

Matter of: The Hackney Group
File: B-261241
Date: September 5, 1995

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Janet N. Repka, Esq., and William E. Brazis, Esq., Washington Headquarters Services, Department of Defense, for the agency.

Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Bidders are responsible for the timely delivery of their bids and amendments, and late delivery generally requires the bid's rejection.
2. Where solicitation contained drawings which reflected differing amounts of work to be performed, an amendment which eliminated the inconsistency and, thereby, clearly obligated the winning bidder to perform all required work at the contract price, was material and bidders were required to acknowledge it prior to bid opening.

DECISION

The Hackney Group protests the rejection of its bid for failure to acknowledge amendment No. 0005 to invitation for bids (IFB) No. MDA946-95-BA007, issued by the Department of Defense, Washington Headquarters Services, for roof replacement at Federal Building No. 2 (the "Navy Annex") in Arlington, Virginia.¹ Hackney asserts that its facsimile acknowledgment, sent prior to bid opening, or its mailed

¹Hackney also failed to acknowledge amendment No. 0004, which it similarly asserts did not constitute a valid basis for rejecting its bid. In light of our conclusion that the agency properly rejected Hackney's bid for failing to acknowledge amendment No. 0005, we need not discuss its failure to acknowledge amendment No. 0004.

acknowledgment, received after bid opening, should have rendered its bid responsive; alternatively, Hackney argues that the amendment was not material and that the agency should have waived the failure to acknowledge.

We deny the protest.

BACKGROUND

The agency issued this solicitation on February 21, 1995, seeking firm, fixed-price bids for the removal and replacement of the Navy Annex's existing roof. As part of the work, the solicitation required removal of existing asbestos. The solicitation package contained three asbestos drawings (numbered AB-1 through AB-3 and labeled "Hazardous Material Abatement - Partial Roof Plan") which identified the specific portions of the roof from which asbestos would have to be removed. Each asbestos drawing stated that it was drawn to a scale under which one-sixteenth of an inch represented 1 foot; the asbestos drawings did not list actual dimensions in numeric form. The solicitation package also contained architectural drawings (numbered A-1 through A-7) to be used in connection with the other demolition and replacement tasks. The architectural drawings similarly stated that they were drawn to a scale under which one-sixteenth of an inch represented 1 foot; in addition, the architectural drawings provided numeric dimensions for the perimeter of each wing of the Navy Annex. Finally, the solicitation package contained an overall site plan (numbered SP-1), which was drawn to a smaller scale than either the asbestos drawings or the architectural drawings;² this drawing also contained numeric dimensions for the perimeter of the building.

As part of the solicitation requirements, offerors were advised that the asbestos removal work would have to be performed by a certified asbestos removal company; thus, prime contractors who were not so qualified were required to obtain subcontractor bids for the asbestos removal work. On March 15, a potential bidder advised the agency that various asbestos subcontractors were providing it with differing quotations based on differing square footage amounts of asbestos removal work to be performed. The bidder noted that calculation of the asbestos removal area from the asbestos drawings resulted in a smaller area than calculation of the same area from either the architectural drawings or the site plan.

²The site plan drawing was drawn to a scale under which 1 inch represented 40 feet.

Upon reviewing the drawings, the agency determined that the asbestos drawings were inaccurate. Specifically, the contracting officer concluded that application of the scale provided on the asbestos drawings resulted in an understatement of the asbestos removal work by between 10,000 and 20,000 square feet. The contracting officer further determined that the scale and dimensions contained in the architectural drawings and the site plan drawing accurately reflected the actual dimensions. Accordingly, on March 31, the agency issued amendment No. 0005 which stated:

"All contractors shall note that the HAZARDOUS MATERIAL ABATEMENT - PARTIAL ROOF PLAN drawings AB-1, AB-2, and AB-3 are published at a slightly smaller scale than the 1/16" = 1'0" indication noted on the plans. The actual dimensions for the roof shall be as numerically labeled and shown on the Site Plan sheet SP-1, the architectural drawings A-1 thorough A-7 and the details as described throughout the remainder of the set."

On April 5, Hackney telecopied an acknowledgment of amendment No. 0005 to the agency. That same day, the agency contacted Hackney by telephone to remind it that the solicitation did not permit submission of bids or acknowledgment of amendments by facsimile. Hackney subsequently mailed an acknowledgment of the amendment to the agency; that acknowledgment was not received until 3 days after bid opening.

Bid opening took place on April 10. At that time, Hackney was determined to be the low bidder at \$1,690,000. The second-low bidder submitted a bid of \$1,837,600.³ Upon review, the agency determined that Hackney's low bid was nonresponsive for failure to acknowledge amendment No. 0005; the contract was subsequently awarded to the second-low bidder. This protest followed.

DISCUSSION

Hackney first argues that its bid should have been found responsive based on either the facsimile acknowledgment of amendment No. 0005 sent prior to bid opening, or the mailed acknowledgment which the agency received after bid opening. We disagree.

³A total of 19 bids were received ranging from \$1,690,000 to \$2,827,500. The government estimate for the procurement was \$2,077,454.

