



Comptroller General
of the United States

1246:311

Washington, D.C. 20548

Decision

Matter of: Eagle Construction Services, Inc.

File: B-257841

Date: November 10, 1994

Victor J. DiAnna for the protester,
Jeffrey I. Kessler, Esq., and Marti Stanczak, Esq.,
Department of the Army, for the agency.
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General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

Agency properly rejected as nonresponsive a bid that failed to acknowledge an amendment; amendment was material, and thus had to be acknowledged for the bid to be responsive, since it contained a requirement that placed an obligation on the bidder that was not imposed by the solicitation as issued, and affected the quality of the item supplied.

DECISION

Eagle Construction Services, Inc. protests the rejection of its bid as nonresponsive, and the award of a contract to Leeward Construction, Inc., under Department of the Army invitation for bids (IFB) No. DAAC71-94-B-0008, for the construction of a staging facility used for the repair and maintenance of large satellite antennas and equipment. Eagle's bid was rejected for failure to acknowledge amendment No. 0002. Eagle maintains that the amendment was not material and, therefore, that its failure to acknowledge the amendment should be waived as a minor informality.

We deny the protest.

The IFB, issued on April 25, 1994, called for the construction of a staging facility, including the installation of a door on the north side of the facility. The IFB specified that the door be manufactured by "Erect-A-Tube or equal," and described the door as follows: "Insulated, 14' high x 44' wide Bi-Folding cargo door mounted on the north end of the building." The IFB included two drawings of the door: drawing 69-1-1, the floor plan for the building, which showed the north end of the building as containing the door that is described as a "14'H X 44'W

BI-FOLD CARGO DOOR"; and drawing 69-1-2, the north elevation to the building, which describes the door as a "14' X 44' BI-FOLD CARGO DOOR." This drawing also showed that the door, based on the scale of the drawing, had to be a total height of 14 feet. After the solicitation was issued, the Army received an inquiry from a potential bidder concerning whether the 14-foot dimension in the IFB referred to the clear opening height for the bi-fold door or the height of the door itself. As a result, the agency issued amendment No. 0002 to the IFB, which stated, in part, as follows: "Reference Drawing 69-1-1, Floor Plan, Schedules and Details, Floor Plan: ADD: "Note 1: The 14' dimension is the clear opening height for the door."

The Army received 12 bids by the May 25 opening date; Eagle submitted the apparent low bid of \$210,000, and Leeward Construction Services the next low bid of \$214,800. However, Eagle was the only bidder that failed to acknowledge amendment No. 0002. The Army rejected Eagle's bid as nonresponsive due to the firm's failure to acknowledge this amendment, which the agency considered to be material, and made award to Leeward. Eagle thereupon filed an agency-level protest, which was denied; this protest followed.

Eagle contends that amendment No. 0002 was not material, and that its failure to acknowledge the amendment thus should be waived as a minor informality. Specifically, Eagle argues that the original IFB already clearly stated the requirement for a 14-foot clear opening height for the door, since it specified that the door was to be manufactured by Erect-A-Tube or equal, and Erect-A-Tube's commercial literature contains dimensions for only the clear openings for doors. The protester also maintains that it is standard industry practice to submit bids for a door solely on the basis of the clear opening dimensions. Eagle concludes that the Army should have made award to Eagle on the basis of its low bid.

A bid which does not include an acknowledgment of a material amendment must be rejected as nonresponsive because, absent such an acknowledgment, the bid does not obligate the bidder to comply with the terms of the amendment. Day and Night Janitorial and Maid and Other Servs., Inc., B-240881, Jan. 2, 1991, 91-1 CPD ¶ 1. An amendment is material where it imposes legal obligations on a prospective bidder that were not contained in the original solicitation, Safe-T-Play, Inc., B-250682.2, Apr. 5, 1993, 93-1 CPD ¶ 292, or it would have more than a negligible impact on price; quantity; quality; or delivery of the item bid upon, or the relative

standing of bidders. See Federal Acquisition Regulation (FAR) § 14.405(d)(2); Star Brite Constr. Co., Inc., B-238428, Apr. 5, 1990, 90-1 CPD ¶ 373. A bidder's failure to acknowledge receipt of an amendment that is material is not waivable as a minor informality. Power Serv., Inc., B-218248, Mar. 28, 1985, 85-1 CPD ¶ 374. No precise rule exists as to whether a change required by an amendment is more than negligible; rather, materiality depends on the facts of each case. Id.

We agree with the Army that Eagle's bid was nonresponsive. As indicated, the IFB described the "14' high x 44' wide" dimensions in several different places as the dimensions of the door itself, rather than the clear opening height. In this regard, the statement of the requirement in IFB specification 2.1.8(b) for an "Insulated, 14' high x 44' wide Bi-Folding cargo door mounted on the north end of the building" could not have more clearly indicated that the dimensions applied to the door itself rather than the clear opening height. Drawing 69-1-1 reinforced this already clear statement further by providing a to-scale sketch of the door showing the height of the door itself as 14 feet. This being the case, amendment No. 0002 changed the original requirement by stating that the 14-foot-height requirement refers to "the clear opening height for the door," rather than to the door itself.

The Army reports that a door that is 14 feet in height yields a clear opening of only 12 feet due to the fact that the door, when opened, folds into the opening at the top of the door frame. A 14-foot clear opening height, similarly, translates into approximately a 16-foot-high door. It follows that the amendment imposed an obligation different from that imposed by the IFB as issued, and also substantially affected quality, in that a 14-foot door simply would not be usable (undisputed by Eagle). In this regard, the 14-foot clear opening height was dictated by the need for the building to accommodate equipment such as satellite antennas and machinery. Because it did not include an acknowledgment of the amendment, Eagle's bid did not obligate the firm to install a door that would provide the 14-foot clear opening height required; consequently, Eagle's bid was nonresponsive. See Belfort Instrument Co., B-218561, Aug. 6, 1985, 85-2 CPD ¶ 135.

Even if Eagle is correct that the IFB's call for a door manufactured by "Erect-A-Tube or equal" could be interpreted as indicating a 14-foot clear opening height, this would not change the fact that the IFB elsewhere clearly called for a 14-foot-high door. These alternate interpretations would merely render the IFB ambiguous, which would lead to the conclusion that amendment No. 0002 was necessary to clearly state the clear opening height requirement; as such, the

amendment still would be material. See Alcon, Inc.,
B-228409, Feb. 5, 1988, 88-1 CPD ¶ 114.

Further, Eagle's claim regarding standard industry practice is unsupported. In response to the protest, the Army contacted several companies to determine whether such a standard practice exists. Two companies--Door Engineering and Manufacturing Company and American Bi-Fold Door--indicated that they would either read the IFB as requiring a 14-foot-high door (Door Engineering), or would question whether door height or clear opening height was intended. Further, MCC Construction, the bidder whose inquiry led to the issuance of amendment No. 0002, stated that it made the inquiry because its door supplier, Wilson Industrial Doors, Inc., asked MCC for the same clarification. Based on this survey, there is no basis for concluding, as Eagle suggests, that the IFB as issued adequately stated the clear opening height requirement in light of industry practice.

The protest is denied.


for Robert P. Murphy
Acting General Counsel