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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Skyline ULTD, Inc.

File: B-297800.3

Date: August 22, 2006

Albert B. Krachman, Esq., and Brian S. Gocial, Esq., Blank Rome LLP, for the protester.

Adele Ross Vine, Esq., General Services Administration, for the agency.

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DIGEST

Protest challenging rejection of proposal for failure to acknowledge solicitation amendment is denied where amendment contains material terms affecting legal relationship of the parties, including obligation for contractor to monitor changes in foreign travel danger area status and promptly coordinate such changes with contracting agency.

DECISION

Skyline ULTD, Inc. protests the rejection of its proposal for failure to acknowledge solicitation amendments under request for proposals (RFP) No. 6FG2005MTV00001, issued by the General Services Administration for information technology services. Skyline contends that the amendments are not material and that its failure to acknowledge them should be waived as a minor informality.

We deny the protest.

The RFP, set aside for service-disabled, veteran-owned small businesses, provides for the award of multiple indefinite-delivery, indefinite-quantity contracts for information systems engineering, operation, and maintenance services for a 5-year base period and a 5-year option period. RFP at F-1, L-1, L-14. The RFP advised that the agency intended to make all awards on the basis of the offerors' initial proposals without conducting discussions. *Id.* Each proposal was to be initially evaluated for "acceptability," including a review for "completeness and adherence to instructions." *Id.* at M-1. "Any material failure to follow directions (nonconformance)," including the omission of "required information of a material nature," was to result in rejection

of the proposal. Id. In this regard, all offerors were advised that “[o]ffers that fail the Acceptability review will not be considered further.” Id. Awards were to be made to the firms with proposals determined to offer the overall best value to the agency considering price and technical factors. Id. at M-1, M-2.

Acceptability reviews were performed for each proposal submitted by the scheduled closing time. Skyline’s proposal failed the acceptability review and was rejected from further consideration for award because it failed to acknowledge receipt of two solicitation amendments which the agency considered to be material.¹ This protest followed.

The RFP advised offerors that performance of the work could take place in locations subject to designation by the State Department as foreign travel danger areas; in this regard, for existing orders, the contracting officer was to determine whether or not performance would continue despite such designation. RFP § B-10. One of the amendments that Skyline failed to acknowledge, amendment No. 6, revised the RFP’s “foreign area travel/work” terms. Specifically, regarding changes in foreign travel danger area status (i.e., where the State Department warns Americans not to travel to an area or issues danger pay for work there), the amendment provided that “[c]ontractors have an affirmative duty to monitor area status during order performance and promptly coordinate with the applicable [ordering contracting officer] on changes in area status.” RFP amend. 6 at 3.

The agency explains that this additional, affirmative requirement for the contractor to specifically monitor changes in danger area status will better protect the government in terms of potential liability for damages that might result from a delay in agency contracting personnel learning of a change in status, and a resulting delay in determining whether or not to continue performance of existing orders. The agency explains that prior to the amendment, the government was solely responsible for monitoring area status changes, since there was no explicit requirement for the contractor to do so. The agency also asserts that, without the amendment, it may face greater litigation risk in contractor disputes for recovery of losses or injuries that could occur from a delay in agency action to halt contract performance or

¹ The protester’s proposal was rejected for failing to acknowledge amendment Nos. 4 and 6. This decision, however, only discusses the protester’s failure to acknowledge amendment No. 6, since, in its report responding to the protest, the agency concedes that the firm constructively acknowledged amendment No. 4 by incorporating some of the administrative requirements (for instance, regarding font and format of proposals) set out in that amendment. Given our conclusion as to the materiality of amendment No. 6, as discussed further in this decision, the rejection of the firm’s proposal for failure to acknowledge that amendment alone constitutes a proper basis for rejection of the proposal; accordingly, we need not discuss further the terms of amendment No. 4 or the protester’s failure to formally acknowledge its receipt.

protect contractor personnel due to a delay in learning of a change in foreign travel danger area status. In this regard, according to the agency, requiring the contractor to monitor foreign travel danger area status changes will provide an additional means for the agency to learn of such changes quickly, which will better ensure that the agency can promptly determine whether contract performance should or should not continue, and may also limit the agency's potential liability for contractor losses, since the contractor shares in the responsibility to monitor the danger status and promptly coordinate the change in status with the agency.

In determining whether an amendment is material, we look at the facts of each case. While no precise rule exists as to whether a change required by an amendment is more than negligible, such that the failure to acknowledge the amendment renders the proposal unacceptable, see Navistar Marine Instrument Corp., B-277143.2, Feb. 13, 1998, 98-1 CPD ¶ 53 at 2, an amendment is material where it imposes legal obligations on the contractor that were not contained in the original solicitation. Id.

Here, the protester contends that amendment No. 6 is not material because it merely clarified existing contract performance requirements and thus did not affect the legal relationship of the parties. Specifically, the protester asserts that, despite its failure to acknowledge the amendment, it would be obliged to monitor foreign travel danger area status changes, since its proposal generally offers to review policies affecting contract performance. We disagree. As the agency points out, prior to issuance of amendment No. 6, there was no specific requirement in the RFP obligating the contractor to affirmatively monitor foreign travel danger status changes and to promptly coordinate any such change with the contracting agency. Since there was no such requirement in the RFP, Skyline's offer to generally review policies regarding contract performance does not constitute an agreement to the specific obligations imposed by amendment No. 6. Consequently, we cannot agree with the protester that amendment No. 6 did no more than clarify existing obligations of the contractor.²

² We note that, in its comments Skyline for the first time contends that, because the RFP, at § B-10, generally provides that work in areas designated as dangerous is unauthorized, the expectation by the agency that the amendment will lessen its risk of liability for contractor losses or injuries is misplaced; Skyline essentially argues that the contractor would be performing in (or would still be located in) such area at its own risk. The argument, which was not raised in the initial protest although based on solicitation terms known to the protester at that time, is untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2006). We note, in any event, that the protester has not shown how this general provision renders unreasonable the agency's view that its risk of delayed action in response to danger area status changes will be lessened by requiring the contractor to monitor danger area status changes and to promptly coordinate action with the agency (performance requirements not challenged by Skyline prior to submission of its proposal as

(continued...)

In light of the amendment's addition of contractor obligations to monitor and coordinate action regarding changes in foreign travel danger area status, and the agency's additional rights derived from those requirements, we conclude that the amendment affects the legal relationship of the parties and therefore is material. See Federal Constr., Inc., B-279638, B-279638.2, July 2, 1998, 98-2 CPD ¶ 5 at 4-5. Consequently, the protester's failure to acknowledge it cannot, as Skyline requests, be waived as a minor informality. See T&S Maint. Servs., B-278598, Feb. 18, 1998, 98-1 CPD ¶ 54 at 2-3. Accordingly, we see no basis to object to the agency's rejection of the proposal for failure to acknowledge amendment No. 6.

The protest is denied.

Gary L. Kepplinger
General Counsel

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ambiguous or otherwise), since, as discussed above, the contractor's responsibility to do so provides legitimate protections for additional prompt notice of area status changes to the agency.