



Comptroller General
of the United States

406293

Washington, D.C. 20548

Decision

Matter of: Farrar Aerospace

File: B-259364

Date: March 27, 1995

James P. Owens for the protester.
Jeffrey I. Kessler, Esq., and Bruce Crowe, Esq., Department of the Army, for the agency.
Katherine I. Riback, Esq., and Daniel I. Gordon, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly rejected bid as nonresponsive where the bidder failed to acknowledge a material amendment which imposed an obligation on the contractor not contained in the original solicitation; absent acknowledgment of the amendment, the bidder would not be required to furnish the services in accordance with the amended solicitation requirements.

2. Agency's failure to send bidder a copy of a material amendment was not improper where the protester was not on the solicitation mailing list, and the record neither supports the protester's allegation that the agency sent the firm the original solicitation nor indicates deficiencies in the contracting agency's solicitation process.

DECISION

Farrar Aerospace protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. DAAJ09-94-B-0010, issued by the Department of the Army for aircraft trailers. Farrar contends that its bid was improperly rejected as nonresponsive for failing to acknowledge an amendment which the agency never sent to the protester.

We deny the protest.

This acquisition was synopsisized in the November 23, 1993, Commerce Business Daily (CBD), and directed interested firms to contact the contract specialist for copies of the IFB. The agency issued the IFB on April 7, 1994, as a total small business set-aside, and copies were mailed to the firms on the bidders list and to those firms that requested the

solicitation in response to the CBD notice. On May 9, the agency issued amendment No. 0001 which extended the closing date from May 9 to May 23. Because certain parts were no longer available from the source designated in the solicitation, the agency issued amendment No. 0002 on May 12, which required the successful offeror to manufacture those parts to stated specifications. This amendment also corrected the source of another required component material, and extended the bid due date until May 31.

Nine bids were received at bid opening, and Farrar was the apparent low bidder. The contracting officer reviewed Farrar's bid and determined it nonresponsive for failing to acknowledge amendment No. 0002. As a result, the contract was awarded to the second low bidder, LM & E Co., Inc. Farrar timely protested to the contracting agency that its failure to acknowledge the amendments should be considered a minor informality since, according to Farrar, the changes in the amendments do not materially affect its bid price. The agency denied the agency-level protest, and Farrar filed this protest in our Office. Farrar reiterates its allegation that the amendments were immaterial and further contends that it did not acknowledge the amendments because the agency failed to send them to the protester.

The issue to be resolved initially is whether the agency properly determined that amendment No. 0002 was material, such that Farrar's failure to acknowledge this amendment rendered its bid nonresponsive. Generally, a bid which does not include an acknowledgment of a material amendment must be rejected as nonresponsive because, absent such acknowledgment, the bidder is not obligated to comply with the terms of the amendment. LaCorte ECM, Inc., B-231448.2, Aug. 31, 1988, 88-2 CPD ¶ 195. 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, by increasing or changing the contractor's obligation or responsibilities, in some material manner. Anacomp, Inc., B-256788, July 27, 1994, 94-2 CPD ¶ 44. Here, the solicitation, as originally issued, required the contractor to purchase certain parts from a designated source. As a result of amendment No. 0002, the contractor is required to manufacture these parts to specific specifications. Since the amendment imposed this differing additional obligation on the contractor, the amendment was material, regardless of its

¹Both the agency and the protester agree that amendment No. 0001, which extended the closing date of the solicitation, is not material, hence Farrar's failure to acknowledge amendment No. 0001 was a minor informality that did not effect the responsiveness of its bid.

effect on bid prices. Universal Parking Corp., 69 Comp. Gen. 31 (1989), 89-2 CPD ¶ 367. Consequently, the agency properly determined not to waive Farrar's failure to acknowledge amendment No. 0002 as a minor informality.

