

Protest of) Date: December 1, 1987
THE G-S COMPANY)
Solicitation No. 419980-87-A-0083) P.S. Protest No. 87-94

DECISION

The G-S Company of Baltimore, Maryland, timely protests the contracting officer's determination that the failure of the apparent low bidder under Solicitation No. 419980-87-A-0083^{1/} to acknowledge an amendment to the solicitation, and its failure to submit PS Forms 7319-B and 7319-C with its bid, were minor informalities.

Background

Solicitation No. 419980-87-A-0083, calling for safety modifications at the Philadelphia BMC, was issued July 27, 1987, by the Facilities Service Center at Philadelphia, PA.

Amendment No. 1 to the solicitation, which was issued August 24, changed the specifications in four areas, and described the changes as "clarifications to the Invitation for Bid based on questions raised at the pre-bid conference." The amendment did not alter the bid opening date of August 31, 1987.

The first of the amendment's four changes affected part 4.9.2 of the specifications. In the solicitation, that section of the specification referred to part 6.5.1.2 for the maximum size of openings in floors and decking; however, the maximum sizes were not shown in part 6.5.1.2. The amendment added specifications for panel size and surface and for the maximum size of openings.

The second provision of the solicitation affected by the amendment was part 4.9.7.3. (and corresponding drawings), which initially called for pipe of "at least 1-1/2 inches nominal diameter" for railings. The amendment required 1-1/2 inches "minimum diameter (1-1/4 inch schedule 40 pipe is acceptable)" and referenced OSHA standards.

^{1/} In referring the protest to the General Counsel, the contracting officer identified the solicitation as No. 419980-87-A-0062. However, the solicitation itself and the relevant documents, including G-S Company's protest, refer to Solicitation No. 419980-87-A-0083.

Item 3.12.7, which requires as-built drawings, was the subject of the third change effected by the amendment. Within that section the requirement that the drawings include shop drawings was changed to include arrangement and shop drawings. The requirement that the drawings cover "the entire installation was changed to a requirement that the drawings cover "all work performed by the contractor." The amendment also explained that the contractor would be required to show all field changes, but would not be required to change "existing facility drawings or A&E bid documents."

The fourth change made by the amendment altered the requirement for steel calculations. Whereas the solicitation had required such calculations for all "new or relocated steel," the amendment required that the calculations be provided for "all new, relocated or additionally loaded structural support steel." It noted that the requirement did not apply to "walkway stringers, platform joists and similar minor steel."

When bids were opened on August 31, the bid submitted by Harding Erectors, Inc. (Harding), in the amount of \$1,576,356, was low. The second low bid, in the amount of \$1,698,768, was submitted by the protester. The contracting officer noted that Harding had failed to acknowledge Amendment No. 1, and had also failed to submit PS Forms 7319-B and 7319-C, Representations and Certifications. However, the contracting officer determined that both matters were minor informalities. Harding acknowledged receipt of the amendment, and submitted the required forms, shortly after bid opening.

On September 11, 1987, the contracting officer awarded the contract to Harding. G-S Company's protest was received by the contracting officer on September 14. The protest is based on the failure of Harding to acknowledge the amendment, and its failure to submit PS Forms 7319-B and 7319-C with its bid. Pursuant to Postal Contracting Manual (PCM) 2-407.8 e., the contracting officer referred the protest to this office.

In its protest, G-S Company asserts that neither failure by Harding could properly be treated as a minor informality. However, in comments dated September 22, GS Company identifies Harding's failure to acknowledge Amendment No. 1 as the central issue presented by its protest. G-S Company asserts that Amendment No. 1 had the effect of requiring the use of grating materials that are more expensive than materials that would have been required under the solicitation in its original form. Thus, G-S Company asserts that the amendment had a direct effect on price. Citing a number of Comptroller General decisions, G-S Company further argues that a failure of a bidder to acknowledge any amendment before bid opening is fatal.

In its September 21 comments to G-S Company's protest, Harding asserts that failure to acknowledge an amendment can be waived where the amendment is "trivial" or "negligible." Harding argues that in Fortec Constructors, 52 Comp. Gen. 544 (1973), the Comptroller General held that the failure to acknowledge an amendment that would increase the price of a project by \$966 was not material, given that the low bid was greater than \$700,000. By contrast, Harding asserts, Amendment No. 1 to the instant solicitation resulted in no additional cost. Harding also states that it intends to be bound by the terms of the amendment, as evidenced by its acknowledgment of the amendment prior to award. Finally, Harding cites Comptroller General decisions in support of its argument that its failure to submit PS Forms 7319-B and 7319-C with its

bid should be treated as a minor informality.

At our request, the contracting officer provided an estimate of the effect of the changes required by Amendment No. 1 on prospective contractors' costs. A separate estimate, based upon the accompanying opinion of the Postal Service's architect-engineer firm, was provided for each of the four changes described above. As is explained more fully below, the contracting officer concluded that the first change had no impact on costs, that the second and third changes would have reduced costs by \$1241 and \$10,250 respectively, and that the fourth produced a cost increase of \$2,000. The contracting officer's estimate and the supporting letter from the architect-engineer firm were provided to G-S Company and Harding; no comments were received in rebuttal.

Discussion

Of the two grounds for its protest -- failure to submit Forms 7319-B and 7319-C and failure to acknowledge the amendment to the solicitation -- G-S Company implicitly acknowledges that the latter is the stronger. Harding's failure to submit Forms 7319-B and 7319-C was properly waived as a minor informality. Alaska Mechanical, Inc., P.S. Protest No. 85-88, December 4, 1985; Structures, Inc., P.S. Protest No. 83-21, April 28, 1983. Thus, the remaining question centers on Harding's failure to acknowledge in its bid Amendment No. 1 to the solicitation.

