

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

Decision

Matter of: Infoshred LLC

File: B-407086

Date: October 26, 2012

James H. Howard, Esq., Phelon, FitzGerald & Wood, P.C., for the protester.
Jeanne S. Morris, Esq., Department of Veterans Affairs, for the agency.
Cherie J. Owen, Esq., Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency rejected awardee's quote for failure to acknowledge an amendment that was immaterial and did not impose any legal obligations on the contractor in addition to those to which it had already agreed.

DECISION

Infoshred LLC, of East Windsor, Connecticut, protests the Department of Veterans Affairs (VA) decision to reject its quotation for failure to acknowledge a solicitation amendment under request for quotations (RFQ) No. VA-241-12-Q-0541, awarded to Shred-it USA, Inc., of Rockville, Maryland for shredding services at VA facilities in Connecticut. Infoshred contends that the amendment was immaterial and a failure to acknowledge it could not provide the basis for rejection of the firm's proposal.

We sustain the protest.

The RFQ, issued on April 19, 2012 via the General Services Administration (GSA) e-Buy system to vendors holding GSA Federal Supply Schedule (FSS) contracts, contemplates the establishment of a five-year blanket purchase agreement (BPA), under which yearly fixed-price task orders for shredding services will be issued.

On April 26, the VA issued an amended solicitation (Amendment 1) that contained an updated statement of work and a list of questions and answers. As relevant here, Amendment 1 contained the following question and answer:

The solicitation says on-site shredding services. Is on-site or off-site shredding required?

Both on-site and off-site shredding is applicable. BPA VA241-12-Q-0541 is modified and included in this amendment to address where both on-site and off-site shredding is required. [The VA] does not want the contractor sitting at the loading dock, for hours, shredding paper. The containers should be picked up and taken to an off-site location for shredding in accordance to meeting the required security stipulations.

Revised BPA VA2421-12-Q-0541 is included as an attachment replacing the original BPA VA241-12-Q-0541 attached and published on 4/19/12.

RFQ amend. 1 at 55.

On May 1, the agency again amended the solicitation, providing additional information about the requirement that shredding occur off-site (Amendment 2). Amendment 2 contained additional questions and answers and again included a revised statement of work. As relevant here, the questions and answers in Amendment 2 provided:

Is this RFQ for on-site or off-site shredding?

Contractor is required to perform off-site and on-site shredding. The primary contract parameters involve 99% off-site shredding. However, on occasion, on-site shredding, estimated at 1% (approx. 920 lbs) of the contractor performance may be required, depending on the nature of the documents being shredded. On-site shredding services will be done within the scope of the current pick-up schedule, as required.

If it is intended to be off-site would you allow on-site proposals?

Please see response to question 1. 99% of shredding is to be conducted off-site. On-site proposals do not meet the requirements of the Statement of Work/BPA.

RFQ amend. 2 at 108-09.

Significantly, Amendment 2 contained a revised BPA which included an updated performance work statement. In this regard, Amendment 2 stated:

2nd Revised BPA VA2421-12-Q-0541 is included as an attachment replacing the original BPA VA241-12-Q-0541 attached and published on 4/19/12 and the revised BPA per the 1st amendment published on 4/26/12.

Id. at 109 (emphasis added).

In the context of another question, Amendment 2 also referenced text in Amendment 1, stating that the agency had cited the reason for the requirement of off-site shredding as “time spent on the loading docks shredding materials.” RFQ amend. 2 at 108. The solicitation also provided that failure to acknowledge solicitation amendments “may result in rejection of your offer.” RFQ amend. 1 at 54; RFQ amend. 2 at 107.

Infoshred submitted its quotation by the due date set forth in the solicitation. As relevant here, the firm’s quotation committed to the following with regard to off-site shredding:

The VA Med Center’s staff will empty the contents of security containers and internal bins into Infoshred supplied collection containers. These containers will be brought to a central location. The material will be picked up in a secured box truck equipped with vehicle tracking and alarm system. The material is returned to Infoshred’s secured facility in East Windsor. The material will be shredded into 1.5” x 5/8” crosscut particle size, baled and sent to a mill to be re-pulped.

