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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Fort Mojave/Hummel, a Joint Venture

File: B-296961

Date: October 18, 2005

Robert P. McManus, Esq., Taft, Stettinius & Hollister LLP, for the protester.
Frank P. Buckley, Esq., Charles D. Raymond, Esq., and Harry L. Sheinfeld, Esq.,
Department of Labor, for the agency.
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Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly rejected low bid as nonresponsive where the bid failed to acknowledge a solicitation amendment that merely clarified requirements already contained in the solicitation and otherwise had a negligible effect on the quality and price of the construction project bid upon.

DECISION

Fort Mojave/Hummel, a Joint Venture, protests the rejection of its bid submitted in response to invitation for bids (IFB) No. DOL 051RB20042, issued by the Department of Labor, for the construction of the new Job Corps Center in Cleveland, Ohio. Fort Mojave/Hummel's bid was rejected as nonresponsive because it did not contain an acknowledgment of amendment No. 1 to the IFB.

We sustain the protest.

The successful bidder under the IFB will be required to construct nine new buildings totaling approximately 190,997 gross square feet, including "three (3) 136 person Dormitories, an Administration-Medical/Dental building, a Recreation building, a Cafeteria building, an Education building, a Vocational Education building, and a Warehouse." The buildings will be "located on a 24 acre parcel of undeveloped land," with the successful bidder also being required to perform "miscellaneous site improvements in the form of general landscaping; earthwork; roads and walks; parking; drainage; water, sewerage, and gas utilities; electric ductbank; and site/security lighting for the new buildings." IFB at 01010-1. One amendment to the

IFB was issued prior to bid opening, which answered 28 bidder questions and clarified the period of performance.

The agency received the following four bids by the bid opening date of May 26, 2005:

Fort Mojave/Hummell	\$31,399,000
KBJ	\$31,764,000
Odyssey	\$34,779,000
New Era	\$34,900,000

Agency Report (AR), Tab 12, Bid Abstract. The agency found that Fort Mojave/Hummel's apparent low bid did not contain an acknowledgment of the amendment. The agency reviewed the amendment, and determined that although most of the matters in it were not material, it made two changes to the IFB that were material. The agency thus rejected Fort Mojave/Hummel's bid as nonresponsive.

After filing an agency-level protest, which was denied, Fort Mojave/Hummel filed this protest with our Office, arguing that the amendment cannot properly be considered material and that its bid therefore should not have been rejected as nonresponsive.

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. Federal Constr., Inc., B-279638, B-279638.2, July 2, 1998, 98-2 CPD ¶ 5 at 2. An amendment is not material and the failure to acknowledge it should be waived as a minor informality where the amendment has no effect or merely a negligible effect on the price, quantity, quality, delivery of the item bid upon, or no effect on the relative standing of the bidders. Federal Acquisition Regulation § 14.405(d)(2); Kalex Constr. & Dev., Inc., B-278076.2, Jan. 20, 1998, 98-1 CPD ¶ 25 at 2. Additionally, an amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation; for example, where it merely clarifies an existing requirement or is a matter of form. Kalex Constr. & Dev., Inc., *supra*. Nevertheless, a procuring agency is not required to enter into a contract which presents the potential for litigation stemming from an ambiguity in a solicitation. ACC Constr. Co., B-277554, Sept. 22, 1997, 97-2 CPD ¶ 84 at 4. Rather, an agency has an affirmative obligation to avoid potential litigation by resolving solicitation ambiguities prior to bid opening, and amendments clarifying matters which could otherwise engender disputes during contract performance are generally material and must be acknowledged. *Id.* No precise rule exists to determine whether an amendment is material; rather, that determination is based on the facts of each case. Dyna Constr., Inc., B-275047, Jan. 21, 1997, 97-1 CPD ¶ 31 at 3.

In rejecting Fort Mojave/Hummel's bid and defending this protest, the agency only contends that only two of the items set forth in the amendment are material: one

item pertains to the insulation of certain pipes and the other item pertains to the placement of certain pipes in five of the rooms in the vocational education building.

Pipe Insulation

Section 15180 of the IFB details the requirements for mechanical (including pipe) insulation. This section includes a “Pipe Insulation Thickness Schedule” that is arranged as a matrix, and which provides the minimum insulation thickness for the different piping system types. Included in this matrix, as set forth in the original IFB, is the following under piping system type: “Storm drainage or downspout above crawl space (horz. & vert.) and drain, waste, and vent.” IFB at 15180-3. The IFB amendment changed this item by deleting the phrase “above crawl space,” so that the matrix, after the issuance of the amendment to the solicitation, provided for the insulation of “Storm drainage or downspout (horz. & vert.) and drain, waste, and vent.” Amend. 1, at 2.

