



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Einhaupl GmbH

File: B-276271

Date: June 2, 1997

Reed L. von Maur, Esq., and J. Casey Fos, Esq., von Maur & Partners, for the protester.

Nancy van Noortwijk-Sommer, Esq., Department of the Army, for the agency. Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected bid as nonresponsive that failed to include acknowledgment of a solicitation amendment that added asbestos abatement work not contemplated by the original invitation for bids and properly canceled the solicitation when it learned that it had failed to furnish the amendment to the bidder.

DECISION

Einhaupl GmbH protests the rejection of its low bid as nonresponsive and the cancellation of invitation for bids (IFB) No. DACA90-96-B-0045, issued by the United States Army Corps of Engineers, Transatlantic Programs Center, Europe, for construction and repair work.

We deny the protest.

The IFB was issued on August 23, 1996, for the repair of the ventilation system, utility lines, and exterior of a dining facility in Hohenfels, Germany, under a fixed-price, lump-sum contract. Among other things, the successful contractor was required to demolish the grid, metal, and acoustic ceilings, and to replace the existing roof and gables, both of which contained asbestos.¹ Amendment No. 0001 was issued to make various "change and additions" to the asbestos abatement work. Among these were the addition of Item 2.2.34, which required the removal and disposal of 783 square meters of cement asbestos ceiling tiles attached to the bottom of the building's wood trusses. Amendment No. 0002 was issued to make

¹The specifications described in detail the aspects and requirements of the work involving the removal of asbestos laden materials. The specifications described the ceilings as not containing asbestos, and the roofing sheets and vinyl floor tile as containing asbestos.

changes to the IFB's estimated quantity work sheets (EQW)² and to postpone the bid opening to September 25.

Five bids were submitted in response to the IFB. Einhaupl submitted the low bid of DM (Deutsche Marks) 1,974,870.66, but failed to acknowledge amendment No. 0001. All bids, including Einhaupl's, acknowledged amendment No. 0002, but only the second and third low bids acknowledged both amendments. The Army rejected Einhaupl's bid as nonresponsive because it determined the changes made by amendment No. 0001, particularly the addition of Item 2.2.34, were material. The Army further determined that Einhaupl had not acknowledged amendment No. 0001 because the agency inadvertently neglected to send Einhaupl the amendment. Because it found that the competition had been negatively affected by its actions, the Army canceled the IFB pursuant to Federal Acquisition Regulation (FAR) § 14.404-1(c), which authorizes the cancellation of an IFB after bid opening where there is a compelling reason to do so. This protest followed.

Einhaupl protests that amendment No. 0001 was not material, that its failure to acknowledge this amendment should have been waived as a minor informality, and that thus the agency did not have a compelling reason to cancel the IFB.

A bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Specialty Contractors, Inc., B-258451, Jan. 24, 1995, 95-1 CPD ¶ 38 at 2. On the other hand, a bidder's failure to acknowledge an amendment that is not material is waivable as a minor informality. FAR § 14.405. An amendment is material where it imposes legal obligations on a prospective bidder that were not contained in the original solicitation or if it would have more than a negligible impact on price, quantity, or delivery. FAR § 14.405(d)(2); Specialty Contractors, Inc., supra at 2.

The Army reports that amendment No. 0001 was issued following the release of the initial IFB because the Army had discovered cement asbestos ceiling tiles concealed between the roof and the ceilings in the building which needed to be removed. The Army states that this amendment, requiring the removal of these tiles, added a substantial amount of new asbestos abatement work, that the additional work may impact the performance schedule, and that the number of personnel needed for asbestos abatement may increase. The Army further advises that neither the specifications nor drawings for the project contemplated the removal of the asbestos cement tiles.

²The EQW reflected the contractor's estimated price in terms of labor and materials keyed to the work required under the specifications; the submission of the EQW with the bid was optional and was to be used for informational purposes only.

Einhaupl argues that the IFB as issued obligated the prospective bidder to remove the asbestos cement tiles in view of the requirements to demolish the various ceilings and to replace the building's asbestos-containing roof and gables so that the amendment was not material.

We disagree. As indicated, the original IFB specifically required various non-asbestos ceilings and the "asbestos-containing roof and gable covering" to be removed. The tiles whose removal was mandated by this amendment were not specifically encompassed by this language and were not identified in the specifications or drawings included in the IFB; indeed, the necessity to remove the asbestos-containing tiles was not known or contemplated until after the IFB was issued. Thus, it is simply unreasonable to read the IFB as requiring the removal of the asbestos-containing tiles attached to the bottom of the trusses between the roof and the ceilings. The removal of this additional asbestos-containing material, which is hazardous and requires special handling, is clearly a material item of work. See MIBO Constr. Co., B-224744, Dec. 17, 1986, 86-2 CPD ¶ 678 at 3. Accordingly, Amendment No. 0001, imposing this additional requirement, was material.³ Although the Army reports that the additional work increased the government estimate by 4.2 percent, and Einhaupl alleges the price impact to be only trivial, the materiality of an amendment which imposes new legal obligations on the contractor is not diminished by the fact that the amendment's impact upon price may be trivial. See Specialty Contractors, Inc., supra at 2.⁴

Since Einhaupl's bid, without acknowledgment of amendment No. 0001, does not represent a commitment to perform this additional material work, the agency properly rejected Einhaupl's bid as nonresponsive. Id. Under the circumstances, we do not object to the cancellation of the IFB.

The protest is denied.

Comptroller General
of the United States

³We note that even Einhaupl admits that Item 2.2.34 required the ceilings to be removed under "asbestos related conditions," which may require additional work.

⁴Because we conclude that the amendment was material based upon the requirement to remove the cement asbestos ceiling tiles, it is not necessary to consider the materiality of the remaining aspects of the amendment.