AR, Infoshred Proposal, at 211.

Infoshred’s quotation also included an express acknowledgment of Amendment 2, but did not separately acknowledge Amendment 1. AR, Infoshred Proposal, at 244. Upon receipt of Infoshred’s quotation, the agency determined that it was “non-compliant” for failure to acknowledge the first amendment. Contracting Officer’s Statement at 3. Therefore, the quotation was rejected and the contents of the quotation were not further evaluated. *Id.* at 4. This protest followed.

DISCUSSION

Infoshred contends that Amendment 1 is not material because all of the requirements imposed by Amendment 1 were encompassed or superseded by Amendment 2, which the firm acknowledged. Comments at 2. Infoshred further argues that, although it did not acknowledge Amendment 1, the firm’s quotation nevertheless committed to comply with the requirements announced in Amendment 1—specifically, the requirement for off-site shredding. Protest at 4.

Generally, a quotation may be rejected for failure to acknowledge a material amendment. 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, an amendment is material where it imposes legal obligations on the contractor that were not contained in the original solicitation or subsequent amendments acknowledged by the offeror. See *MG Mako, Inc.*, B-404758, April 28, 2011, 2011 CPD ¶ 88 at 2; *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. We have also held that an amendment may be constructively acknowledged where the proposal includes the material items appearing only in the amendment. Kuhana-Spectrum Joint Venture, LLC, B-400803, B-400803.2, Jan. 29, 2009, 2009 CPD ¶ 36 at 9-10. Further, where a solicitation states that a quotation may be excluded from consideration for failing to meet a requirement, as is the case here, offerors are reasonably put on notice that rejection will not be automatic but instead will occur only if there is a reasonable basis for such action. See Macfadden & Assoc. Inc., B-275502, Feb. 27, 1997, 97-1 CPD ¶ 88 at 2-3.

When asked by GAO to identify obligations imposed by Amendment 1 that were not also imposed by Amendment 2, the agency initially stated that because the protester did not acknowledge Amendment 1, “Infoshred is not bound to perform off-site shredding.” VA Response to GAO’s Questions, Oct. 1, 2012, at 1. Further, the VA characterized Amendment 2 as non-substantive. Id. However, in response to further questions from GAO, the VA acknowledged that Amendment 2 contained a revised statement of work and also addressed the requirement for off-site shredding. VA Response to GAO’s Questions, Oct. 4, 2012.¹ As noted above, Amendment 2 stated that it was “replacing” Amendment 1’s BPA and statement of work. RFQ amend. 2 at 109.

Here, we find that in light of Amendment 2, which was acknowledged by Infoshred, Amendment 1 was immaterial. Amendment 2 contained each of the substantive requirements that were contained in Amendment 1 and included a revised performance work statement that superseded the one attached to Amendment 1. Although Amendment 1 imposed legal obligations on the contractor that were not contained in the original solicitation—that is, the requirement for off-site shredding—Amendment 2, which Infoshred acknowledged, also contained these requirements and provided even more detail regarding the requirements. Therefore, the agency’s rejection of the protester’s quote for failure to acknowledge Amendment 1 was unreasonable.

The protest is sustained.

¹ In its last response to GAO’s questions, the agency argued that the statement in Amendment 1 that contractors should not sit at the loading dock for hours shredding paper, but should instead take the paper to an off-site location, imposed a different requirement than the requirements for off-site shredding set forth in Amendment 2. VA Response to GAO’s Questions, Oct. 4, 2012 at 1. We find the agency’s argument to be unpersuasive. The requirement that shredding be performed off-site precluded the possibility of a contractor performing the shredding on-site at a loading dock. While Amendment 1 may have provided offerors with additional insight into the agency’s reasons for requiring off-site shredding, it did not impose any legal obligations that were not also contained in Amendment 2.

RECOMMENDATION

We recommend that the agency reevaluate quotations, including the one submitted by Infoshred, and make a new selection decision. If that decision results in the selection of another vendor, we also recommend that the VA terminate for convenience the BPA and, if feasible, the task order issued to Shred-it USA. We further recommend that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2012). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receiving this decision.

Lynn H. Gibson
General Counsel