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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Takota Corporation

File: B-294104

Date: July 30, 2004

Robert J. Symon, Esq., and Christyne K. Brennan, Esq., Spriggs & Hollingsworth, for the protester.

Timothy A. Chenault, Esq., Department of Homeland Security, U.S. Coast Guard, for the agency.

Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected as nonresponsive a bid that failed to acknowledge an amendment that, read in a reasonable manner, added significant work that was not included in the solicitation as issued, and therefore was material.

DECISION

Takota Corporation protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. HSCG-82-04B-3ACP03, issued by the Department of Homeland Security, U.S. Coast Guard for the construction of the Galveston Bay entrance range structures and salvage of existing range structures. Takota's bid was rejected for failure to acknowledge amendment No. 0002 to the IFB. Takota maintains that its failure to acknowledge the amendment should be waived.

We deny the protest.

The solicitation, posted on the Federal Business Opportunities website on March 25, 2004, called for the fabrication and installation of one offshore entrance range light in Galveston Bay and one land-based rear range light on Bolivar Peninsula, north of Galveston, and the salvage and removal of the existing structures at both sites. As relevant here, IFB § 02950, Offshore and Onshore Salvage and Removal, provided that the contractor shall "remove and dispose of the existing Galveston Entrance Range 'A' Rear and Front Structures," and that "[c]ontractor will salvage and remove the existing structures." IFB § 02950, ¶ 1.1, at 1.

After the solicitation was issued, the Coast Guard received an inquiry from a potential bidder asking, among other things, whether the contractor was required to remove the concrete slabs at the front and rear range entrances. Agency Report (AR), Tab 6, Bidder Inquiry, at 1. In response, the agency issued amendment No. 0002, which, in relevant part, provided: “Front Range: Contractor shall abandon the slab in place. . . . Rear Range: Contractor shall remove the slab, and restore the soil to natural grade. No piles are known at the rear range location. If there are piles, they may be abandoned in place.” IFB, amend. 0002, at 2.

Three bids were received by the April 28 bid opening, including Takota’s apparent low bid of \$1,074,000. After the agency notified Takota that it had failed to acknowledge amendment No. 0002, Takota advised the Coast Guard that it had received and read the amendment, and that the amendment “did not have anything within it that would have changed either our bid or the cost of the construction.” AR, Tab 11, Letter from Takota to the Contract Specialist, Apr. 28, 2004, at 1. However, the agency determined that the amendment was material—in particular, due to the requirement that the rear range slab be removed, work valued by the agency at approximately \$18,100—in that it specified additional work with a value greater than the difference between Takota’s bid and the next low bid (\$13,350). AR, Tab 20, Government Estimate for Concrete Removal, at 1; Tab 8, Abstract of Bids, at 1-2; Tab 15, Legal Memorandum, at 4. The agency therefore rejected Takota’s bid as nonresponsive for failure to acknowledge the amendment. Takota filed this protest with our Office on May 20.

Takota contends that amendment No. 0002 was not material, and that its failure to acknowledge it thus should be waived as a minor informality, because the original IFB language already required that the rear concrete slab be removed (and the other changes, by themselves, were not material). It cites in this regard section 02950, paragraph 1.1, which stated that the contractor was to salvage and remove “the existing structures” at both the front and rear range entrances. Protester’s Comments at 5. Takota reads the reference to “structures” as including the slabs.

A bid that 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. Eagle Const. Servs., Inc., B-257841, Nov. 10, 1994, 94-2 CPD ¶ 181 at 2. An amendment is material where it imposes legal obligations on the contractor that were not contained in the original solicitation, 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. Id. at 2-3. 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.

A solicitation ambiguity exists where two or more reasonable interpretations of the terms of the solicitation are possible. Ashe Facility Servs., Inc., B-292218.3, Mar. 31, 2004, 2004 CPD ¶ 80 at 10. To be reasonable, an interpretation must be consistent

with the solicitation read as a whole and in a reasonable manner. Malkin Elecs. Int'l, Ltd., B-228886, Dec. 14, 1987, 87-2 CPD ¶ 586 at 4.

Since the IFB did not expressly define the term “structure(s),” the dispute here turns solely on the question of whether, reading the IFB as a whole, that term reasonably could be read as referring only to the towers; if so, the amendment was material because it was necessary to clearly establish removal of the rear range slab as a contract requirement.

We find that, as issued, the IFB was not clear as to whether the slab was to be removed. Our conclusion rests on our reading of the language in IFB § 010101, General Requirements, which provides that

[t]he Range Front structure is a four-legged angle iron structure, approximately 20 feet high, anchored to a concrete slab approximately 5' x 7' x 2'. The tower and slab are resting on the jetty capstones. The Range Rear structure is land-based on the Bolivar Peninsula. It is a Free standing steel galvanized tower approximately 90' tall bolted to a 23' x 23' x 4' thick concrete foundation.

Id., ¶ 1.1.2, at 1. We think it is possible to read this language as the protester suggests—because “the Range Front structure” (the description is similar for “the Range Rear structure”) was described as comprised of an “iron structure . . . anchored to a concrete slab,” the requirement for removal of the “structure(s)” encompassed removal of the slab. However, we think it also is possible to read the provision as the agency did—because the language also refers to the tower itself as “a four-legged angle iron structure,” the IFB as issued could be read as requiring removal of only the tower “structure(s).” Under these circumstances—where both interpretations of the IFB requirements were reasonable—the IFB as issued was ambiguous, and the amendment was necessary to require removal of the rear range slab. Since the estimated cost of removal of the slab was greater than the difference between Takota’s and the next lowest bid—and therefore could have affected the outcome of the competition, assuming that one bidder may have included the cost while the other did not—the amendment was material. Takota’s bid therefore was properly rejected as nonresponsive for failing to acknowledge the amendment. Eagle Const. Servs., Inc., *supra*, at 4.

The protest is denied.

Anthony H. Gamboa
General Counsel