

YOU FORGOT TO ACKNOWLEDGE AN AMENDMENT—DISASTER?

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A bidder's failure to acknowledge a material amendment to an Invitation for Bids ("IFB") normally requires the agency to reject the bid as nonresponsive. (That's the "disaster"). To be responsive, a bid must comply in all material respects with the IFB. FAR 14.301(a). Where an amendment makes a material change and there is no acknowledgement, the bidder could either (a) decide after bid opening whether to furnish extraneous evidence that it considered the amendment or (b) if its bid were accepted, the bidder would not legally be bound to perform in accordance with the material terms of the amendment, and the government would bear the risk. However, the Government Accountability Office has a long line of cases where an IFB amendment has been constructively acknowledged. In those cases the bid itself includes one of the essential items that only appears in the amendment, showing the bidder's intent to be bound by the amendment. *Mark Dunning Industries, Inc.*, B-415890, Nov. 5, 2018 is a case that demonstrates this.

Mark Dunning protested a bid from Zero Waste Solutions in response to an Army waste disposal IFB, alleging that Zero Waste had not acknowledged all of the IFB's amendments. In particular, Mark Dunning alleged that Zero Waste had failed to acknowledge amendment no. 12 which changed the unit description of Contract Line Item Number ("CLIN") 2005 from "job" to "months."

The GAO held that Zero Waste's bid had constructively acknowledged amendment no. 12 by modifying CLIN 2005 in its bid to reflect the change in unit type from "job" to "months." This change in CLIN unit type was not in the original IFB, and was only added by amendment no. 12. This action in Zero Waste's bid (which the Army was fully aware of) served to constructively acknowledge the amendment. Zero Waste had acknowledged all amendments in its bid.

This case is instructive on how a bidder can fall into a responsiveness trap, if it does not take routine and elementary actions to acknowledge all amendments and its bid does not constructively acknowledge a material amendment. There are three ways to formally acknowledge amendments, and a bidder should *always* take advantage of one of them to ensure there is no question in its bid. It's better to be certain than to rely on constructive acknowledgement. The formal methods of acknowledging an amendment are:

- (1) List each amendment and its date in box 14 of Standard Form 33, Solicitation, Offer and Award (FAR 53.301-33) when you submit it with your bid; or
- (2) Include in your bid a copy of each amendment, Standard Form 30, Amendment of Solicitation/Modification of Contract (FAR 53.301-30), and complete box 8 (name and address of contractor) and box 15 (name and title of signer and contractor/offeror); or

- (3) Submit a separate letter or email that refers to the IFB number and the amendment numbers being acknowledged. Normally this is accomplished in a cover letter transmitting the bid.

By explicitly acknowledging your receipt of all IFB amendments, you will be bound to comply with them, and your bid cannot be rejected as nonresponsive on that ground. Of course, there may be other reasons for nonresponsiveness, but not failure to acknowledge amendments.

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