A hearing was conducted at our Office, during which testimony was received from the architect/project manager who was responsible for, among other things, preparing the specifications and drawings included in the solicitation.¹ By way of background, the architect/project manager explained that in accordance with industry standards a “crawl space” is “a space which resides between the first floor of a building and the ground.” Hearing Transcript (Tr.) at 53-54. The architect/project manager explained that for this contract buildings will be constructed “concrete on the ground” and as such will not have crawl spaces. Tr. at 18, 20, 37, 81. The architect/project manager further explained that the original IFB’s reference to a “crawl space” was an error, and at one point testified with regard to the insulation requirements that the IFB as initially issued was “gray because of those three words ‘above crawlspace.’” Tr. at 16, 37, 55. The architect/project manager later clarified, however, that in his view and consistent with industry standards, the IFB’s specifications prior to the issuance of the amendment could only have been reasonably read as having the same meaning as the IFB’s specifications as amended, that is, as requiring the insulation of all interior storm drainage or downspout piping, given that none of the buildings in fact will be built with crawl spaces. Tr. at 57-58, 63, 67.

In our view, given the architect/project manager’s explanation and the IFB’s specifications and drawings, which provide that the buildings will be “concrete on ground” without crawl spaces, we agree that the solicitation, both as initially issued and as amended can only be read as requiring the same thing—the insulation of all

¹ The project’s architect/project manager is employed by a private-sector firm with which the agency has a contract.

interior storm drainage or downspout piping.² Given that this aspect of the amendment does not have any effect on the work bid upon, that is, it does not impose any legal obligations on the bidder different from those imposed by the original solicitation or affect the quality or price of the project, it is at best a clarification of an existing requirement and cannot properly be considered material.

Pipe Placement

The other item in the amendment (at 3) pointed to by the agency as constituting a material change provided for the inclusion of the following note on the IFB's drawing B-P2.1 – Plumbing Floor Plan:

All above grade piping in rooms B104, B115, B123, B134 and B146 shall be run high in joist space.

At the hearing conducted by our Office, the architect/project manager explained that the rooms listed in the above note are vocational shops located in the vocational education building, and that the agency required, where possible, “a 14-foot high ceiling space.”³ Tr. at 84. The architect/project manager added by way of background that the buildings would have “open ceilings,” such that the joists,⁴ and

² We note that the architect/project manager's testimony differed from the position taken in the agency report, which argued that the “[t]he deletion of the phrase ‘above crawl space’ meant that all storm drainage and downspout piping was required to be insulated not just the storm drainage and downspout piping above the crawl space.” AR at 6. As indicated by the testimony of the architect/project manager, this argument appears to be predicated on the erroneous belief that the buildings would be built with crawl spaces. The testimony of the architect/project manager also differs from the position taken in the agency's supplemental report where, while conceding that the buildings would be built “concrete on ground,” it is argued that based upon the definition of crawl space in “Webster's Ninth New Collegiate Dictionary (1984) . . . a bidder may have viewed the original specifications as imposing an obligation to insulate only storm drainage and downspout piping above the ceiling.” Agency Supplemental Report at 2. Given the architect/project manager's testimony, we give no weight to these agency arguments. We also note in this regard that after the architect/project manager's testimony the agency provided no further argument in its post-hearing comments that the pipe insulation clarification was material.

³ The record reflects that the ceilings in certain of these rooms would be sloped, with ceiling heights ranging from 8 feet to 26 feet. Tr. at 195.

⁴ A “joist” is a “[a] structural load-carrying member with an open web system which supports floors and roofs utilizing hot-rolled or cold-formed steel and is designed as
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all piping as well as the necessary ductwork, would be visible to the rooms' occupants. Tr. at 109-10. In addition to gaining the required clearance, the architect/project manager explained, the piping was required to be "run high in joist space" for aesthetic reasons. Specifically, the architect/project manager explained that the piping, joists and ceiling will be painted white, so that the piping (described by the architect/project manager as "very ugly") will visually blend into the ceiling. Tr. at 118. The architect/project manager explained that the note that "[a]ll above grade piping in rooms B104, B115, B123, B134 and B146 shall be run high in joist space" was intended to "make it very clear to a bidder that he had to do some special routing of this piping" in order to meet the agency's requirements in this regard concerning minimum overhead clearance and aesthetics. Tr. at 84.

The architect/project manager conceded at the hearing that the IFB as issued included a "Mechanical General Requirements" section, and within that section, an "Interferences" subsection (at 15010-7), which provided in relevant part:

Install additional offsets in new piping or ductwork where required to obtain maximum headroom or to avoid conflict with other work without additional cost to Owner.⁵

The architect/project manager specifically testified that, as argued by the protester, because of the requirement in the "Interferences" subsection to install additional offsets in piping to obtain maximum headroom, the piping was required by the terms of the IFB as initially issued (prior to issuance of the amendment) to be placed high in the joist spaces in order to obtain maximum headroom.⁶ Tr. at 173, 176; see

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a simple span member." Agency Submission (Oct. 3, 2005), International Organization for Standardization.

⁵ The architect/project manager defined the term "headroom" here as "clearance above . . . the occupants." Tr. at 174; see Tr. at 203.