The standards applicable in cases of failure to acknowledge an amendment are well developed in our precedents.

As a general rule, a bidder's failure to acknowledge an amendment prior to bid opening renders the bid nonresponsive. Air Conditioning, Plumbing & Heating Service Co., Inc., [P.S. Protest No. 80-7, April 21, 1980]. The Postal Contracting Manual recognized two exceptions to this rule. First, the failure to acknowledge receipt of an amendment may be waived as a minor informality or irregularity if the amendment involves only a matter of form or "clearly would have no effect or negligible effect on price, quality, quantity, delivery, or the relative standing of bidders." The second exception is that failure to acknowledge receipt of an amendment may be waived or cured "if the bid received clearly indicates that the bidder received the amendment."

Mattox Motor Service, P.S. Protest No. 83-36, August 12, 1983 (citation omitted). There is no assertion in the parties' submissions, or any indication in the materials before us, that Harding's bid indicated clearly that it had received the amendment. However, both the contracting officer and Harding rely on the first exception noted above, that for amendments having clearly no effect or a negligible effect on price, quantity, delivery, or relative standing of bidders. G-S Company, on the other hand, contends that Amendment No. 1 to the solicitation was material, and that Harding's failure to acknowledge it rendered its bid nonresponsive.

As noted above, the first of the amendment's four changes stated the requirements for the maximum size of openings in floors and grating. The requirements themselves were omitted from the original specifications; however, the maximum sizes stated in the

amendment were taken from an OSHA standard that had been referenced in paragraph 2.1.5.1.6 of the original specifications. That paragraph subjected the contractor to the OSHA standards, and expressly gave the OSHA standards precedence where they were more stringent than the stated specifications. Failure to acknowledge such a clarification, which does not alter the contractor's obligations or its legal relationship to the Postal Service, does not require rejection of Harding's bid. See Warfield and Sanford, Inc., Comp. Gen. Dec. B-223976, October 23, 1986, 86-2 CPD & 448.

Both the second and third changes effected by Amendment No. 1 potentially reduced the cost of compliance with the specifications. Although the contracting officer's estimate, as supported by the Postal Service architect, recognizes that these two changes address matters of confusion in, or interpretation of, the specifications as originally issued, they do so in a manner that allows for the provision of smaller pipe and less extensive drawings. Any failure of Harding to consider and incorporate the changes in the preparation of its bid would merely have increased the costs of its planned performance, and worsened its standing relative to G-S Company and the other bidders. Failure to acknowledge a change that reduces the cost of performance does not require the rejection of Harding's bid. See Imperial Fashions, Inc., Comp. Gen. Dec. B-182252, January 24, 1975, 75-1 CPD & 45; 41 Comp. Gen. 550, 553 (1962); see also Mer-Cal Construction Company, P.S. Protest No. 80-59, September 30, 1980.

The amendment's fourth change is the only element of the amendment having the effect of increasing the cost of performance for the successful bidder. In determining whether the estimated \$2,000 increase in the cost of performance is trivial or negligible, we compare the cost increase to both the overall scope of the work and the difference between the two lowest bids. See Pearson Construction Co. Ltd., P.S. Protest No. 86-24, May 19, 1986.

The determination of whether a difference in cost is trivial or negligible is not susceptible to mathematical formula, but must be made on the basis of the facts of each case. Wirco, Inc., Comp. Gen. Dec. B-220327, January 29, 1986, 86-1 CPD & 103. Recognizing the importance of maintaining the integrity of the competitive bidding process, protest decisions have generally taken a narrow view of the exception for unacknowledged amendments of negligible effect. See, e.g., Government Contract Services, Inc.; Daly Construction, Inc., P.S. Protest No. 85-95, January 21, 1986 (difference of 5% of bid and 30% of difference between low bids not negligible); AFB Contractors, Inc., Comp. Gen. Dec. B-181801, December 12, 1974, 74-2 CPD & 329 (0.9% of apparent low bid and 14.8% of difference between low bids not negligible). Although the criterion for negligibility is stringent, the standard is not an impossible one to meet. See, e.g., Fortec Constructors, supra (0.1% of cost of job and 5.7% of difference between low bids negligible).

In the instant case, the estimated cost increase of \$2,000 represents 0.1% of Harding's bid, and 1.6% of the difference between Harding's low bid and that submitted by G-S Company. These extremely small percentages, combined with the fact that the cost of additional steel calculations was more than offset by cost-reducing changes in the same, unacknowledged amendment, leads us to conclude that the contracting officer correctly determined that the amendment had merely a trivial or negligible effect on

price, quality, quantity or delivery.¹⁴ Thus, the contracting officer properly waived Harding's failure to acknowledge the amendment as a minor informality.

The protest is denied.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Compared to original 3/12/93 WJJ]

¹⁴ G-S Company cites Reliable Building Maintenance, Comp. Gen Dec. B-211598, September 19, 1983, 83-2 CPD & 344, for the proposition that an amendment may be material even where there is little or no effect on the bid price or the work to be performed. However, this proposition, while correct, does not vitiate the "negligible or trivial effect" exception. Rather, it recognizes that considerations other than design or price may render an amendment material. In Reliable Building Maintenance, and cases cited therein, the Comptroller General recognized that amendments imposing new legal obligations on the contractor -- such as liquidated damages provisions, an additional testing requirement, or the addition of new types of contract work -- may be material without regard to their effect on price. Our decisions have likewise recognized materiality not based upon significant cost impact. See, e.g., East River Construction Co., P.S. Protest No. 86-51, August 21, 1986. In the instant case, however, the cost-increasing element of the amendment simply increased the number of steel calculations to be provided by the successful bidder.