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 obligated to comply with the terms of the amendment, and its bid is thus nonresponsive. Tri-Tech Int'l, Inc., B-246701, Mar. 23, 1992, 92-1 CPD ¶ 304. Bidders are responsible for the timely delivery of their bids and amendments, and late delivery generally requires the bid's rejection. MAPA Pioneer Corp., B-231517, Sept. 13, 1988, 88-2 CPD ¶ 232.

Hackney does not dispute that the provisions of the solicitation did not permit submission of bids or amendments by facsimile; neither does Hackney dispute that the agency specifically called its attention to this matter on April 5, after Hackney's facsimile was sent. Accordingly, Hackney's facsimile transmission did not constitute acknowledgment of the amendment. See Recreonics Corp., B-246339, Mar. 2, 1992, 92-1 CPD ¶ 249; Mabuhay Bldg. Maintenance Co., Inc., B-241908, Nov. 23, 1990, 90-2 CPD ¶ 424.

There is also no dispute that Hackney's mailed acknowledgment was not received by the agency until after bid opening. To be effective, an acknowledgment must be submitted prior to bid opening. Ira Gelber Food Servs., Inc., 55 Comp. Gen. 599, 601 (1975), 75-2 CPD ¶ 415; Navaho Corp., B-192620, Jan. 16, 1979, 79-1 CPD ¶ 24. A bid that is nonresponsive may not be made responsive after bid opening because the bidder would have the competitive advantage of choosing to accept or reject the contract after bids are exposed. Avantek, Inc., B-219622, Aug. 8, 1985, 85-2 CPD ¶ 150. Here, Hackney's mailed acknowledgment, received after bid opening, did not provide a basis for accepting its bid.

Hackney alternatively asserts that its failure to timely acknowledge amendment No. 0005 should have been waived as a minor informality. Hackney contends that, because the architectural drawings and site plan indicated the actual roof dimensions, amendment No. 0005 merely clarified the solicitation's existing requirements and thus did not reflect a material change. We disagree.

The Federal Acquisition Regulation (FAR) provides that an amendment is material where it would have more than a negligible impact on price, quantity, quality, or delivery of the item solicited. See FAR § 14.405(d)(2). No precise rule exists to determine whether a change required by an amendment is more than negligible; rather, that determination is based on the facts of each case. Central Atl. Contractors, Inc., B-243663, Aug. 14, 1991, 91-2 CPD ¶ 146.

Here, the asbestos drawings--which were included in the solicitation package for the sole purpose of identifying the portions of the roof where asbestos would have to be removed--understated the amount of work that bidders could expect to perform. Thus, the specific drawing on which offerors were expected to rely in preparing the asbestos removal portion of their bids provided inaccurate and misleading dimensions.⁴ Further, prior to issuing amendment No. 0005, the agency was on notice of both the error and the fact that bidders were relying to their detriment on the inaccurate drawing. The agency issued amendment No. 0005 to ensure that all offerors were preparing their bids on an equal basis and to prevent this matter from becoming a subject of dispute during contract performance.

A procuring agency is not required to enter into a contract which presents the potential for litigation stemming from an ambiguity in the solicitation. Air Quality Experts, Inc., B-256444, June 15, 1994, 94-1 CPD ¶ 374. Rather, an agency has an affirmative obligation to avoid potential litigation by resolving solicitation ambiguities prior to bid opening. Amendments clarifying matters which could otherwise engender disputes during contract performance are generally material and must be acknowledged. Id.

Here, it is clear the agency had a legitimate basis for its concern that the inconsistency between the drawings could result in the submission of bids based on inaccurate data and, subsequently, form the basis for a dispute between the parties. See, e.g., Sommers Bldg. Co., Inc., ASBCA No. 32232, 86-3 BCA ¶ 19,223 (1986) (dispute between agency and contractor based on inconsistent specifications). In the absence of the amendment, the winning contractor ultimately could have argued that it was entitled to a price increase because the asbestos drawings inaccurately indicated the likely amount of asbestos to be removed. Thus, the amendment did more than clarify agency requirements--it established as clearly as the agency could what the actual dimensions of the asbestos removal area would be, thereby obligating the winning bidder to remove all asbestos discovered at the contract price.⁵

⁴This understatement was clearly material to the offerors since the solicitation specifically provided that all asbestos would have to be removed for the price offered, regardless of the actual amount of asbestos found in the roof.

⁵Hackney also argues that the "order of precedence" clause in the solicitation rendered amendment No. 0005 immaterial in that it effectively provided a basis for offerors to

(continued...)

Accordingly, the amendment was material and the agency properly rejected Hackney's bid for failure to acknowledge a material amendment.

The protest is denied.

\s\ Ronald Berger
for Robert P. Murphy
General Counsel

⁵(...continued)
determine which of the drawings should have been relied on in preparing their bids. We disagree. The solicitation clause stated:

"Large scale drawings shall, in general, govern small scale drawings. Figures marked on drawings shall, in general, be followed in preference to scale measurements."

The architectural drawings and site plan contained dimensional figures for some, but not all, of the roof dimensions; for portions of the roof where actual dimensions were not listed, bidders were required to revert to the scale drawings for their calculations. Since the asbestos drawings were drawn to a larger scale than the site plan drawing, and to the same size scale as the architectural drawings, the above "order of precedence" clause failed to establish a definitive order of precedence between the accurate site plan and architectural drawings and the inaccurate asbestos drawings.