⁶ As noted by the agency, the architect/project manager initially testified that the IFB failed to provide any specification, clause, or drawing providing for where the piping is to be placed in any of the buildings. Agency's Post-Hearing Comments at 1-2; Tr. at 93, 97-98, 100-01. However, later in the hearing during cross-examination, the architect/project manager recognized and explained the applicability of the "Interferences" subsection to the issue as outlined above. Nevertheless, it is now argued in the agency's post-hearing comments that the Interferences subsection "does not even apply" to the general placement of piping, but rather "comes in to play only when there is a problem with work of one contractor interfering with the work of another." Agency's Post-Hearing Comments at 5. This view is inconsistent with that of the architect/project manager (as corrected and clarified during the

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Protester's Post-Hearing Comments at 6. The architect/project manager also testified that a contractor, reading the IFB as issued (pre-amendment), along with each of the drawings furnished by the agency with the IFB, should have understood that they had to "bid [the job] to take the [piping] all the way up." Tr. at 104.

At another point, the architect/project manager testified that in his view the solicitation, prior to the issuance of the amendment, could also be interpreted as requiring, consistent with the above-quoted Interferences subsection, that the piping be placed, at a minimum, on the "under side of the joists," that is, attached to the bottom of the joists. Tr. at 184, 188. He estimated that the costs involved with placing the piping "high in the joist space" rather than on the underside of the joists at \$10,000. Tr. at 204.

As explained below, we agree with the protester that under either of the above interpretations provided by the architect/project manager, the amendment's note that the piping in the rooms listed be placed "high in joist space," viewed in the context of the solicitation as a whole, does not constitute a material change.⁷ See Protester's Post-Hearing Comments at 6. In this regard, we first note that this amendment affects only a small aspect of the IFB, which provides for the award of a

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course of the hearing) who drafted the solicitation; moreover, nothing in the Interferences subsection limits its applicability in the manner argued.

⁷ The agency argued in its report to our Office that this aspect of Fort Mojave/Hummel's protest should be dismissed as untimely because it was not raised by Fort Mojave/Hummel in its protest to the contracting agency. Our Bid Protest Regulations provide that where, as here, a protest has been initially filed with the contracting agency, we will consider a subsequent protest if the initial protest was timely filed. 4 C.F.R. § 21.2(a)(3) (2005). Because our regulations do not provide for the unwarranted piecemeal presentation of protest issues, where a protester initially files a timely agency-level protest, and subsequently files a protest with our Office which includes additional grounds, the additional grounds must independently satisfy our timeliness requirements. Wilderness Mountain Catering, B-280767.2, Dec. 28, 1998, 99-1 CPD ¶ 4 at 5. Here, while the agency-level protest only specifically discusses why the pipe insulation issue was not material, it specifically recognizes the pipe placement issue and contends that the other matters addressed in the amendment were only "clarifications." Indeed, the pipe placement issue was labeled a "clarification" in the agency analysis of the amendment provided to Fort Mojave/Hummel prior to filing its agency-level protest. AR, Tab 9, Architect/Project Manager's Explanation, at 1, 3. Considering that we resolve doubts regarding timeliness in favor of protesters, Sigmattech, Inc., B-296401, Aug. 10, 2005, 2005 CPD ¶ 156 at 5, we find Fort Mojave/Hummel's protest of this issue to be timely.

comprehensive construction contract for nine new buildings totaling approximately 190,997 gross square feet, on a 24-acre parcel, with a contract value of more than \$31 million. As discussed above, the architect/project manager explained that the requirement that certain piping be “run high in joist spaces” either was provided for by the IFB as issued, or required merely a slightly different placement of the piping in only five rooms in only one of the nine buildings to be constructed. Assuming the amendment is considered as requiring a slightly different placement of the piping (as opposed to merely clarifying the IFB requirements), the agency’s estimate of the cost impact of the amendment is negligible in the context of the contract as a whole--\$10,000 versus \$31,399,000 bid by Fort Mojave/Hummel. Moreover, because Fort Mojave/Hummel’s bid price is \$365,000 lower than the next low bid, the \$10,000 estimated cost of the slightly different placement of the piping would have no effect on the relative standing of the bidders. Under the circumstances, the addition of the note can best be characterized as no more than a minor modification of what was already required by the IFB, not, as the agency suggests, the imposition of a material, new and separate legal obligation. Thus, we do not agree with the agency that Fort Mojave/Hummel’s failure to acknowledge the amendment to the solicitation rendered its bid nonresponsive. See Head Inc., B-233066, Jan. 25, 1989, 89-1 CPD ¶ 82 at 4 (amendment’s change to a small portion of a sprinkler system from a sidewall type to an overhead type was not material in that it made only a minor modification to a requirement in the IFB and had de minimis effect on price).

We recommend that award be made to Fort Mojave/Hummel if it is determined to be a responsible contractor. We also recommend that Fort Mojave/Hummel be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d)(1). Fort Mojave/Hummel should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the agency within 60 days of receiving this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel