

Protest of)
SOUTHSTAR CONSTRUCTION COMPANY) Date: December 27, 1988
Solicitation No. 489986-88-A-0131) P.S. Protest No. 88-72

DECISION

Southstar Construction Company (Southstar) protests the contracting officer's determination that its bid under Invitation for Bid (IFB) No. 489986-88-A-0131 was nonresponsive for failure to acknowledge receipt of an amendment to the solicitation.

IFB No. 489986-88-A-0131, issued July 6, 1988, by the Dallas Facilities Service Office (FSO), sought bids to clean and paint the interior and exterior of the Pasadena, TX, Main Post Office. The original bid opening date was August 9. There were four amendments to the solicitation. Amendment Nos. 1 and 2 merely extended the bid opening date, ultimately to September 22. Amendment No. 3, issued September 2, transmitted contract specifications and drawings A1, A2 and A3, describing substantial additional work to be performed and increased the estimated cost range for the procurement from \$53,000 - \$63,000 to \$130,000 - \$140,000. The specifications and drawings of Amendment No. 3 included contract provisions requiring chemically cleaning existing ceiling tiles. Note No. 20 of contract drawing A1, provides:

Replace Damaged & Water Stained Ceiling Tiles To Match Existing.
Chemically Clean Existing Tiles.

Section 3.04 of specification 09511, Suspended Acoustical Ceiling, added by Amendment No. 3, provides:

A. Clean ceiling tiles and grid with a spray-on chemical process provided by All-Brite Cleaning Systems, Inc., phone (713) 447-6554, or approved equal. Rusted grid: remove rust; prime; and paint as required. Match existing color.

Amendment No. 4, issued September 9, 1988, included specifications prescribing procedures for chemically cleaning the ceiling surface. The amendment also required

bidders to complete and submit an alternate bid price on an attachment titled "Supplement 1 To P.S. Form 7388," apparently for replacement, as indicated in Note No. 20 of drawing A1, of damaged and water stained ceiling tile where noted on the drawing in lieu of cleaning.

Each amendment required that bidders acknowledge its receipt by signing and returning one copy of the amendment, acknowledging receipt on each copy of the bid submitted, or submitting a separate letter or telegram including reference to the solicitation and amendment number. Block 5, PS Form 7330, Amendment - Modification.

Bids were opened September 22. The low bid submitted by Woodrow Decorators was rejected because it failed to acknowledge Amendments Nos. 2, 3 and 4. Southstar's bid of \$129,500 was second low, and it too was determined to be nonresponsive by the contracting officer, since the protester had not acknowledged receipt of Amendment No. 4. The contracting officer advised Southstar of this determination in a telephone conversation September 30 and confirmed that advice by a letter to Southstar dated October 3.

Southstar timely protested the rejection of its bid in a letter received by the contracting officer October 13. The contracting officer referred the protest to this office pursuant to Postal Contracting Manual (PCM) 2-407.8. In that letter, protester's counsel contends that Southstar never received Amendment No. 4 but that, nevertheless, Southstar included in its bid "a dollar amount for each separate item of the project, including the item covered in Amendment No. 4."

In his report to this office, the contracting officer contends that the bid was unacceptable because Southstar did not acknowledge receipt of Amendment No. 4. The contracting officer states that the procedures prescribed in the amendment for cleaning the ceiling surface were not acknowledged and that, consequently, he was unable to determine from the bid whether Southstar agreed to adhere to those procedures. The contracting officer, moreover, states that Southstar did not provide an alternate price, as required by the amendment. Implicit in the report is the contracting officer's contention that the amendment was material.

By letter dated November 7, protester's counsel submitted comments in rebuttal to the contracting officer's report. That rebuttal cited Note No. 20 of contract drawing A1 and section 3.04, "Ceiling Tile Cleaning," of specification 09511 accompanying Amendment No. 3 and argues that, although Southstar never received Amendment No. 4, it "fully complied with the intent of the amendment." Aside from quoting the drawing and specification the comments repeated issues raised in Southstar's earlier letter.

Discussion

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 recognizes 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." PCM 2-405 (3)....

Mattox Motor Service, P.S. Protest No. 83-36, August 12, 1983 (citation omitted). Neither exception is applicable here. Southstar admits not receiving the amendment^{1/} so the second exception could not apply. To prevail, therefore, the protester must demonstrate that Amendment No. 4 had clearly no effect or a negligible effect on price, quality, quantity, delivery, or relative standing of bidders.