Farrar argues in its protest to our Office that it was improper for the agency to reject its bid as nonresponsive when it was prevented from acknowledging the amendment by the agency's failure to send it the amendment. The Army responds that Farrar did not appear on the initial bidders list supplied by the agency's Small Business Office, and that it never received a request from Farrar for a copy of this solicitation.² As a result, the agency states that Farrar was not on the agency's mailing list and was not sent either the initial solicitation or the amendments. The agency surmises that Farrar obtained its copy of the IFB from a source other than the contracting activity. The agency notes that it is the responsibility of a bidder who obtains a solicitation from a source other than the contracting activity to check with that source or the contracting activity to ensure that no amendments have been issued.

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 relevant regulatory requirement in this protest is the requirement in Federal Acquisition Regulation (FAR) § 14.205-1(c) that the names of prospective bidders who request a copy of the solicitation be added to the mailing list, so that they will be furnished a copy of any amendments.

The parties disagree about whether Farrar requested a copy of the IFB from the Army. Farrar insists that it both requested and received the IFB from the Army, while the agency responds that it never received a request from Farrar and did not send the IFB to Farrar, thus, Farrar must have received its copy from another source. This factual dispute is central to the protest because, if Farrar had requested the IFB from the Army, FAR § 14.205-1(c) would require that Farrar's name and address be added to the mailing list for the amendments, and the Army not having done so, and consequently not having mailed a copy of the amendments to Farrar, would be improper.

²The agency states that all requests for the IFB were date stamped upon receipt and retained in the solicitation file.

Both the agency and the protester submitted documentary evidence to support their respective positions concerning whether or not the protester requested a copy of the IFB from the agency. Farrar included with its protest a document identified as its "original request for quote." This undated letter is addressed to the contracting activity and requests a copy of the IFB. The notation "FAXED" is stamped on the upper right hand corner of this letter, with a hand-written notation underneath that reads "filed 4-18-94." The agency notes in its report that the CBD notice gave an estimated bid due date of January 14, 1994, 3 months earlier than the hand-written date on Farrar's letter, and that it is implausible that a bidder would have waited until April to request the IFB.

In its comments on the agency report, Farrar then submitted an unsigned document dated December 2, 1993, titled "original request from CBD," and addressed to the contracting activity requesting a copy of the IFB.³ Farrar contends in its comments that it received the bid package from the agency as a result of its "original request." Farrar also submitted with its comments another copy of its April 18, 1994, request for the IFB, now identified as a "duplicate request."⁴

The agency notes that Farrar has offered inconsistent arguments and documents in a piecemeal fashion in the course of this protest. The agency points out that Farrar produced its alleged "original request for quote," marked "filed 4-18-94," in its initial GAO protest, and then, after the agency argued that prospective bidders would not have waited until April to request the IFB, produced the December 1993

³The document had a stamped star on the upper right hand corner, presumably to indicate that it was transmitted by telefacsimile.

⁴In a supplemental submission, Farrar submitted a copy of the IFB with Farrar's name and address typed on the solicitation. Farrar contends that it "received the solicitation in our name" and that this demonstrates both that Farrar requested the solicitation from the agency and that the agency was aware of its interest in the solicitation. The agency responds that it never types bidders' names and addresses on solicitations it distributes. Farrar then effectively conceded that the agency had not typed Farrar's name and address on the IFB.

"original request" with its comments on the agency report. The agency contends that if Farrar did receive the solicitation package as a result of its original request, as the protester now argues, then there was no reason for Farrar to send the "duplicate" request in April.⁵

The record simply does not support Farrar's allegation that it requested a copy of the IFB from the agency. The record shows that the Army maintains adequate records and has a reasonable procedure in place to comply with FAR § 14.205 to ensure that all prospective bidders receive the IFBs and amendments. The agency retained all requests for copies of the solicitation and mailed copies to all firms who were on the original list or who requested a copy of the IFB. No such request from Farrar appears in the agency's records, and the agency confirms that it has no other indication that a request was ever received from Farrar. Farrar's allegations to the contrary are not supported by persuasive evidence, and the internal inconsistencies in the explanations that Farrar offered during the course of the protest undermine the credibility of the evidence that it did present.

The protest is denied.

\s\ Paul Lieberman
for Robert P. Murphy
General Counsel

⁵The agency also points out that the April "duplicate" request for the solicitation did not refer to, or mention, the request which Farrar had allegedly submitted in December.