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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Hospitality Inn--Downtown

File: B-248750.3

Date: October 28, 1992

Courtney Wilder Stanton, Esq., for the protester.
L. James Gardner, Esq., Department of the Navy, for the agency.
John Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Amendment to solicitation for lodging and meals for military applicants clarified that the solicitation's estimated quantity of 12,000 for double occupancy rooms referred to 12,000 persons in double occupancy rooms and not 12,000 rooms. The amendment was material since it removed the ambiguity from the solicitation concerning the number of persons to be lodged under the contract and therefore had an impact on the relative standing of bidders.

2. While it is the contracting agency's affirmative obligation to use reasonable methods, as required by the regulations for the dissemination of amendments to prospective competitors, this does not make the contracting agency a guarantor that these documents will be received in every instance. Protester's nonreceipt of a material amendment does not warrant corrective action where the record does not show that the agency deliberately attempted to exclude bidder from competition, or otherwise violated applicable regulations governing the distribution of amendments.

DECISION

Hospitality Inn--Downtown protests the award of a contract to any other firm under invitation for bids (IFB) No. N68836-92-B-0041, issued by the Navy for lodging and meals in Jacksonville, Florida for military applicants. The agency rejected Hospitality's bid because the firm failed to acknowledge an amendment to the IFB. Hospitality argues that its failure to acknowledge the amendment should have been waived by the agency and alternatively that the agency failed to send it a copy of the amendment.

We deny the protest.

The solicitation required bidders to submit firm, fixed-prices for facilities, labor and materials for military applicants' lodging and meals for a base year and 2 option years. Bidders were required to submit prices for both single and double lodging. When the solicitation was issued, at section B-1 it included the following bid schedule for the base year:[1]

ITEM NO.	DESCRIPTION	ESTIMATED QUANTITY	UNIT OF ISSUE	UNIT PRICE	ESTIMATED TOTAL ITEM AMOUNT
0001	Provide facilities, labor, and materials for designated military applicants' lodging, for the period of 92 OCT 01 through 93 SEP 30. as follows:				
0001AA	Lodging, single	200	EA	$_____	$_____
0001AB	Lodging, double	12,000	EA	$_____	$_____
0002	Provide facilities, labor, and materials for designated military applicants' meals, for the period of 92 OCT 01 through 93 SEP 30, as follows:				
0002AA	Breakfast	12,000	EA	$_____	$_____
0002AB	Lunch	10	EA	$_____	$_____
0002AC	Dinner	12,000	EA	$_____	$_____

The agency received inquiries from potential bidders concerning whether bids for double lodging were to be priced on a per person or per room basis. As a result, the agency issued solicitation amendment No. 0001 which stated: "For the purposes of clarification, the estimated quantities specified in Section B-1 represent the estimated number of individuals to be lodged per year. Therefore, unit prices should reflect charges per person, not per room."

The agency received nine bids in response to the solicitation. The agency reports that Hospitality was the only bidder that failed to acknowledge the amendment. The Navy rejected Hospitality's bid as nonresponsive due to the firm's failure to acknowledge the amendment, which the agency considered to be material. Two other bids were rejected for other reasons so there are six remaining responsive bids.

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[1]The option year requirements were the same as those for the base year.

Hospitality argues that its bid should not have been considered nonresponsive as a result of the firm's failure to acknowledge the amendment. According to the protester, the amendment was not material and therefore did not have to be acknowledged since it did not impose legal requirements on the bidders different from those imposed by the original solicitation. Hospitality argues that the only reasonable reading of its bid, and the interpretation which the agency should have given to it, was that the firm had priced double occupancy rooms on a per room, not a per person basis. The protester maintains that this should have been evident from its bid because the price it inserted for single lodging was $18 per room while its price for double lodging was $22, and reason dictates that the per person price for a double occupancy room (in this case, half of $22, or $11) will never be greater than the per person price for a single occupancy room. Under the circumstances, Hospitality argues that the amendment was immaterial and therefore its bid should have been considered responsive. Hospitality also argues that its bid should have been evaluated at $22 for each double room and, as a result, its bid should have been considered the lowest priced responsive bid.

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. Day and Night Janitorial and Maid and Other Servs., Inc., B-240881, Jan. 2, 1991, 91-1 CPD ¶ 1. However, an amendment is material only if it would have more than a negligible impact on price, quantity, quality, or delivery of the item bid upon, or would have an impact on the relative standing of bidders. See Federal Acquisition Regulation (FAR) § 14.405(d)(2); Star Brite Constr. Co, Inc., B-228522, Jan. 11, 1988, 88-1 CPD ¶ 17. A bidder's failure to acknowledge receipt of an amendment that is not material is waivable as a minor informality. Power Serv., Inc., B-218248, Mar. 28, 1985, 85-1 CPD ¶ 374. 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. Id.

