

Protest of) Date: September 2, 1987
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HAROLD J. BECKER CO., INC.)
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Solicitation No. 209986-87-A-0057) P.S. Protest No. 87-54

DECISION

Harold J. Becker Co., Inc. (Becker), timely protests the contracting officer's determination that the bid of Mid-American Roofing and Sheetmetal Co., Inc. (Mid-American), was responsive, and the subsequent award of the contract under Invitation For Bids No. 209986-87-A-0057 (IFB) to Mid-American.

The IFB, issued by the Postal Service Facilities Service Office, Louisville, KY, solicited bids for reroofing services at the Main Post Office and Vehicle Maintenance Facility at Dayton, OH, April 10, 1987. Addendum 1, an amendment consisting of three pages of additions and clarifications, was issued April 28.^{1/} Seven bids were " received May 7, of which Mid-American's bid of \$371,420 was low. However, Mid-American failed to acknowledge receipt of Addendum 1. Becker's bid of \$372,776, which did acknowledge the amendment, was second low.

The contracting officer determined that Mid-American's failure to acknowledge Addendum 1 was a minor informality, as the amendment had a negligible effect on price, quality, quantity or delivery of services, and waived the informality pursuant to Postal Contracting Manual (PCM) 2-405. Becker protested this decision on May 10, 1987, claiming that Addendum 1 included significant cost items. Becker argues that Mid-American's bid must be rejected as nonresponsive.^{1/} Becker claims that items 1 and 6 of Addendum 1 were items of additional work beyond that called for in the original IFB, would cause an increase in the contractor's cost of performance, and, therefore, cannot be disregarded as minor informalities. The items in question provided as follows:

Item 1 - Division 1, Section B-4, Special Provisions:
Paragraph 14, Items C" and "D"

^{1/}Another amendment, also numbered 1, was dated April 6 and dealt with wage rates. It was issued with the IFB and was included in the specifications as Appendix IV, section 1B-8.

^{2/} Subsequent to the filing of this protest, the contracting officer requested award be immediately made to Mid-American, as the roof repair was an emergency. Approval was received to proceed with the award from the Regional Postmaster General, who determined that the Postal Service will be seriously injured financially or otherwise if award is delayed until protest resolution. Pursuant to PCM 2-407.8 g, the contracting officer, as authorized, awarded the contract to Mid-American on June 19.

Sanitary Facilities:

The contractor must provide temporary sanitary facilities for construction personnel. There will be no construction personnel permitted within USPS facilities at any time.

Item 6 - ADD:

Section 15400, Plumbing, Part 3, Execution:

All roof drains on Buildings "B" and "C" shall be mechanically cleaned, clear to main sewer system at the completion of work.

A water test must be performed to assure the integrity of the roof drain system. Any or all leaks in system will be repaired by the contractor to the satisfaction of the quality control inspector.

The contracting officer determined that the above provisions would have a "very negligible effect on price, quality, quantity or delivery of the supplies or performance of the services being procured. The amendment consisted primarily of clarifications to the specifications." The contracting officer therefore waived Mid-American's failure to acknowledge the amendment pursuant to PCM 2-405, "Minor Informalities or Irregularities in Bid".^{1/} Becker asserts that Item 1 is a cost item, although it admits that Item 1 standing alone could be considered to have a negligible effect on price. Its main contention is that Item 6 is a significant cost item. Becker includes a May 6 price quote from Clemens & Company Inc. (Clemens) which it claims was used in preparing its bid. The \$3200 price quote covers cleaning, flushing and testing of roof drains of Buildings "B" and "C". The \$3200 quote represents more than the \$1356 difference between the bids of Becker and Mid-American, and so, argues Becker, failure to acknowledge the amendment cannot be dismissed as a minor informality.

The contracting officer asserts that Clemens' price quote was primarily for work covered in the original specifications,^{1/} not the Addendum 1 clarifications. The contracting officer claims that the purpose of Item 6 was to clarify the requirement that the cleaning of the drains was to be done by a mechanical method and that all leaks were to be repaired by the contractor. He states that the amendment served merely as clarification and need not have been issued. As no additional work was specified, the contracting officer believes that the failure to acknowledge receipt of the amendment is a minor informality as there is a very negligible effect on price.

Mid-American, the eventual contract awardee, submitted comments. While admitting that it failed to acknowledge Addendum 1 due to a clerical error, Mid-American states that the amendment was unnecessary as it served merely to clarify items already covered by the specifications. It claims that the amendment did not affect its bid. Specifically, Mid-American asserts that it was aware of the need for the sanitary

^{3/}PCM 2-405 states:

A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured, and the ... waiver of which would not affect the relative standing of, or be otherwise prejudicial to, bidders. The contracting officer shall ... waive any such deficiency where it is to the advantage of the Postal Service. Examples of minor informalities include: ... (3) Failure of a bidder to acknowledge receipt of an amendment to an invitation for bids, but only if ... the amendment clearly would have no effect or negligible effect on price, quality, quantity, delivery, or the relative standing of bidders.