An amendment is material if it has more than a trivial or negligible effect on price, quality, quantity or delivery of the item or service bid upon (Aerial Service Corp., Comp. Gen. Dec. B-209761.2, May 24, 1983, 83-1 CPD & 559), and failure to acknowledge a material amendment is grounds for rejection of the bid because the government's acceptance of such a bid would not legally obligate the contractor to meet the government's needs as identified in the amended solicitation. Id; Government Contract Services, Inc., Daly Construction Inc., P.S. Protest No. 85-95, January 21, 1986; AJF Leasing, P.S. Protest No. 83-66, November 10, 1983.

While the specifications issued under Amendment No. 3 required bidders to clean ceiling tiles, nowhere do they either directly or indirectly obligate a potential contractor to perform the work in accordance with the requirements established in Amendment No. 4. That amendment was specific as to the cleaning processes, cleaning solutions, equipment and specialized services required. For example, Amendment No. 4

^{1/}A bidder's failure to acknowledge a material amendment resulting from its nonreceipt of the amendment does not excuse a nonresponsive bid provided the nonreceipt is not the result of a conscious and deliberate attempt to preclude the bidder from participating in the competition. The bidder bears the risk of nonreceipt of an amendment. H.A. Dorsten, Inc., P.S. Protest No. 87-42, June 22, 1987; Aleman Roofing Company, P.S. Protest No. 84-74, December 24, 1984; accord AAMCO Transmission, P.S. Protest No. 80-24, October 30, 1980. Since there is no suggestion that the FSO attempted to preclude Southstar from the competition, Southstar's claim that it did not receive the amendment does not afford a basis for relief from its failure to acknowledge Amendment No. 4.

specified that USDA approved cleaning solutions be used, that OSHA approved equipment rated acceptable by the American Society of Mechanical Engineers be utilized, that trained, authorized personnel handle the chemical solutions, that agreed upon times be established for the work to be done, and that certain health and safety standards be followed. Unlike Amendment No. 3, which required that only the ceiling tiles and grids be cleaned, Amendment No. 4 also specified that diffusers, speaker grills and the outside surfaces of light fixture panels were to be cleaned. Amendment No. 4 provided detailed instructions for the replacement of ceiling tiles and required that the ceiling surfaces be restored to 70% to 90% of their original condition. Note No. 20 and specification 09511, section 3.04 accompanying Amendment No. 3 do not impose any specific obligation to clean the ceiling surface in accordance with the stringent requirements in Amendment No. 4. They state only that damaged tiles are to be replaced, undamaged ones are to be chemically cleaned by an unspecified process available from a source named and rusted grids are to be painted to match existing color.

While the record does not suggest the probable impact on price of Amendment No. 4, it is clear that without acknowledging the amendment the contractor could not be legally bound to clean the ceiling surface in accordance with Amendment No. 4. This would have a significant effect on the contractual services the FSO receives, and the amendment therefore must be viewed as material. Huffman Engineers, Inc., Comp. Gen. Dec. B-212281, November 18, 1983, 83-2 CPD & 587. Any contract with the protester would not bind it to perform according to the standards established in Amendment No. 4 or to assume any additional costs resulting from the higher standard. Southstar's failure to acknowledge the receipt of Amendment No. 4 was fatal to the responsiveness of its bid.^{4/}

^{2/}Southstar's reliance on its inclusion in its breakdown of its price "Clean ceiling tile & replace as indicated as per plan-\$10,000.00," as an indication of its compliance with Amendment No. 4 requirements is unpersuasive. Amendment No. 3, acknowledged by Southstar, included tile cleaning and replacement requirements. Thus, the notation can in no way be construed to create a clear, legal obligation to meet the government's need as identified by the IFB as amended by Amendment No. 4.

The protester's failure to acknowledge Amendment No. 4 prior to bid opening renders the bid nonresponsive. This failure cannot be waived under the facts and circumstances before us. The bid was properly rejected by the contracting officer.^{1/}

The protest is denied.

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

[checked against original JLS 3/8/93]

^{3/}Because the ceiling cleaning surface specifications in Amendment No. 4 were neither acknowledged nor trivial, we sustain the contracting officer's rejection of Southstar's bid on that ground and need not consider the impact of the failure to acknowledge the requirement that an alternate price be submitted by the bidder.