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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: MG Mako, Inc.

File: B-404758

Date: April 28, 2011

Gabriel Reza, MG Mako, Inc., for the protester.
Maj. Christine C. Fontenelle, Department of the Army, for the agency.
Cherie J. Owen, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

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 coordinate with local utility company to minimize electrical outages.

DECISION

MG Mako, Inc. protests the rejection of its proposal for failure to acknowledge a solicitation amendment under request for proposals (RFP) No. W912LA-11-R-0001, issued by the Department of the Army for maintenance, repair, construction, and design/build services in support of National Guard activities in Southern California. MG Mako contends that the amendment was not material and that the firm's failure to acknowledge it should be waived as a minor informality.

We deny the protest.

The RFP, issued as a small business set-aside on November 4, 2010, as a multiple award indefinite-delivery/indefinite-quantity (ID/IQ) contract contemplates the award of multiple task orders over a 2-year base period and three 1-year option periods.

As relevant here, the solicitation involves substantial electrical work. The RFP contains over 80 pages of detail regarding the electrical requirements of the procurement. RFP at 260100-1 to 269020-3. In a conference call with the parties, the agency explained that the scope of work involves 30 panels and roughly 600 circuits. Fax Confirmation of GAO Conference Call with the Parties at 1.

On December 2, the agency issued amendment 2 to the solicitation. Amendment 2 contained the agency's responses to requests for information. As relevant here, paragraph A27 of the amendment stated that "[t]he utility work to be done that is labeled as 'by utility' shall be done during the construction period of this project and the contractor shall coordinate with the Utility to schedule this work to minimize electrical outages." RFP amend. 2, at 3.

MG Mako submitted a proposal by the due date set forth in the solicitation. After reviewing the proposal, the agency rejected it as non-responsive for failure to acknowledge amendment 2. This protest followed.

DISCUSSION

MG Mako contends that amendment 2 is not material because it merely clarified existing contract performance requirements and thus did not affect the legal relationship of the parties. The protester also states that it was the firm's intention to acknowledge amendment 2 and that it "always understood the fact that there were two amendments to the solicitation." Protester's Response to Dismissal Request at 1. However, the protester states that it inadvertently submitted the incorrect version of a form, which failed to acknowledge amendment 2. Id.

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, an amendment is material where it imposes legal obligations on the contractor that were not contained in the original solicitation. Skyline ULTD, Inc., B-297800.3, Aug. 22, 2006, 2006 CPD ¶ 128 at 3; Navistar Marine Instrument Corp., B-277143.2, Feb. 13, 1998, 98-1 CPD ¶ 53 at 2.

The agency explains, and we agree, that given the complexity of the electrical work involved in this procurement, the effort to plan for electrical outages can be complex and convoluted. Thus, unless the RFP imposed a requirement to coordinate outages with the local utility, the contractor and the local utility could schedule their outages independently of each other to maximize the efficiency of each one's work, which would not minimize the outages. Fax Confirmation of GAO Conference Call with the Parties at 1. The requirement added in paragraph A27 of amendment 2, requiring that the contractor coordinate with the local utility, recognizes that the project will necessarily involve some outages by the local utility and some outages by the contractor. In essence, this provision requires that the contractor work with the utility company to make those outages minimal, for example, by rescheduling its outage work to occur during an outage by the local utility, or requesting the local utility to reschedule an outage to a time that best suits the contractor.

Although the protester points to a number of other solicitation provisions that reference coordination with various entities prior to or during electrical work, none of these provisions required that the contractor coordinate with the utility company

to minimize outages. See Protester's Response to GAO's Questions, March 9, 2011, at 1-2.

In light of the amendment's addition of contractor obligations to coordinate with the utility company to minimize electrical outages, we conclude that the amendment affects the legal relationship of the parties and therefore is material. Consequently, the protester's failure to acknowledge it cannot, as the protester requests, be waived as a minor informality. Accordingly, we see no basis to object to the agency's rejection of the proposal for failure to acknowledge amendment 2.

The protest is denied.

Lynn H. Gibson
General Counsel