^{4/}Section 01010, "Plumbing Work", of the original specifications provides: "Clean out existing drain lines down to the sewer system. Replace clamping bolts and damaged rings and related items. Replace damaged drain covers."

Section 15400 - Plumbing, states: "(1) Clean the existing drain lines from the roof surface down to the sewer system to assure proper drainage. (2) Replace broken or missing clamping rings at drains with new parts to match existing. (3) Replace existing drain bolts/clamps with new parts to match existing. (4) Replace existing damaged drain covers with new covers to match existing.... At completion of cleaning the drains, a water test must be performed."

facilities which were the subject of Item 1 and that this item had no effect on price. As for Item 6, Mid-American directs our attention to Plumbing Section 01010 of the original specifications, requiring the contractor to clean out the existing drain lines. It also points out that Section 15400 of the original specifications covers the entire plumbing requirements in detail. The only new item in the amendment, according to Mid-American, is that Buildings "B" and "C" were to have their drains done. Mid-American claims however, that industry practice is that specifications cover all buildings to be worked on where the base specifications do not mention any specific buildings.

We begin with the general proposition that where a bidder fails to acknowledge a material IFB amendment, the bid must be rejected as nonresponsive. Aleman Roofing Company, P.S. Protest No. 84-74, December 24, 1984. An amendment is material if it affects a bidder's price or the quantity, quality or delivery terms of the IFB in more than a trivial or negligible manner. Id. The failure to respond to a nonmaterial amendment can be waived as a minor informality. PCM 2-405.

The protester claims that the amendment caused a \$3200 increase in its bid. This amounts to only .86% of its bid, but accounts for 235% of the difference between its second low bid and Mid-American's low bid, thereby affecting their relative standing. We have previously held that whether or not a change affected by an amendment was trivial or negligible must be determined in relation to the overall scope of the work and the difference between the low bids. W.A. Thomas Inc., P.S. Protest No. 80-64, November 13, 1980. In Thomas, the increase caused by an amendment was only .96% of the bid but represented 120% of the difference between the low and second low bids. Such a change caused by an amendment was held material. Therefore, if Becker's bid was increased by \$3200 because of the amendment, as the protester claims, then the amendment is material and could not be waived by the contracting officer as a minor informality.

The contracting officer asserts however, that Becker's \$3200 price quote was for services included in the original specifications. The Comptroller General has held that "an amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation, that is, for example, it merely clarifies an existing requirement. In that case, the failure to acknowledge the amendment may be waived and the bid may be accepted." Pittman Mechanical Contractors, Inc., Comp. Gen. Dec. B-225486, February 25, 1987, 87-1 CPD & 218. See also Four Seasons Maintenance Inc., Comp. Gen. Dec. B-213459, March 12, 1984, 84-1 CPD & 284. Simply put, an amendment is deemed nonmaterial where no substantive additional or different requirement is imposed on the bidders from that in the unamended IFB. Emmett R. Woody, Comp. Gen. Dec. B-213201, January 26, 1984, 84-1 CPD & 123. We adopt this position as a logical corollary of PCM 2-405. Should the contracting officer's determination that the amendment added no further requirements be accepted, the amendment must be deemed nonmaterial and the failure to acknowledge it properly waived as a minor informality.

The protest boils down to a factual dispute therefore, centering around whether Items 1 and 6 of Addendum 1 changed the legal obligations of bidders. The protester concedes that Item 1, concerning contractor provided sanitary facilities, would have a negligible effect on price.

The resolution of the dispute as to Item 6, requiring the contractor to clean mechanically all roof drains on Buildings "B" and "C" to the main sewer system, necessitates a comparison of the amendment language to that of the solicitation. Such a comparison reveals that the only differences are the naming of Buildings "B" and "C" and that cleaning is to be done "mechanically". Both buildings were covered in the original specifications, which required "cleaning drains down to the sewer system", and required work be done on several buildings, including "B" and "C". It is apparent that the drain work was to be done on all buildings involved, as Mid-American contends industry custom would require. Since such work was required in the first instance, it is doubtful that mandating it be done "mechanically" had any real effect on price. The water test and systems repairs called for in the amendment were also set forth in the prior specifications. The likely purpose of Item 6 appears to be one of clarification, as stated by the contracting officer.

Any doubts as to the proper resolution of this factual dispute must be resolved in favor of the contracting officer. Conclusions of the contracting officer are accorded a "presumption of correctness" which the protester must overcome. Edsal Machine Products Inc., P.S. Protest No. 85-84, January 29, 1986. Becker has failed to carry its burden. We therefore hold that Addendum 1 is a nonmaterial amendment. Mid-American's failure to acknowledge it was properly waived by the contracting officer as a minor informality. The bid was, therefore, properly deemed responsive.

The protest is denied.

William J. Jones
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Office of Contracts and Property Law

[Compared to original 3/5/93 WJJ]