberger's final cost and bid price.

Where an amendment imposes new material obligations or responsibilities not already in the solicitation as issued, it is material, even if the amendment may have little or no affect on a bidder's particular bid price. Anacomp, Inc., B-256788, July 27, 1994, 94-2 CPD ¶ 44. By failing to acknowledge amendment No. 2, Sponaugle did not legally limit its work to one 8-hour shift in the specified areas, which

allowed it greater flexibility to deploy its resources than was available to the other bidders. Accordingly, the agency correctly determined that the amendment was material and properly rejected Sponaugle's bid for failing to acknowledge the amendment.

The protest is denied.


Robert P. Murphy
Acting General Counsel