The solicitation as issued was ambiguous as to whether the 12,000 quantity estimate listed for double lodging referred to persons or rooms. It is our view that the most reasonable reading of the unamended solicitation was that the double lodging estimate referred to persons, not rooms.[2] Under this interpretation, the basic contract

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[2]We think that this was the case since the bid schedule listed 12,000 breakfasts and 12,000 dinners. We would (continued...)

would require double rooms for 12,000 persons. That the solicitation was ambiguous is demonstrated by Hospitality's argument that the double lodging requirement should be interpreted as referring to rooms, not persons. In that case, the total number of persons to be provided double rooms under the basic contract would be 24,000.

The amendment removed this ambiguity by informing prospective bidders that the estimated quantity for double lodging represents 12,000 persons per year, not 24,000 persons in 12,000 rooms per year. According to Hospitality, under its interpretation of the unamended solicitation, its bid was the lowest of the bids remaining in the competition, while the same bid under the solicitation as amended would be the fifth low bid received. It is thus clear in our view that the amendment, by specifying that bid prices were to be on per person basis, had a significant impact on the relative standing of bidders. Therefore, the amendment was material and Hospitality's failure to acknowledge it could not be waived. See M. C. Hodom Constr. Co., Inc., B-209241, Apr. 22, 1983, 83-1 CPD ¶ 440.

The protester also argues that the contracting agency was responsible for Hospitality's nonreceipt of the amendment. First, the protester maintains that either the agency failed to adopt procedures designed to ensure that amendments reach prospective bidders, or the procurement clerk failed to follow the established procedures. Second, Hospitality maintains that when it met with an agency contract specialist to make certain that its bid was responsive, the contract specialist failed to inform the firm that an amendment had been issued even though the cover sheet of Hospitality's bid did not acknowledge the amendment.

It is the contracting agency's affirmative obligation to use reasonable methods, as required by the FAR, for the dissemination of solicitation documents, including amendments, to prospective competitors. FAR §§ 14.203-1, 14.205, 14.208; Southeastern Enters., Inc., B-245491.2, Jan. 17, 1992, 92-1 CPD ¶ 88. This, however, does not make the contracting agency a guarantor that these documents will

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[2](...continued)
expect these numbers generally correspond to the number of persons in the rooms--in the case of a per person interpretation, 12,000 persons, while in the case of a per room interpretation, 24,000 persons (12,000 double occupancy rooms, each with two persons). We recognize that the schedule also provided for 200 single rooms, but we think that this figure does not invalidate the expected correlation between the number of persons and the number of meals to be served.

be received in every instance. In fact, as a general rule, the risk of nonreceipt of an amendment rests with the offeror. Id.

There is no evidence that the process for disseminating the amendment followed by the agency was deficient or that it was contrary to regulation. The agency has submitted a signed statement from the procurement assistant responsible for compiling the bidders list for the solicitation and for mailing the amendment to prospective bidders. The procurement assistant states that it is standard procedure to mail a copy of every amendment to each prospective bidder on the mailing list and then to note on the mailing list that the amendment was sent and the date the amendment was mailed. The procurement assistant explains that her practice is to annotate the mailing list when a solicitation or an amendment is sent by initialing the first name on the list and drawing a line down the column under the amendment to indicate that a copy was mailed to each prospective bidder.

In this case, the contracting agency has provided a copy of the mailing list, which includes Hospitality as one of the prospective bidders that was mailed a copy of the IFB. Under the column for the amendment, the mailing list includes the procurement assistant's initial, the date that the amendment was sent and a line down the column to indicate that a copy was sent to each prospective bidder.

Thus, the evidence supports the agency's position that it used its standard procedure for distributing the amendment. Further, of the nine firms that submitted bids, only Hospitality is known to have not received the amendment.[3] There is nothing in the record to indicate that Hospitality's failure to receive the amendment resulted from a deficient dissemination process, a regulation violation, or a deliberate effort to exclude it from the competition.

There is also no merit to Hospitality's claim that the agency's contract specialist should have made certain that the bid included the amendment. Hospitality's representative met with the agency's contract specialist in order to be certain that its bid was responsive. The contract specialist states that she informed Hospitality that the firm was responsible for preparing its own bid and that the firm never specifically asked her to review the bid to be certain that it was acceptable. The contract specialist states that she answered a number of questions

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[3]Although based on the prices submitted by one other bidder Hospitality argues that that firm did not receive the amendment, the Navy explains that the firm acknowledged the amendment.

from Hospitality regarding the Procurement Integrity Act, equal employment opportunity compliance and small business matters and that Hospitality never asked her whether any amendments had been issued concerning the solicitation. Nothing in the record contradicts the contract specialist's recollection of the meeting with Hospitality's representative, and we do not find that the contract specialist acted in anyway improperly. It is the bidder's responsibility to prepare its own bid and to assure that the bid is responsive. That responsibility cannot be shifted to the contracting agency by expecting or asking an agency representative to review the bid before submission.

Finally, Hospitality argues that if its bid is not considered responsive, there was inadequate competition and the requirement should be resolicited. There were nine bids received and six responsive bids remain in the competition. In these circumstances, since the agency complied with all statutory and regulatory requirements in soliciting bids, full and open competition was achieved. Crown Mgmt. Servs., Inc., B-232431.4, Apr. 20, 1989, 89-1 CPD ¶ 393.

The protest is denied.

for James F. Hinchman
General Counsel