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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

# Decision

**Matter of:** Northern Sealcoating & Paving, Inc.

**File:** B-299393

**Date:** March 30, 2007

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Jay Zavala, Zavala Inc., for the protester.

Julia L. Perry, Esq., Federal Highway Administration, for the agency.

Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Agency properly rejected as nonresponsive a protester's bid that failed to acknowledge a material solicitation amendment; the amendment was material because it changed the color of exterior shingles, and specified the use of cedar lap siding and a color additive for concrete.

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## DECISION

Northern Sealcoating & Paving, Inc. protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. DTFH71-07-B-00001, issued by the Department of Transportation, Federal Highway Administration, for resurfacing, grading, drainage, and pavement reconstruction of Head of the Meadow Beach Road and Parking Area at the Cape Cod National Seashore, together with the optional installation of a restroom building at the site.

We deny the protest.

The IFB, issued on November 22, 2006, included in addition to the basic resurfacing work, an option for the installation of a Romtec Model #1018 restroom facility. IFB § 646.04 at J-21. The IFB was amended on January 5, 2007 to:

Revise the Special Contract Requirements (Section 646) to change the exterior building style for the ROMTEC restroom facility.

Special Contract Requirement changes

*Delete the 2<sup>nd</sup> paragraph of Subsection 646.04 of the Special Contract Requirements, page J-22 and substitute the following:*

Amber colored shingles, cedar lap siding, brown concrete, smooth exterior, stainless toilet paper dispensers, and a polyethylene urinal.

IFB amend. No.1, at 2.

The original IFB required the following features for the Romtec restroom facility: “red shingles, gray concrete, smooth exterior, stainless toilet paper dispensers, and polyethylene urinal.” IFB § 646.04, at J-21. Thus, the amendment made three changes to the specifications—it changed the color of the exterior shingles from red to amber, added cedar lap siding and required the use of a color additive to the concrete.

Four bids were received in response to the IFB by the January 9 bid opening. Protest, Exh. C. Northern submitted the apparent low bid, but failed to acknowledge receipt of amendment No. 001 prior to bid opening. Finding that the amendment affected performance of the contract, and the contractor’s obligations under the contract, the agency rejected Northern’s bid as nonresponsive for failure to acknowledge a material amendment. This protest followed.

Northern protests that the amendment was not material since it was obligated under the terms of the IFB to provide Romtec’s specific restroom facility model #1018, and argues that its failure to acknowledge the amendment was a minor informality that should have been waived since the amendment had no effect on price, quality, quantity or delivery.

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 CDP ¶ 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. Federal Acquisition Regulation (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, quality, or delivery. FAR § 14.405(d)(2); Specialty Contractors, Inc., *supra*, at 2.

Here, while the original IFB specified the Romtec restroom facility model #1018, the record shows that this model comes with several options. For example, purchasers have the option of brown or gray concrete color, split-face or smooth exterior, and custom cedar, low or plank siding, or stucco or stone exteriors. Romtec Website, <http://www.romtec.com>. The IFB as originally issued required the following options:

red shingles, gray concrete, smooth exterior, stainless toilet paper dispensers, and polyethylene urinal. The amended IFB changed the color of the shingles to amber, changed the concrete to brown and added a cedar lap siding. The agency maintains that the most significant change made by the amendment was the addition of the cedar lap siding. According to the agency, while cedar siding is more expensive, it is favored by the National Park Service for its appearance and its ability to withstand exposure. The agency contends that without Northern's acknowledgment of the amendment, it would have no assurance that Northern intended to provide the more expensive cedar siding.

Northern contends that its failure to acknowledge the amendment should be waived since, according to Northern, the amendment imposed no additional legal obligation on the contractor.<sup>1</sup> Northern states that, under the terms of the IFB, it was obligated to deliver Romtec model #1018 and it understood that colored shingles and colored concrete were required. In addition, Northern contends that the details of the sketches provided with the solicitation showed lap siding rather than log or plank siding. Since the only lap siding available for this product is the more costly cedar siding, the protester argues that its bid was improperly rejected.

We disagree. By failing to acknowledge this amendment, Northern was only obligated to provide the agency a restroom built with red shingles and gray concrete, when the agency required amber shingles and brown concrete. Moreover, since the original IFB was silent with respect to the type of siding required--notwithstanding Northern's contention that the drawings depicted lap siding and that Romtec only has cedar lap siding--Northern was under no obligation to provide the cedar lap siding the agency required and could have provided a less expensive alternative.<sup>2</sup> In other words, absent acknowledgment of the amendment here, Northern has not bound itself to furnish the specified siding. Furthermore, even if an amendment's impact on price is trivial, the amendment is material if it affects the quality of performance in more than a negligible way. MIBO Constr. Co., B-224744, Dec. 17, 1986, 86-2 CPD ¶ 678 at 2. The color of an item can be a material requirement, as can

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<sup>1</sup> To the extent the protester believes its failure to acknowledge this amendment can be waived because the amendment involves requirements for the optional restroom installation, as opposed to the resurfacing work, the protester is incorrect. The restroom installation is a mandatory requirement, the price of which was to be added to the price of the resurfacing effort to determine the lowest priced bidder. See e.g., Just in Time Mfg., Inc., B-238998.4, Sept. 17, 1990, 90-2 CPD ¶ 220 at 3.

<sup>2</sup> The protester contends that its price for the restroom facility was based on a quote from Romtec for cedar lap siding. However, the protester's bid only contains a lump sum price for the restroom facility and without Northern's acknowledgment of the amendment, the agency has no assurance that Northern would provide cedar lap siding at the price quoted.

compliance with a pre-existing color scheme or other aesthetic considerations.  
Products for Indus., B-257463, B-257463.2, Oct. 6, 1994, 94-2 CPD ¶ 128 at 2  
(descriptive literature identifying color of workbenches and cabinets as “gray”  
properly resulted in rejection of bid where IFB listed “black” as the required color).

On this record, we view the amendment as material; without acknowledging the amendment, Northern’s bid does not represent a clear commitment by that firm to furnish amber shingles, brown concrete or cedar lap siding, and the bid is therefore nonresponsive.

The protest is denied.

Gary L. Kepplinger  
General Counsel